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Doing History to Justice: Theory and Historiography in the History of International Criminal Law

By

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The Thesis is Submitted to University College Dublin in Fulfilment of the Requirements of the Degree of Doctor of Philosophy in Law.

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Abstract

Taking its methodological cues from recent work on the theory and history of international law, this thesis has two primary aims. Firstly, to explore how history figures within international criminal law (ICL) scholarship and to identify the dominant historiographical trends present within this body of work. And secondly, with these trends and tendencies in mind, to identify and reclaim historical episodes that fall outside this established account, but which might still tell us much about the development and current state of the field.

Part I provides a literature review and situates the thesis within the broader corpus of international law and ICL scholarship, focusing on the extent to which ICL scholars have undergone a 'turn to history' as in other subfields of international law. Following this, Part I then sets out the critical and theoretical underpinnings of the thesis. There is, firstly, the concept of periodisation which I draw on to think through how the dominant disciplinary accounts of ICL's development are structured. And secondly, there is the body of work associated with 'Third World Approaches to International Law'. This body of work will assist in developing substantive critiques of the mainstream accounts of ICL and will also provide guidance when developing my own 'counter-narrative' of ICL's development in later chapters.

Parts II and III of the thesis will draw on these historiographic insights with a view towards unsettling the standard account of ICL's development. To this end, they will focus on specific moments where ICL norms and notions of international criminality animated popular activist causes during the American Civil Rights era, as well the anti-war movement during the Vietnam War. These two episodes have particular value, I will argue, as they help us to move beyond the institutional settings we typically focus on when engaging with the history of the field. The thesis thus concludes with a reflection on the value of this approach and signals some future directions for ICL scholarship.

Statement of Original Authorship

I hereby certify that the submitted work is my own work, was completed while registered as a candidate for the degree stated on the Title Page, and I have not obtained a degree elsewhere on the basis of the research presented in this submitted work.

Acknowledgements

Although the production of a doctoral thesis ostensibly appears to be a largely solitary affair, it is ultimately a deeply collaborative effort and possible only with the intervention of many sources of both institutional and individual support. And it is towards these sources of support that this acknowledgement is humbly directed.

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Thesis Introduction

1. Thesis Prologue: The African Union vs The International Criminal Court—A Clash of Historical Perspective?

In its first two decades of operation, one of the most pressing challenges for the International Criminal Court (ICC) has been its strained relationship with the African continent. Indeed, there is arguably no single topic that has generated the same level of commentary as the so-called "African problem" has.[1] As a sign of the intense threat this issue was perceived as having, it was often held to be not just an operational difficulty the Court had to face, but an existential threat to the entire institutional endeavour itself—what Tladi characterised as the battle for the "soul" of international law.[2] In one sense this tension—and the disciplinary angst it seemed to generate—was made all the more intense given the utopian ambitions the ICC embodied.[3]

This context marked a stark contrast to the previous decade, where African continental support for the ICC had proved instrumental. This support was itself reflective of more general support for institutional criminal justice initiatives in the 1990s,[4] which was fuelled by longstanding frustrations at the inability of international institutions to deal with the most pressing continental concerns,[5] as well as broader trends of expanding civil liberties and demands for political accountability.[6] African states were also motivated by a desire to demonstrate their commitment to good governance and the international system more generally,[7] with support for these kinds of institutions reflecting changing socio-political

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[1] For references to the 'Africa problem', see for example: Solomon A. Dersso, 'The ICC's Africa Problem: A Spotlight on the Politics and Limits of International Criminal Justice' in Kamari Clarke, Abel Knottnerus, and Eefje De Volder (eds), *Africa and the ICC: Perceptions of Injustice* (CUP 2016). See also: Iommi L. García, 'Whose justice? The ICC "Africa problem"' (2020) 34(1) International Relations 105. Similarly, it has also been labelled the "Africa issue" in: Richard H. Steinberg (ed), *Contemporary Issues Facing the International Criminal Court* (Brill Nijhoff 2016).

[2] Dire Tladi, 'The African Union and the International Criminal Court: The Battle for the Soul of International Law' (2009) 34(1) South African Yearbook of International Law 57.

[3] Makaza has characterised the ICC as the "largest utopian project in international criminal justice." See: Dorothy Makaza, 'Towards Afrotopia: The AU Withdrawal Strategy Document, the ICC, and the Possibility of Pluralistic Utopias' (2017) 60 German Yearbook of International Law 481. See also Fichtelberg on the ICC as a "cosmopolitan" institution in pursuit of universalist aims: Aaron Fichtelberg, 'Democratic Legitimacy and the International Criminal Court: A Liberal Defence' (2006) 4(4) Journal of International Criminal Justice 765.

[4] Rowland Cole, 'Africa's Relationship with the International Criminal Court: More Political Than Legal' (2013) 14(2) Melbourne Journal of International Law 670, 673.

[5] William Schabas, 'The Banality of International Justice' (2013) 11(3) Journal of International Criminal Justice 545, 548. See also: Schabas, 'Regions, Regionalism and International Criminal Law' (2007) 4 New Zealand Yearbook of International Law 3, 14.

[6] Donald Gordon, 'African Politics' in April Gordon and Donald Gordon (eds), *Understanding Contemporary Africa* (5th edn, Rienner 2013) 62.

[7] Kamari Maxine Clarke, 'Why Africa?' in Richard H. Steinberg (ed), *Contemporary Issues Facing the*

conditions across the continent.[8] This happened in tandem with the emergence of the African Union (AU) in 2002, which was born of a commitment to anti-colonialism, pan-African solidarity, democracy and democratisation, and the pursuit of "African solutions to African problems".[9]

Within this context, forty-seven African states, supported by NGOs and civil society organisations, participated in the Rome Statute negotiations in 1998.[10] Of these, thirty-four would eventually sign the finalised draft of the Rome Statute. Regional bodies such as the African Commission on Human and People's Rights and the Organisation of African Unity (OAU)—the predecessor to the AU—early on affirmed and urged support for African states to sign and ratify the Rome Statute.[11] Signing up to the Court was important, OAU legal advisor Professor Maluwa argued, given the historical incidences of atrocities and human rights violations Africa had endured.[12] African support thus breathed life into the Court, with African states providing the first ratification it received and the final ratification needed to bring the Rome Statute into force.[13]

However, after operating for scarcely a decade, ICL scholarship was already exhibiting signs of deep-seated disciplinary angst about the Court and the future of international criminal justice. Luban thus questioned whether the "honeymoon" had ended,[14] whilst Damaska wrote of a Court caught between "aspiration and achievement" as it grappled with the operational realities of delivering the goals of an *international* justice institution.[15] Jalloh similarly painted a picture of an institution overloaded by the expectations of what it can realistically achieve, particularly in the context of the *Westphalian* structure of the international legal order.[16] These institutional and disciplinary angsts seemed to coalesce into a sentiment where *crisis* and *critique* became the default scholarly modes when writing about ICL.[17] Tensions with the AU and the African continent thus seemed to signal system failure rather than a temporary dysfunction or operational difficulty.

International Criminal Court (Brill Nijhoff 2016) 326.

[8] Gordon (n 6) 63.

[9] Kurt Mills, '"Bashir is Dividing Us": Africa and the International Criminal Court' (2012) 34(2) Human Rights Quarterly 404, 411.

[10] Cole (n 4) 674.

[11] ibid.

[12] Professor T. Maluwa quoted in Charles Jalloh, 'Regionalising International Law' (2009) 9(3) International Criminal Law Review 445, 450.

[13] These had been provided by Senegal and the Democratic of Congo, respectively.

[14] David Luban, 'After the Honeymoon: Reflections on the Current State of International Criminal Justice' (2013) 11(3) Journal of International Criminal Justice 505.

[15] Mirjan Damaska, 'The International Criminal Court: Between Aspiration and Achievement' (2009) 14(1) UCLA Journal of International Law & Foreign Affairs 19.

[16] Charles Jalloh, 'Africa and the International Criminal Court: Collision Course or Cooperation?' (2012) 34(2) North Carolina Central Law Review 204, 215.

[17] Joseph Powderly, 'International Criminal Justice in an Age of Perpetual Crisis' (2019) 32(1) LJIL 1.

Given that the roots and possible causes of this apparent continental dissatisfaction have been extensively covered elsewhere, we need only identify several high-water marks in brief to situate ourselves.[18] To this end, as a background context, we should note that continental dissatisfaction with the institutional machinery of international criminal justice had been building for some time, with the assertion of universal jurisdiction by certain European states around 2005 acting as a precursor to the later fallout between the AU and the ICC.[19] Following this, the Sudanese and Kenyan cases pursued by the ICC provoked particularly strong reactions, which prompted the more active opposition by certain African states. In particular, the cases against the Sudanese and Kenyan sitting heads of state put the issue of "state sovereignty and international law in the spotlight", which elicited strong reactions to the Court's presence.[20] These contexts raised issues regarding, in particular, the appropriate sequencing of peace and justice and the problem of immunity for sitting heads of non-member states. Perhaps more importantly, however, they brought into sharp relief the fact that the focus of the Office of the Prosecutor (OTP) was overwhelmingly on the African continent, with the Court's docket exclusively filled with African defendants. In response to this state of affairs, expressions of critique and dissent, as well as active manoeuvres against the Court, were mounted by several African states—particularly as funnelled through the AU. In particular, three broad themes of critique emerged: firstly, the handling of specific cases by the Court; secondly, concerns about the political and societal ramifications of the Court's interventions; and thirdly, a feeling that the Court was susceptible to manipulation by powerful Western states.[21]

In terms of the anti-ICC rhetoric this generated, the 'double-standards' criticism was perhaps the most stinging. This critique was grounded in a perception that the ICC ignored

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[18] Some of the monographs and edited collections include: Gerhard Werle, Lovell Fernandez and Moritz Vormbaum (eds) *Africa and the International Criminal Court, Vol. 1* (TMC Asser Press 2014); Christian de Vos, Sara Kendall, Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (CUP 2015); Kamari Clarke, Abel Knottnerus, and Eefje De Volder (eds), *Africa and the ICC: Perceptions of Injustice* (CUP 2016); Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (CUP 2018); Res Schuerch, *The International Criminal Court at the Mercy of Powerful States An Assessment of the Neo-Colonialism Claim Made by African Stakeholders* (1st edn, Springer 2017); Charles Cherner Jalloh and Ilias Bantekas (eds), *The International Criminal Court and Africa* (OUP 2017); Tim Murithi, *Judicial Imperialism: Politicisation of the International Criminal Justice in Africa* (Open Access 2019); Kamari Maxine Clark, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Duke University Press 2019); P. Brett and L.E. Gissel, *Africa and the Backlash Against International Courts* (Zed Books 2020); Jeremy Sarkin, Ellah T.M. Siang'andu (eds), *Africa's Role and Contribution to International Criminal Justice* (Intersentia 2020); and Fred Aja Agwu, *Africa and International Criminal Justice: Radical Evils and the International Criminal Court* (Routledge 2021).

[19] Eberechi Ifeonu, 'An Imperial Beast of Different Species or International Justice? Universal Jurisdiction and the African Union's Opposition' (PhD Thesis, The University of British Columbia 2015)

[20] Patryk Labuda, 'The International Criminal Court and Perceptions of Sovereignty, Colonialism and Pan-African Solidarity' (2013) 20(1) African Yearbook of International Law 289, 306.

[21] Brendon J. Cannon, Dominic R. Pkalya, and Bosire Maragia, 'The International Criminal Court and Africa' (2016) 2(1/2) African Journal of International Criminal Justice 6. Also see: Lydia A. Nkansah, 'International Criminal Court in the Trenches of Africa' (2014) 1(1) African Journal of International Criminal Justice 8.

atrocities in other parts of the world, whilst Africa and Africans overwhelmingly drew the gaze of the Court. This created the conditions in which characterisations of the Court as *colonial* or *neo-colonial* seem appropriate. And although deployed cynically and politically at times, even moderate supporters of the Court often agreed with the premise that the ICC overlooked atrocities committed elsewhere in favour of those committed in Africa.[22]

This sentiment was also expressed as a critique that the Court engaged in racist practices by *targeting* and *hunting* Africans whilst others escaped scrutiny.[23] And for critics of the Court, these operational issues were thus to be viewed as the "the injustices of the past including colonialism, imperialism…coming back in different forms."[24] By failing to hold Western states responsible, the ICC thus revealed itself as the "toy of declining imperial powers".[25] Viewed as such, the ICC appeared little more than an attempt at *recolonisation*.[26] Niang argues this kind of rhetoric was drawn on when efforts to suspend the ICC cases against al-Bashir and in the Kenyan situation failed. The aim was thus to "discredit the Court's actions, to undermine its legitimacy and its nascent legacy and to shake the Court to its very foundations."[27] Other African leaders made similar allusions and accusations.[28] This was accompanied by efforts to stymie the Court, including refusing to cooperate, threatening withdrawal, and mobilising forums such as the AU and the State Parties forum to weaken the judicial process.[29]

Whilst at times this rhetorical campaign appeared more like a public-relations issue the Court had to manage, at others it seemed to present an existential threat—particularly when

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[22] For example, Desmond Tutu argued that the actions of Tony Blair and George W. Bush should be looked at, despite not agreeing with the AU's efforts: Desmond Tutu, 'Why I had No Choice but to Spurn Tony Blair' *The Guardian* (Lodnon, 2 September 2012) <https://www.theguardian.com/commentisfree/2012/sep/02/desmond-tutu-tony-blair-iraq> accessed 26 January 2022; and Desmond Tutu, 'In Africa, Seeking a License to Kill' *The New York Times* (New York, 10 October 2013) < https://www.nytimes.com/2013/10/11/opinion/in-africa-seeking-a-license-to-kill.html> accessed 26 January 2022.

[23] See the accusations of the ICC as engaging in "race-hunting": 'African Union Accuses ICC of "Hunting" Africans' (*BBC News*, 27 May 2013) <https://www.bbc.com/news/world-africa-22681894> accessed 26 January 2022. On the selectivity of the ICC, see: 'Gambia Announces Withdrawal from International Criminal Court' (*Reuters,* 26 October 2016) <https://www.reuters.com/article/uk-gambia-icc-idUKKCN12P333?edition-redirect=uk> accessed 26 January 2022.

[24] Kezio-Musoke David, 'Kagame tells why he is against ICC charging Bashir' (*Daily Nation,* 3 August 2008) <https://allafrica.com/stories/200808120157.html> accessed 26 January 2022.

[25] 'African Union Urges ICC to Defer Uhuru Kenyatta Case' (*BBC News*, 12 October 2013) <https://www.bbc.com/news/world-africa-24506006> accessed 26 January 2022.

[26] 'Sudan Leader in Qatar for Summit' BBC News (29 March 2009) <http://news.bbc.co.uk/1/hi/world/africa/7970892.stm> accessed 2 April 2018.

[27] Mandiaye Niang, 'Africa and the Legitimacy of the ICC in Question' (2017) 17 ICL Review 615, 617-8.

[28] See for example: 'Uganda's President Museveni Calls for Africa to Review Ties with ICC' (*The Daily Nation*, 9 October 2014) < http://www.nation.co.ke/news/Africa-should-review-ties-with-ICC--Museveni/1056-2480492-9lu59iz/index.html> accessed 24 January 2022. And also: 'Rwandan President Says ICC Targeting African Countries' (*The Sudan Tribune*, 1 August 2008) <http://www.sudantribune.com/spip.php?article28103> accessed 24 January 2022.

[29] ibid.

the mass withdrawal of African members seemed a genuine possibility.[30] This threat ebbed and flowed in intensity, often influenced by domestic politics—as was the case in Kenya,[31] Ivory Coast,[32] and South Africa.[33] Writing in 2016, for example, Vilmer described it as the "most serious diplomatic crisis" the ICC faced.[34] Whilst these sorts of announcements often generated a significant amount of attention from both the traditional news media and academic communities,[35] mass withdrawals did not materialise.[36] Gambia, for example, left the Court and then later re-joined.[37] Burundi was the only African state to withdraw officially.[38]

Threats of withdrawal were also accompanied by what appeared to be a parallel plan to establish a rival *African* international criminal court. This arose from the AU's support for expanding the jurisdiction of the African Court of Justice and Human and Peoples' Rights to cover a range of international crimes—as per the 'Malabo Protocol'—although so far ratifications have lagged.[39] Whilst this move is often positioned as having been formulated in direct response to the ICC—and thus viewed as a complement to the *withdrawal*

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[30] On the withdrawal campaign generally, see: Ronald Chipaike, Nduduzo Tshuma, and Sharon Hofisi, 'African Move to Withdraw ICC: An Assessment of Issues and Implications' (2019) 75(3) India Quarterly 334; Konstantinos Magliveras, 'The Withdrawal of African States from the ICC: Good, Bad or Irrelevant?' (2019) 66(1) Netherlands International Law 419; and Pacifique Manirakiza, 'A TWAIL Perspective on the African Union's Project to Withdraw from the International Criminal Court' (2018) 23(1) African Yearbook of International Law 391.

[31] 'African Union members back Kenyan plan to leave ICC' (The Guardian, 1 February 2016) <https://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international- criminal-court> accessed 26 January 2022.

[32] A. Tejan-Cole, 'Is Africa on trial?' (*BBC News,* 27 March 2012) <http://www.bbc.co.uk/news/world-africa-17513065> accessed 26 January 2022.

[33] For an overview of this saga, see: Hannah Woolaver, 'Unconstitutional and invalid: South Africa's Withdrawal from the ICC Barred (For Now)' (*EJIL: Talk!*, 27 February 2017) <https://www.ejiltalk.org/unconstitutional-and-invalid-south-africas-withdrawal-from-the-icc-barred-for-now/> accessed 26 January 2022.

[34] Jean-Baptiste Jeangène Vilmer, 'The African Union and the International Criminal Court: Counteracting the Crisis' (2016) 92(6) International Affairs 1319.

[35] Karen Allen, 'Is this the end for the International Criminal Court?' (*BBC News,* 24 October 2016) <https://www.bbc.com/news/world-africa-37750978> accessed 26 January 2022.

[36] Although the so-called 'ICC Withdrawal Strategy' was published in 2017 by the AU, it only contained a number of recommendations and general statements of objectives. See Mark Kersten, 'Not All it's Cracked Up to Be – The African Union's "ICC Withdrawal Strategy"' (*Justice in Conflict*, 6 February 2017) <https://justiceinconflict.org/2017/02/06/not-all-its-cracked-up-to-be-the-african-unions-icc-withdrawal-strategy/> accessed 24 January 2022.

[37] 'Gambia announces withdrawal from International Criminal Court' (*Reuters,* 26 October 2016) <http://www.reuters.com/article/us-gambia-icc-idUSKCN12P335?il=0> accessed 26 January 2022. And later: Merrit Kennedy, 'Under New Leader the Gambia Cancels Withdrawal From International Criminal Court' (*NPR*, 14 February 2017) <https://www.npr.org/sections/thetwo-way/2017/02/14/515219467/under-new-leader-gambia-cancels-withdrawal-from-international-criminal-court> accessed 26 January 2022.

[38] The other Member State to officially withdraw was the Philippines, who as of March 2019 are no longer members of the Court—notwithstanding the ICC's retention of jurisdiction over possible crimes committed before the withdrawal took effect. See: 'Philippines Officially Out of the International Criminal Court' (*Al Jazeera*, 17 March 2019) <https://www.aljazeera.com/news/2019/3/17/philippines-officially-out-of-the-international-criminal-court> accessed 26 January 2022.

[39] 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, African Union Doc. STC/Legal/Min7(1) Rev. I (2014) ('Malabo Protocol').

strategy—the plans for the *African Court* had been in motion for some time, with this context accelerating these plans.[40]

As a result of this sequence of events, *Africa and international criminal law* now represents a discrete area of lively scholarly research within the field of international criminal law and justice in ways that *European*, *American,* or *Asian* ICL has not. However, we should note that the sentiment underlying the so-called *African problem* was not uniformly shared across the continent,[41] with many states voicing their support for the Court throughout this period.[42] Furthermore, there was also wide-ranging civil society support present across the continent.[43] This was in addition to the many individual Africans working for and within the ICC itself.[44] In terms of where this relationship presently stands, relations do appear to have entered a more constructive phase with some of the dissenting members—particularly in light of the more recent decision to seek an Advisory Opinion from the International Court of Justice on the issue of the immunity of sitting heads of state in the context of the referral of non-state parties.[45] The ICC has also sought to more positively engage with African State parties.[46] And in these circumstances, the more pressing threat is the institutional and operational difficulties it faces, rather than its relationship with Africa.[47]

Without wanting to comment on the validity of the criticisms made by certain African states, what I found particularly interesting was the range of responses they elicited from ICL scholars. Firstly, there was what might be characterised as the 'mainstream' view and response, which tended to label the descriptions of the ICC as an *imperial* or *colonial*

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[40] Dominque Mystris, *An African Criminal Court: The African Union's Rethinking on International Criminal Justice* (Brill 2020) 4. See also: Kamari M. Clarke, Charles C. Jalloh and Vincent O. Nmehielle, 'Introduction: Origins and Issues of the African Court of Justice and Human and Peoples' Rights' in Clarke, Jalloh, Nmehielle (eds), *The African Court of Justice and Human and People's Rights: Development and Challenges* (CUP 2019).

[41] André Mbata Mangu, 'The International Criminal Court, Justice, Peace and the Fight against Impunity in Africa: An Overview' (2015) 40(2) Africa Development 7, 10; Sarah Nimigan, 'The Malabo Protocol, the ICC, and the Idea of "Regional Complementarity"' (2019) 17(5) Journal of International Criminal Justice 1005, 1012; H.J. Van der Merwe, 'The International Criminal Court, Universal Jurisdiction and Africa: Intrusion or Intercession?' in H.J. Van der Merwe and Gerhard Kemp (eds), *International Criminal Justice in Africa* (Konrad Adenauer Stiftung/Strathmore University Press 2017) 66-7.

[42] Some examples include Senegal, Nigeria, and Botswana. See: Mangu, ibid 28.

[43] Elise Keppler, 'Managing Setback for the International Criminal Court in Africa' (2012) 56(1) Journal of African Law 1, 8; and Mangu, ibid 25.

[44] Niang (n 27).

[45] Sascha-Dominick Dov Bachmann and Naa A. Sowatey-Adjei, 'The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice?' (2020) 29(2) Washington International Law Journal 247.

[46] See: ICC Press Release, 'ICC Holds Retreat with African States Parties in Addis Ababa' (*Public Affairs Unit, International Criminal Court*, 12 June 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1458> accessed 26 January 2022.

[47] Douglas Guilfoyle, 'Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis' (2019) 20(2) Melbourne Journal of International Law 401.

institution as patronising,[48] mythic,[49] defiant,[50] cynical,[51] or as perpetuating "conspiracy theories".[52] Secondly, there was also a more 'critical' view, which although accepting these critiques might have been politically motivated, did not necessarily agree that they were devoid of substance. So, for example, Cowell has explored the extent to which these "imperial" dynamics might be identified within the Rome Statute itself.[53]

In these latter works, the claims of *imperialism* and *colonialism* were taken more seriously. Labuda has thus argued that underlying these criticisms was a suspicion that the ICC represented "another chapter in a long history of colonialist and racist ventures on the African continent", with the claims of *neo-colonialism* encompassing a wider array of concerns and criticisms.[54] This way of framing the Court's activity proved successful precisely because it *did* resonate with the audiences to whom they were directed.[55] To view them as simply cynical or devoid of substance was thus to overlook what might continue to prove an obstacle to the successful operation of the ICC on the continent.[56]

In terms of the analyses produced, an interesting point of divergence between these *mainstream* and *critical* views was how seriously each was willing to take a particular understanding of history when trying to respond to the *African critiques* of the ICC. For the critical scholars, the mainstream view was limited insofar as it failed to consider these critiques in the context of an international legal order that has historically marginalised and worked against the interest of African states. In doing so, the scholarship reproduced a discursive pattern in which dissenting AU members were presented as the "antithesis of the ideals articulated in the ICC project", with Africans themselves rendered passive victims

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[48] Max du Plessis, *The International Criminal Court that Africa Wants* (Institute for Security Studies 2010) 39.
[49] ibid 82.
[50] Luke Moffett, 'Al-Bashir's Escape: Why the African Union Defies the ICC' (*The Conversation,* 15 June 2015) <https://theconversation.com/al-bashirs-escape-why-the-african-union-defies-the-icc-43226> accessed 24 January 2022.
[51] Cole (n 4).
[52] Konstantinos Magliveras, 'Substituting International Criminal Justice for an African Criminal Justice?' (2017) 14(2) International Organizations Law Review 291, 295-6.
[53] Frederick Cowell, 'Inherent Imperialism: Understanding the Legal Roots of Anti-Imperialist Criticisms of the International Criminal Court' (2017) 15(4) Journal of International Criminal Justice 667.
[54] Such as, for example, economic and political disparities between Global North and South states, as well as the broader politicisation of the Court's operations. See: Labuda (n 20) 300 & 319. For another example drawing on an expressly *postcolonial* theoretical framework, see: Christopher R. Rossi, 'Hauntings, Hegemony, and the Threatened African Exodus from the International Criminal Court' (2018) 40(2) Human Rights Quarterly 369.
[55] Geoffrey Lugano, 'Counter-Shaming the International Criminal Court's Intervention as Neocolonial: Lessons from Kenya' (2017) 11(1) International Journal of Transitional Justice 9; Renée Nicole Souris, 'African Challenges to the International Criminal Court: An Example of Populism' (2020) 9 Philosophical Foundations of Law and Justice 255; and Clarke (n 18).
[56] Labuda (n 20) 318. Gevers makes a similar point regarding the 'mainstream' failure to engage in a broader view of the history of international law in: Christopher Gevers, 'Africa and International Criminal Law' in Kevin Heller, Frédéric Mégret, Sarah Nouwen, Jens Ohlin, Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (OUP 2020)

in need of saving by international institutions in the face of brutal and oppressive leaders.[57] On this reading, the complexities of the socio-historical context in which the Court had to operate were marginalised and a "hero-villain" reading of the situation produced.[58] The emergence of these two visions of the ICC reflects what Garcíca has characterised as the breaking out of a "normative crisis" for the field.[59]

Divergent understandings of the history of international law and ICL figured prominently in the scholarly responses to this episode, although this was not the first time this kind of re-historicization of ICL institutions had been mounted to express dissatisfaction by affected parties.[60] And whilst discussions of the ICC and Africa were animated by disagreement on the substance of the claims made by dissenting African states, also important was the "location and identity of the speaker, or author" and how this impacted where the "place of history and the relationship between the post-colonial African state and the struggle for human dignity" were thus located.[61]

My interest in this episode is the point at which the research interests pursued in this thesis began to form. In particular, I am interested in how historical framing— in this case, certain African states' critiques of the ICC—figured within both the 'mainstream' and more 'critical' commentary on this episode. It is particularly curious that whilst in the 'mainstream' responses, the historical framing employed by those critical of the ICC's operations could be characterised as *baseless* or *irrelevant*, whilst at the same time failing to recognise the historical meta-context that made the 'mainstream' understandings of the field possible to begin with. Evidently, differences in historical framing could produce markedly different understandings. However, given that an "argument about a rule of principle, or institutional technique in international law, is almost always an argument about history",[62] it is perhaps unsurprising that a sense of history did figure so prominently in the responses to this episode.

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[57] Souheir Edelbi, 'The Framing of the African Union in International Criminal Law: A Racialized Logic' (*Völkerrechtsblog*, 21 February 2018) <https://voelkerrechtsblog.org/articles/the-framing-of-the-african-union-in-international-criminal-law-a-racialized-logic> accessed 26 January 2022. Similarly, see Mutua's argument that human rights scholarship is dominated by the metaphors of the *savage, saviour, and victim*: Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law Journal 201. Also see Hamilton on the anti-African narrative critiquing the Court and the counter-narrative deployed by its advocates, see: Rebecca Hamilton, 'Africa, the Court, and the Council' in Margaret deGuzman and Valerie Oosterveld (eds), *The Elgar Companion to the International Criminal Court* (Edward Elgar 2020).
[58] Dire Tladi, 'Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited' (2018) 60(1) German Yearbook of International Law 43.
[59] García (n 1). See also Tladi describing it as a battle for the "soul" of international law: Tladi (n 2).
[60] See for example Milosevic's attempts to discredit the ICTY: Jonathan Graubart and Latha Varadarajan, 'Taking Milosevic Seriously: Imperialism, Law, and the Politics of Global Justice' (2013) 27(4) International Relations 439.
[61] Makau Mutua, 'Africans and the ICC: Hypocrisy, Impunity, and Perversion' in Kamari Clarke, Abel Knottnerus, and Eefje De Volder (eds), *Africa and the ICC: Perceptions of Injustice* (CUP 2016) 47.
[62] David Kennedy, 'The Disciplines of International Law and Policy' (1999) 12(1) LJIL 9, 88.

In terms of how this initial curiosity gives rise to the interests that shape the research undertaken in this thesis, a number of concerns underlie the arguments which follow. In particular, I want to explore the roots of the historiographical tendencies that have produced the responses outlined above and what, if anything, this might tell us about the historical sensibilities that animate ICL scholarship more broadly. As might now be clear, this episode raises the possibility of 'mainstream' and 'critical' understandings of the history of the field. It also focuses attention on the propriety of placing the present-day operations of ICL institutions within the history of imperialism and colonialism in international law and affairs. These issues and concerns give rise to the following research interests which form the basis of the chapters contained in this thesis:

- Firstly, what are the 'mainstream' or 'conventional' accounts of ICL, and how do ICL scholars typically present the history and development of the field?
- Secondly, what historiographical premises does this account rest on and why are certain kinds of accounts produced in preference to others?
- And thirdly, what would it look like to move beyond these historiographical constraints and, if possible, how might the field's history otherwise be told?

With these concerns and interests in mind, my intention in this thesis is to identify the historiographical boundaries ICL scholarship typically stays within, to rationalise them, and find ways of opening up a space where the field's history can be reimagined. My ultimate aim is to try and move beyond the established historiographical terrain ICL scholars typically inhabit, with the hope that new insights about the nature, functions and dysfunctions, and possibilities of international criminal justice can be generated. My concern, then, lies in how particular understandings of the history of the field figure within ICL scholarship as a matter of scholarly discourse—by which I mean a "particular way of talking about and understanding the world (or an aspect of the world)."[63] In this meaning, a *legal* scholarly discourse refers to the ways legal scholars talk about their chosen topic or subject matter.[64]

[63] Marianne W Jørgensen, Louise J Phillips, *Discourse Analysis as Theory and Method* (Sage 2002) 1-2, quoted in Thomas Skouteris, 'Engaging History in International Law' in José María Beneyto and David Kennedy (eds) *New Approaches to International Law: The European and American Experiences* (T.M.C. Asser press The Hague 2012) 112.
[64] ibid 112.

2. International (Criminal) Lawyers and History: A Historiographical Approach

That a historical sensibility did feature so prominently in both the expressions of institutional dissent articulated by certain AU members and the scholarly responses to it is perhaps not all too surprising given how prominently history figures in international legal arguments and discourses—as Kennedy noted above. Beyond articulating ideas about international law and its development in more general terms, there are methodological reasons why international legal scholars might be drawn to engaging *history* in this manner. Indeed, even ascertaining the existence of customary rules or state conduct inevitably requires a kind of historical work.[65] In light of the proximity of this disciplinary relationship, Moyn and Kolb have thus argued that legal history might be thought of as a kind of *source* of international law.[66] Taking this further, Orford has argued that international law is idiosyncratically historicised, with international legal argumentation consisting of an attempt to transmit "concepts, languages, and norms across time and space", which entails retrieving the past to rationalise present obligations.[67]

But it is perhaps in their normative mode that these historical sensibilities operate most potently; that is, invocations of the past directed at rationalising the present or at singalling some future direction. In this register, historical metanarratives about the field provide a reference point by which our disciplinary endeavours are justified. This might manifest in references to historical events such as *Westphalia*, historical figures like the *founding fathers*, or the *Groatian tradition* the discipline is said to follow.[68] A historical sensibility is also present in the concepts that have been used to justify international law itself, such as ideas about *civilisation*.[69] These sorts of metaphorical invocations of the field's past illustrate the "mythic" qualities the history of international law takes on and how this view of

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[65] Antony Carty, 'Distance and Contemporaneity in Exploring the Practice of states: The British Archives in Relation to the 1957 Oman and Muscat Incident' in Matthew Craven, Malgosia Fitzmaurice, and Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff 2007). See also: Robert Kolb, 'Legal History as a Source of International Law: From Classical to Modern International Law' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP, 2017).
[66] Kolb, ibid. Also see Samuel Moyn, 'Legal History as a Source of International Law: The Politics of Knowledge' in Bresson and d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017).
[67] Anne Orford, 'On International Legal Method' (2013) 1(1) London Review of International Law 166, 175.
[68] John T. Parry, 'What is the Groatian Tradition in International Law?' (2013) 35(2) University of Pennsylvania Journal of International Law 299. On Grotius as a founding father, see: Martine Julia van Ittersum, 'Hugo Grotius: The Making of a Founding Father of International Law' in Anne Orford and Florian Hoffman (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016).
[69] Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law* (CUP 2020). See also: Tzouvala, 'Civilization' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019).

history shapes our disciplinary discourses.[70] They also constitute historical reference points within the "conceptual vocabulary of international law".[71] And it is in this regard that historical narratives prove such a pervasive force within international legal discourses.[72]

As I will argue throughout this thesis, this is also true of ICL scholarship, with history and particular notions of a shared disciplinary past proving a pervasive force in how we think about the present and future of international criminal law and justice. As Mégret has argued, the field of international criminal justice is profoundly *historical* and *historicising*, with scholars and practitioners alike already having developed a strong sense of their place in history even as the discipline was just emerging.[73] These histories display a strong teleological sensibility, with the disciplinary origins often invoked to rationalise and direct the field's future development. They have thus been characterised as "self-serving or at least too focused on the prize…to do much justice to the past."[74] And whilst ICL arguably does not differ from international law scholarship in this regard, this tendency appears acute in a context where the origins of the field are relatively shallow in chronological terms, with ICL having developed in intense fits and bursts rather than accreting more slowly over greater expanses of time.

Despite the prevalence of historicised thinking, however, much ICL scholarship appears either trepidatious about critically engaging with the origins of the field or where this exercise is undertaken, it displays a reluctance to move beyond familiar historical terrain. This might relate to a tendency to see too great a distance between the work undertaken by legal scholars and historians, as is perhaps suggested by Werle and Jessberger's comment that the origins of the field are of interest to *historians* only.[75] This, of course, overlooks the more routine ways the history of ICL is constituted through our scholarship, even when not undertaken in an ostensibly *historical* mode—as noted by Kennedy above.[76] With that said, my aim in this thesis is to explore how the field's history has figured within

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[70] On the "mythical" foundations of international law, see: Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (OUP 2012) 44 & 55; and Focarelli, *International Law* (Edward Elgar 2019) 13. Also see: Stephane Beaulac, 'The Power of the Westphalian Myth in International Law' in R.V.P.S. Gama & W. Menezes (eds), *Paz de Westphalia/Peace of Westphalia (1648-2008)* (Sao Paulo University Press 2013).
[71] John D. Haskell, 'Hugo Grotius in the Contemporary Memory of International Law: Secularism, Liberalism, and the Politics of Restatement and Denial' in José María Beneyto and David Kennedy (eds), *New Approaches to International Law* (T.M.C. Asser Press 2012).
[72] Skouteris (n 63) 100.
[73] Frédéric Mégret, 'International Criminal Justice Writing As Anachronism: The Past that Did Not Lead to the Present' in Thomas Skouteris and Immi Tallgren (eds), *The New Histories of International Criminal Law: Retrials* (OUP 2019) 72.
[74] ibid 73.
[75] This comment was made with particular reference to discussions about whether Nuremberg constituted an origin moment or a continuation of nascent ICL norms already in existence. See Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (3rd edn, OUP 2014) para 28.
[76] Kennedy (n 62).

ICL scholarship. In doing so, I intend to move beyond the immediate concerns of the *turn to history* that has so far taken place within ICL scholarship,[77] towards exploring the role ICL scholars themselves have played in constructing their own disciplinary histories.[78] The history of the field as it is presented within ICL scholarship will thus be engaged with less as consisting of axiomatic truths about a particular disciplinary past, and instead as something that is altogether more historiographically contingent in nature.

Given my concern for how the history of ICL is presented in and constructed through our scholarly discourses, my interest lies in the *historiography* of ICL. Understood as the study of history and historical writing as a genre,[79] 'historiography' generally comprises two possible meanings. Firstly, it might be taken to refer to the broad corpus of historical works on a given historical topic, period, or subject matter. For example, when starting a new research project, an initial task would be to gain familiarity with the historiography of a subject matter to identify the main scholarly trends in terms of how it is written about. A second, closely related, meaning captures the theoretical and methodological underpinnings of the writing of history. Here the inquiry is more theoretical in nature given the concern for historical knowledge itself. Common questions pursued in this second meaning include authorial and methodological questions regarding how and why histories have been written in a particular way. These concerns might also have an epistemic dimension insofar as *historiography* encompasses the theorisation of historical knowledge.

If historiography comprises the study of the "development of man's sense for the past",[80] this kind of approach is particularly valuable given the prominence of history and historical sensibilities within international law and ICL discourses. Reflecting on the *turn to history* within international law, Skouteris identifies three registers in which history shapes international legal arguments.[81] Firstly, in its methodological form, historical accounts of events, doctrines, and institutions are often relied on in our scholarship. Secondly, particular narratives about the history of the field form "orthodoxies" about the development of international law and how best to interpret present-day issues. And thirdly, it also contributes to the formation of a "historical consciousness" of the discipline, which serves a function in its "self-constitution". A historiographical approach helps explore these

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[77] As will be explored in chapter one that follows.
[78] Baars makes a similar point in identifying the role legal scholars have played in constructing knowledge about ICL. See: Grietje Baars, 'Making ICL History: On the Need to Move Beyond Pre-Fab Critiques of ICL' in Christine Schwöbel (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2014).
[79] In a now classic definition, Becker describes in slightly more restrictive terms as: "the study of the history of historical study." Carl Becker, 'What is Historiography?' (1938) 44(1) The American Historical Review 20.
[80] E. Sreedharan, *A Textbook of Historiography: 500 BC to AD 2000* (Orient Longman 2004) 2.
[81] Thomas Skouteris, 'The Turn to History in International Law' in Anthony Carty (ed), Oxford Bibliographies in International Law (OUP 2017) <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0154.xml> accessed 26 January 2022.

registers as it provides an opportunity to reflect on the conditions that make particular historical understandings possible in each. In this way, history and historiography present a "terrain on which to read the development of ideas about identity, geography, and entitlement."[82] They allow us to reflect upon the "consciousness of the discipline itself and how it creates and manages its conditions of reproduction."[83]

3. A Periodised Approach to the History of International Criminal Law

Before setting out the specific intervention I will make, I will first set out an important structural component that shapes how this thesis is structured—although it will be explored in greater detail in Chapter 2. Understood as a conceptual tool that makes change over time manageable,[84] periodisation works by carving and organising an expanse of time into "meaningful clusters in order to better understand the reasons for the occurrence of events or trends".[85] It facilitates historical analysis by providing a temporal schema where historical events and time can be located and contextualised.[86] Periodisation goes beyond simply creating these blocks of time and also involves designating meaning to them.[87] This allows the processes of historical change to be captured and made intelligible,[88] typically by designating descriptions to the blocks of time in question and identifying turning or transition points between each period.

As will be argued in Chapter 2, periodisation is useful in thinking through how ICL's histories have been presented and understood, particularly the "waves" of development ICL is said to have experienced from Nuremberg onward.[89] In this standard account, there is a wide-ranging *pre-historical* phase, which consists of the various antecedent forms of international criminal justice as it is said to have emerged at Nuremberg. This is followed by the first substantive phase, which consists of the trial and judgment of the International

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[82] Kennedy (n 62).
[83] John D. Haskell, 'The Choice of Subject in Writing Histories of International Law' in Jean d'Aspremont, Tarcisio Gazzini, Andre Nollkaemper, and Wouter Werner (eds), *International Law as a Profession* (CUP 2017).
[84] Peter N. Stearns, 'Periodisation in World History Teaching: Identifying the Big Changes' (1987) 20(4) The History Teacher 561, 562.
[85] William E. Butler, 'Periodization and International Law' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (2nd edn, Edward Elgar 2020) 379.
[86] A Gangatharan, 'The Problem of Periodization in History' (2008) 69 Proceedings of the Indian History of Congress 862.
[87] Lauren McArthur Harris, 'Conceptual Devices in the Work of World Historians' (2012) 30(4) Cognition and Instruction 312, 323.
[88] Peter Stearns, *World History: The Basics* (Taylor & Francis 2010) 74-5.
[89] See Heinze on the "waves" of development of ICL: Alexander Heinze, 'Attacked, Applauded, Threatened, Universalised. Or: A Wednesday at the International Criminal Court' in Alexander Heinze and Viviane E. Dittrich (eds), *The Past, Present and Future of the International Criminal Court* (TOAEP 2021) 93-4

Military Tribunal at Nuremberg, followed by several closely related doctrinal and institutional developments. The next substantive phase captures the *hibernation* of ICL during the Cold War, which is followed by the *rebirth* and *renaissance* of the field with the ad hoc tribunals and the establishment of the International Criminal Court. As I will argue, this periodised schema helps anchor a linear, progressive disciplinary narrative from "Tokyoberg" to The Hague,[90] which constitutes the "accepted account" of the field's history.[91]

As Sandberg has noted of periodisations more generally, this periodised schema helps to naturalise a particular understanding of the history of the field such that it is "not seen as history at all" and is "simply the way in which legal change is presented".[92] This form of historicised narrativisation constitutes a distillation of ICL's history into a sequence of disciplinary developments that have coalesced into a form of historical orthodoxy for the field. And by focusing on this standard sequence of historical "events", this gives the accepted history of ICL the quality of being a "code or sequence" by which the field can "orient itself and generate a sense of disciplinary movement."[93] It is this tendency that this thesis will both further diagnose and critique.

In terms of how this will be reflected in the structure of the thesis as a whole, given that it consists of three *parts*, Part I is concerned with exploring the idea of periodisation more generally and detailing my methodological and theoretical starting points. Following this, Part II examines the first two periods of ICL's history, with Part III directed towards the third and fourth.

If historical narrative is impossible without a "filter that identifies some facts as worth being mentioned",[94] periodisation serves this function when constructing the histories of ICL. It helps to structure a narrative about the field's development and to categorise, organise, and place in relation to each other the historical events it captures. However, the very nature of such a filter means that whilst certain events will pass through, others will be kept back and prevented from achieving historical significance. This process is explored in Chapter 3, where I draw on the work of Michel-Rolph Trouillot to articulate this idea of

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[90] Gerry Simpson, 'History of Histories' in Kevin John Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (OUP 2013) 3.
[91] Sarah Nouwen, 'Justifying Justice' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012).
[92] Russell Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education* (Routledge 2021) 108.
[93] Johns et al make this point writing on the force of "events" in international legal discourse. See: Fleur Johns, Richard Joyce, Sundhya Pahuja, 'Introduction' in Johns, Joyce, and Pahuja (eds), *Events: The Force of International Law* (Routledge 2011) 2.
[94] Skouteris (n 63) 113.

historical signification. Rather than a filter, Trouillot characterises history as comprised of a "particular bundle of silences".[95]

With this in mind, in Chapters 5 and 8 I will explore what these *silences* might constitute in the established histories of ICL. To do so, I will adopt an episodic approach that attempts to re-imagine the established history of the field from particular moments in time. In Chapter 5, I do so with reference to the *We Charge Genocide* episode, whilst in Chapter 8, I explore the Vietnam War as an overlooked moment in ICL's history. In addition to showing how a "narrative of linearity" dominates ICL scholarship and retains only the "most superficial aspects of past developments in order to serve modern projects",[96] this approach brings other benefits. Firstly, it serves a perspectival function. It provides an opportunity to reimagine the established narrative from a new vantage point. In this regard, it attempts something similar to what Parfitt has characterised as the "shadow box" approach, which itself is inspired by the artist's shadow box, where physical objects can be viewed from different perspectives within a frame.[97] Secondly, this episodic approach also serves an imaginative function, given that history and historiography are used to generate "new insights and an imaginative space in addition to or despite classical narratives."[98] Further detail on the strategies employed when reading these episodes against the established narratives will be set out in Chapter 3.

In drawing attention to these episodes, my intention is not to deploy them to establish alternative historical moments from which the history of the field *should* be read. Indeed, this approach shows us that many more such *silences* might exist. Rather, by identifying these episodes, we can gain a sense of the possibilities that ICL's past possesses for how we might understand the historical development of the field. It should also be noted that whilst we might look to any number of historical moments that lie outside the accepted narrative of the field's development, these specific episodes have a degree of historical synergy between them. Indeed, not only do they both capture events taking place in contemporary American history, but they also have certain historical overlaps in terms of their respective chronologies and the key figures involved. Whilst this does not necessarily change or enhance the substantive analysis undertaken in each chapter, it nevertheless gives us a better grounding in a particular historical time and place.

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[95] Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History* (20th Anniversary Edition, Penguin Random House 2015) 27.
[96] Mégret (n 73) 75.
[97] Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (CUP 2019).
[98] Liliana Obregón Tarazona, 'Writing International Legal History: An Overview' (2015) 7(1) Dans Monde(s) 95, 99.

4. Situating My Approach

With the above in mind, I will now situate the research undertaken in this thesis within the broader corpus of ICL scholarship. As a preliminary matter, this also necessitates identifying the 'mainstream' body of work to which my own 'critical' project responds. Within 'critical' international law scholarship, the idea of the 'mainstream' is often used to capture work displaying a particular set of methodological commitments, which themselves often have normative implications as regards how the nature, function, or history of international law is understood.[99] So, for example, writing from a Marxist and TWAIL vantage point, Chimni has characterised the 'mainstream' as exhibiting four features: adherence to positivism, reliance on particular progressive narratives about the history of international law, faith in the objectivity in international law as a system of rules, and a failure to appreciate structural constraints on the operation of international law.[100] Similar characterisations have been made of 'mainstream' ICL scholarship. In his identification of the five main types of ICL scholarship, Vasiliev has identified the 'mainstream' as consisting of *conventional* and *doctrinal* scholarship.[101]

This thesis uses 'mainstream' to refer to a historiographical, rather than methodological or strictly theoretical, commitment. I thus follow d'Aspremont in characterising it as "adherence to a dominant orthodoxy".[102] I will consider this historiographical orthodoxy in Chapters 4, 6, and 7, although in brief, it captures what was earlier referred to as the "accepted account" of the history of ICL. It is hoped that by treating 'mainstream' and 'critical' as relational in nature rather than as possessing fixed content, we can avoid some of the "flattening" tendencies that have often seen even 'critical' scholars abandoning nuance in favour of caricature.[103] This is particularly important in the context of ICL scholarship, where adherence to ostensibly 'mainstream' methodologies is often paired with more 'critical' perspectives.[104]

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[99] In particular, it is often used to capture a certain kinds of *doctrinal*, *formal*, or *positivist* work—notwithstanding the limitations of such characterisations. See: Tamara Hervey, Robert Cryer, Bal Sokhi-Bulley, Ali Bohm, *Research Methodologies in EU and International Law* (Hart 2011) 37.
[100] B.S. Chimni, 'An Outline of a Marxist Course on Public International Law' (2004) 17(1) LJIL 1, 1-3.
[101] Sergey Vasiliev, 'On Trajectories and Destinations of International Criminal Law Scholarship' (2015) 28(1) LJIL 701, 711.
[102] Jean D'Aspremont, 'Martti Koskenniemi, the Mainstream, and Self-Reflectivity' (2016) 29(3) LJIL 625, 627.
[103] ibid 627-8.
[104] Jacobs and Cassese have, for example, advocated for a kind of "critical positivism". See: Dov Jacobs, 'Sitting on the Wall, Looking in: Some Reflections on the Critique of International Criminal Law' (2015) 28(1) LJIL 1; and Antonio Cassese, *Five Masters of International Law: Conversations with R.J. Dupuy, E Jiménez de Aréchaga, R Jennings, L Henkin and O Schachter* (Bloomsbury 2011) 529.

With this in mind, the historiographical critiques I develop in this thesis will draw on two bodies of 'critical' ICL scholarship. The first of these is a body of work cohering under the label of 'Critical Approaches to International Criminal Law' (CAICL).[105] Although this moniker appears to have lost momentum in recent years, which itself is perhaps reflective of the *mainstreaming* of a 'critical' posture within ICL scholarship,[106] several works have emerged that display a commitment to a self-identified 'critical' approach.[107]

Additionally—and as will be expanded upon in Chapter 3—I will also draw inspiration from a body of work that has explored ICL from the perspective of 'Third World Approaches to International Law' (TWAIL). In this regard, 'Third World Approaches to International *Criminal* Law' (TWAICL) represents a distinctive strand within the cacophony of 'critical' voices that populate the field.[108] One of the earliest critiques articulated from a self-identified TWAIL perspective came with Anghie and Chimni's work exploring the idea and possibility of *individual criminal responsibility* under international law,[109] although the ad hoc tribunals had earlier elicited a TWAILian critique from Mutua.[110] Anghie and Chimni's work establishes what has become a persistent concern and strain of critique within TWAICL work,[111] which is the extent to which *individual criminal responsibility* can capture the reality of violence that has been displaced from the *First* to the *Third* world. ICL has thus brought about a *civilising mission that* necessitates the deployment of new legal technologies and institutions to address the violent consequences of conditions created and sustained by the Global North.[112]

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[105] The CAICL acronym is, at least ostensibly, attached to a research group housed with the law department at the University of Liverpool. See: 'Critical Approaches to International Criminal Law Unit' <https://www.liverpool.ac.uk/law/research/critical-approaches-to-international-criminal-law/> accessed 22 January 2022. Also see: 'Critical Approaches to International Criminal Law network' <https://www.caicl.net/> accessed 22 January 2022.

[106] On this trend, see: Sergey Vasiliev, 'The Crisis and Critiques of International Criminal Justice' in Kevin Jon Heller, Frédéric Mégret, Sarah M. H. Nouwen, Jens David Ohlin, and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (OUP 2020).

[107] See for example: William Schabas, Yvonne McDermott, and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law* (Ashgate 2013); Christine Schwöbel (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2014); and Carsten Stahn, *A Critical Introduction to International Criminal Law* (CUP 2018).

[108] For a reference to 'Third World Approaches to International Criminal Law' see: Asad G. Kiyani, 'Third World Approaches to International Criminal Law' (2015) 109 AJIL Unbound 255.

[109] Antony Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2(1) Chinese Journal of International Law 77.

[110] Makau Mutua, 'Never Again: Questioning the Yugoslav and Rwanda Tribunals' (1997) 11(1) Temple International and comparative Law Journal 167.

[111] Burgis-Kasthala has, for example, argued this dynamic results from the field's use of "techniques of depoliticization and jurisdiction to advance liberal and neoliberal rationalities for often divided and peripheral societies." See: Michelle Burgis-Kasthala, 'Holding Individuals to Account Beyond the State? Rights, Regulation, and the Resort to International Criminal Responsibility' in P. Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press 2017).

[112] Anghie and Chimni (n 109) 89-91. On the 'civilising mission' of the international criminal justice project, see Carsten Stahn, 'Justice Civilisatrice? The ICC, Post-Colonial Theory, and Faces of the "Local"' in Christian De

Many of TWAIL's concerns with international law have carried over into the critique of ICL and ICL institutions. So, for example, the contemporary politics of international criminal justice have been identified as perpetuating the imbalances that have historically animated the international legal order.[113] These relationships shape the operation of contemporary ICL institutions, with Cowell, for example, identifying the Rome Statute as bearing this influence.[114] Similarly, other work has identified how international criminal justice is inherently selective to the detriment of Global South states.[115] This is notwithstanding the contributions Global South actors have made to shape present-day ICL.[116]

As we saw above, TWAIL critiques found particular resonance in the context of AU dissatisfaction with the ICC,[117] which reflects how seriously TWAIL scholars have taken the sorts of historicised critiques made of the ICC. TWAIL perspectives have thus proved well suited to critically examining the historical claims often present within scholarly discourses about ICL and international criminal justice institutions.[118] And as we will see in Chapter 3, TWAIL scholars have used their 'critical' vantage point to elicit historical and historiographical insights of mainstream ICL scholarship.[119]

In light of the above, we thus get a sense that TWAICL represents a lively area of scholarly production.[120] And although just a brief glimpse into the wide volume of work that

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Vos, Sara Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (CUP 2015)

[113] See Parvathi Menon, 'Self-Referring to the International Criminal Court: A Continuation of War by Other Means' (2015) 109 AJIL Unbound 260.

[114] In particular, Cowell argues that the complementarity regime, the role of the security council, and the prosecutorial powers contained in the Rome Statute are *inherently* imperialist. See Frederick Cowell, 'Inherent Imperialism: Understanding the Legal Roots of Anti-Imperialist Criticisms of the International Criminal Court' (2017) 15(4) Journal of International Criminal Justice 670.

[115] See for example: Asad Kiyani, 'Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity' (2016) 14(4) Journal of International Criminal Justice 942.

[116] John Reynolds, 'Third World Approaches to International Law and the Ghosts of Apartheid' in D. Keane and Y. McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar 2012); and Asad Kiyani, 'International Crime and the Politics of Criminal theory: Voices and Conduct of Exclusion' (2015) 48(1) NYU Journal of International Law and Policy 129.

[117] Evelyne Owiye Asaala, 'Rule of Law or Realpolitik?: The Role of the United Nations Security Council in the International Criminal Court Processes in Africa' (2017) 17 African Human Rights Law Journal 266.

[118] See for example Mutua forcefully arguing that: "The irony of Nuremberg, and the White men who created it, was that the adjudicating states either condoned (or practiced as official policy) their own versions of racial mythologies: Britain and France violently put down demands for independence in "their" colonies in Africa and Asia while the United States denied its citizens of African descent basic human rights." See: Mutua (n 110) 171.

[119] See for example Gevers (n 56); and Vasuki Nesiah, 'Crimes Against Humanity: Racialized Subjects and Deracialized Histories' in Immi Tallgren and Thomas Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (OUP 2019).

[120] As evidenced by the symposia held in 2015 and 2016, respectively: James T. Gathii and Henry J. Richardson III, 'Introduction to Symposium on TWAIL Perspectives on ICL, IHL, and Intervention' (2015) 109 AJIL Unbound 252; and Asad Kiyani, John Reynolds, Sujith Xavier, 'Foreword' (2016) 14(4) Journal of International Criminal Justice 915. We also see this continuing influence in the various doctoral dissertations that have been undertaken on ICL from TWAIL perspectives. See for example Ifeonu (n 19); Asad G. Kiyani, 'International Crime and the Politics of International Criminal Theory' (PhD Thesis, The University of British Columbia 2016); and Nergis Canefe, 'International Criminal Law and Limits of Universal Jurisdiction in the

TWAIL scholars have produced on international criminal law and justice, it nevertheless gives us a sense of the depth and variety of the work produced in recent years. In terms of how this will influence the research undertaken for this thesis, Burgis-Kasthala's reflection on how we might *TWAIL* ICL is instructive. This includes interdisciplinary or transdisciplinary scholarship, "a global historicization of law that is particularly concerned with subaltern perspectives", an examination of the day to day impact of global governance in the Global South, and "forms of discourse analysis that are intent on exploring marginal voices and are suspicious of universalising narratives".[121] These influences will be explored in more detail in Chapter 3. However, at this early stage, we can note that it embeds both scepticism of the dominant framing of ICL and concern for amplifying the *silenced* histories that have been marginalised by these 'mainstream' accounts. I will draw on TWAIL and TWAICL scholarship more directly in Chapters 5 and 8 when I attempt to re-read ICL's history.

5. Contribution of the Thesis

In terms of the contribution this thesis intends to make, there are methodological and historiographical dimensions. Regarding the former, and as we will get a better sense of in Chapter 1, the thesis contributes to a growing body of historiographical ICL work. This is particularly important given what I identify as a reticence amongst mainstream ICL scholars to engage with their role in constituting the history of the field through their scholarly interventions. These interventions have coalesced into a historiographical orthodoxy about the development of the field that dominates ICL scholarship, with the causes and implications of this to be explored in more detail in Chapters 2, 4, and 6. I also make a novel contribution to existing ICL scholarship by drawing on the concept of periodisation to explore the structure of this dominant historiographical orthodoxy and by linking this temporal 'structure' to the historical sensibilities present within the field. Beyond this, specific historiographical contributions are contained in Chapters 5 and 8, both of which deal with episodes that have thus far been overlooked within mainstream accounts of the development of ICL, but which still hold much value for contemporary understandings. In

Global South: A Critical Discussion on Crimes Against Humanity' (PhD Thesis, Osgoode Hall Law School February 2018).

[121] See: Michelle Burgis-Kasthala, 'Rethinking the International Criminal Justice Project in the Global South' (*Völkerrechtsblog*, 20 January 2017) <https://voelkerrechtsblog.org/de/rethinking-the-international-criminal-justice-project-in-the-global-south/> accessed 19 January 2022. This builds on the work in: Michelle Burgis-Kasthala, 'Scholarship as Dialogue? TWAIL and the Politics of Methodology' (2016) 14(4) Journal of International Criminal Justice 921.

this regard, they signal new historiographical possibilities for how we might think about the history and development of ICL.

6. Structure of the Thesis

As noted, the concept of periodisation has both methodological and structural implications for how this thesis is presented. To this end, it is divided into three parts. Part I contains chapters relating to the methodological and theoretical dimensions of the thesis, with Parts II and III containing critical engagements with the phases of the periodisation I identify.

Part I of the thesis contains three chapters. Chapter 1 functions as a literature review and situates the thesis within the broader corpus of international law and ICL scholarship. It focuses on the extent to which the *turn to history* that has taken place within other subfields of international law has been experienced amongst ICL scholars. Following this, Chapter 2 introduces the concept of periodisation and explores how it can help us understand the accounts of the development of ICL that dominate the field. It thus serves to establish the orthodox chronology, with Chapters 4 and 6 later building on and responding to it. Following this, Chapter 3 sets out my own theoretical and scholarly commitments. As my work draws from TWAICL, it spends considerable time setting out TWAIL as a critical approach, with particular emphasis on how TWAIL scholars put history to use. The second function of Chapter 3 is to introduce the work of Michel-Rolph Trouillot, as well as the 'counter-narrative' and 'contrapuntal' strategies that will be adopted in Chapters 5 and 8.

Part II consists of two chapters and provides an outline, critique, and critical re-reading of the first two phases of ICL's history as they were identified in Chapter 2. Chapter 4 achieves this by exploring how the trial and judgment of the International Military Tribunal at Nuremberg has been turned into a symbolic point of origin for the field. In this sense, borrowing from Haskell, it explores how Nuremberg forms part of the "conceptual vocabulary of international law" and, in this way, is transformed into something more than just a *historical event*.[122] Following on from this, Chapter 5 provides a historiographical rebalancing by retrieving an episode that has been largely overlooked within mainstream ICL scholarship. This chapter, which centres on the *We Charge Genocide* petition brought by the Civil Rights Congress, uses this episode as a way of critically re-reading the

[122] Haskell makes this point about the figure of Grotius in international legal discourses: Haskell (n 71).

Nuremberg moment. In particular, it argues that this episode can be used to reflect on a limitation of international criminal justice that has persisted since the field's beginnings.

Part III consists of three chapters and focuses on the third and fourth phases of ICL's history as set out in Chapter 2. To this end, Chapter 6 provides an overview of how they are presented within ICL scholarship. In particular, I argue that a historiography of *hiatus* and *renaissance and rebirth* dominates our accounts of the third and fourth phases, respectively, which captures the development of ICL during the Cold War and from the 1990s onward. I argue that this kind of account, which is pervasive within mainstream ICL scholarship, reflects the institutional focus we adopt when recounting the development of the field. Chapter 7 thus stands as a response to this dominant historiographical tendency by identifying the various ways that ICL underwent substantive development when the field is said to have been *paralysed* or *on hiatus*.

Building on this work, Chapter 8 once again adopts the episodic approach to re-read and re-imagine this mainstream account. To do so, I focus on the Vietnam War as a period of history that has been largely overlooked by ICL scholars, but which I argue has much to tell us about the development of ICL and international criminal justice norms. In this regard, it seeks to move beyond the institutional and doctrinal terrain we typically inhabit when recounting the development of the field.

The thesis then concludes with a reflection both on the preceding chapters and the contributions they make, as well as the value of historiography more generally. This approach, I argue, opens up new possibilities for how the history of the field might be told, as well as the kinds of insights we might generate about its past. In particular, Chapters 5 and 8 signal the possibility of retelling the history of international criminal justice without the narrow institutional focus it tends to exhibit. In doing so, we are given an insight into how particular international legal norms gain resonance with the communities and peoples who often look to them for a myriad of emancipatory or political purposes.

Part I

Chapter 1: The Turn to History Within and Beyond International Criminal Law

1.1 Introduction

Whilst international criminal law ('ICL') scholarship has not avoided the *turn to history*, it has not necessarily been experienced on quite the same terms or to the same extent as within other subfields of international law. To this end, the present chapter will broadly consider the *turn to history* within international law scholarship and some of the historiographical debates it brought about, with a view towards exploring these in the context of ICL scholarship. As will be seen, one of the main achievements of the *turn to history* has been an increased awareness of and concern for how international law scholars draw on and produce historical knowledge. Despite the efforts of certain critical ICL scholars, however, the field still suffers from a general lack of historiographical awareness, with little attention paid to *how* and *why* ICL scholars rely on and produce historical knowledge. With that said, the present chapter represents a first step towards the broader aims of this thesis by exploring the *turn to history* within ICL scholarship, with a particular focus on its achievements and the limits of the historiographical introspection it has brought about.

1.2 International Law and the Historiographical Turn

As is so often stated, international law scholarship has undergone a profound and wide-ranging turn to history over the last few decades. This 'turn' purportedly occurred from the 1990s onwards when there was a proliferation in historical and historiographical work. Hueck was perhaps the first to identify this trend, albeit as present amongst German-speaking scholars interested in periodisation and the epochs of international law and other methodological debates.[1] This trend encompassed several strands, including an interest in the historical development of international law and various attempts at disciplinary genealogy. It also captured a growing interest in the methodological dimensions of writing these histories—which Galindo has characterised as a *historiographical turn.*[2]

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[1] Ingo J. Hueck, 'The Discipline of the History of International Law: New Trends and Methods on the History of International Law' (2001) 3(2) Journal of the History of International Law 194.
[2] George Rodrigo Bandeira Galindo, 'Martti Koskenniemi and the Historiographical Turn in International Law' (2005) 16(3) EJIL 539.

Although often ascribed to the success of *The Gentle Civilizer of Nations,*[3] the historiographical turn had long been in gestation. Indeed, in addition to the influence of the "Helsinki School" identified by Bianchi, we should also note the influence of other scholars associated with the so-called 'New Approaches to International Law' (NAIL).[4] Kennedy's work acted as a catalyst for many critical interventions within international law scholarship at the time, with his concern for the relationship between legal and historical arguments proving particularly influential.[5] Although it should be noted that Koskenniemi has himself identified those working from postcolonial perspectives as one of the main instigators of this trend.[6]

The reality is, of course, more diffuse than the influence of any individual or grouping of scholars, with the turn encompassing various strands, each with distinct causal factors. For example, it has been linked to a turn away from pragmatic and functionalist works that previously dominated the field during a period of increased professionalisation when a new post-Cold War zeitgeist took root.[7] With the international legal system no longer mired in dualist world order, a period of disciplinary introspection occurred. This was also exacerbated by the breakdown of a broadly modernist frame, characterised by a certain universalism that marginalised non-European perspectives and experiences.[8] Similarly, this interest in history might also be viewed as the product of a more general climate of angst regarding the capacity and effectuality of international law itself, which resulted in both introspection and retrospection.[9]

Others have focused less on the causes and instead on the conditions that made the turn to history possible to begin with. To this end, Craven expressed a concern for "what was required in order for the productive representation of the past of international law as 'history' to be a meaningful activity?"[10] Craven thus looked to other moments when the

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[3] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP 2001).
[4] Andrea Bianchi, *International Law Theories: An Inquiry Into Different Ways of Thinking* (OUP 2016) 143.
[5] See for example: David Kennedy, 'International Law in the Nineteenth Century: History of an Illusion' (1996) 65(3-4) Nordic Journal of International Law 385; and Kennedy, 'The Disciplines of International Law and Policy' (1999) 12(1) LJIL 9.
[6] Martti Koskenniemi, 'Expanding Histories of International Law' (2016) 56(1) American Journal of Legal History 104. Pitts makes a similar claim in her review essay: Jennifer Pitts, 'The Critical History of International Law' (2015) 43(4) Political Theory 541, 541-2.
[7] Martti Koskenniemi, 'Why the History of International Law Today?' (2004) 4 Rechtsgeschichte 61; and Galindo (n 2) 548.
[8] Koskenniemi, ibid 64.
[9] Randal Lesaffer, 'International Law and its History: The Story of an Unrequited Love' in Matthew Craven, Malgosia Fitzmmaurice, and Maria Vogiatzi (eds), *Time, History, and International Law* (Martinus Nijhoff, 2007); and Martti Koskenniemi, 'What Should International Legal History Become?' in Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit (eds*), System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (OUP 2017) 383.
[10] Mathew Craven, 'Theorising the Turn to History in International Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook on the Theory of International Law* (OUP 2016) 22.

discipline *turned* to history, as a way of generating insights on contemporary expressions of this tendency. Two phases are identified by Craven. One where the agenda was to "place international law itself within the frame of history" and a second where "historical knowledge itself has become the point of focus, in which the grounds and conditions for speaking about the past of international law have themselves opened up to examination through the lens of time and place."[11]

On this reading, international lawyers have not so much *turned* to history. Instead, it is an expression of something they have long since grappled with.[12] Indeed, international lawyers have always laboured under a distinct sense of their place in history, with the past often drawn on to make sense of and justify contemporary developments. Usually, this manifests as part of the everyday practice of international law, which requires us to *make meaning move across time*,[13] as well as in a normative sensibility that pervades the field.[14]

Others have identified the *turn* as occurring when international law coalesced both as a professional craft and an area of academic study in the modern university environment.[15] In this regard, this view seems to dovetail with Orford's comments that the *turn to history* was, more specifically, a turn to history as a critical method, rather than an engagement with the past as history alone.[16]

We should also remember not to be too disciplinary narrow in searching for the origins of this trend. And in this regard, it is important to note that a turn towards a particular type of theoretically inclined scholarship was also underway amongst historians. A renewed interest in historiography had been growing since the 1960s when many began to shift away from a predominantly empiricist and sharply positivist view—a shift aided by the influence of structuralist and postmodernist thought, critical theory, and the rise of interdisciplinary research.

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[11] ibid.
[12] Matthew Craven, 'The Invention of a Tradition: Westlake, the Berlin Conference and the Historicization of International Law' in Luigi Nuzzo and Miloš Vec (eds), *Constructing International Law: The Birth of a Discipline* (Vittorio Klostermann 2012).
[13] Anne Orford, 'On International Legal Method' (2013) 1(1) London Review of International Law 166, 172.
[14] In this regard, a historical sensibility animates much thinking about international law, as has been noted in relation to the shadow cast by the 'founding fathers' over contemporary international law discourses: Ignacio de la Rasilla del Moral, *In the Shadow of Vitoria: A History of International Law in Spain (1770-1953)* (Brill 2017); John D. Haskell, 'Hugo Grotius in the Contemporary Memory of International Law: Secularism, Liberalism, and the Politics of Restatement and Denial' (2011) 25(1) Emory International Law Review 269; and Martti Koskenniemi, 'Imagining the Rule of Law: Rereading the Groatian "Tradition"' (2019) 30(1) EJIL 17. Similarly, a historical sensibility underlies many of the concepts that have historically animated international law: Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law* (CUP 2020).
[15] Jean d'Aspremont, 'Critical Histories of International Law and the Repression of Disciplinary Imagination' (2019) 7(1) London Review of International Law 89.
[16] Orford (n 13); and Anne Orford, 'International Law and the Limits of History' in Wouter Werner, Marieke de Hoon, and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (CUP, 2017).

This broader interest in historiography was evidently influencing the legal academy, with Gordon noting in the 1990s a greater interest in history amongst lawyers over the last two decades.[17] This encompassed at least two strands. Firstly, an increase in "critical historicism" looked at history's role in determining the contemporary functions and dysfunctions of legal regimes—be it from critical race or feminist perspectives, for example.[18] Here, history was used as a way of critiquing mainstream legal scholarship. Secondly, there was an increased interest in historiography, which drew on structuralist, postmodern, and critical thinking to understand the nature of historical knowledge—what Dubber has characterised as a body of "historical jurisprudence".[19]

Although the origins are hard to isolate, what is notable is the kind of scholarship it produced. And despite its disparate origins, common was a shared concern for the "self-serving, repetitive, excessively linear in focus, unstable" treatments of international legal history that dominated the mainstream and which were aimed at concealing vested interests.[20] To counter this, history was used as a critical discourse aimed at critiquing the production of international legal history itself.[21] To this end, Skouteris identified six distinct trends as part of the *turn*: a re-reading of contemporary international law that provincialises its histories; a shift from grand-narratives in the European tradition to local and subaltern histories; socio-historical accounts of the profession; increased attention on the *archive*; a reflection on epistemic questions; and recognising the link between the historical consciousness of the field and its legitimacy and vitality.[22]

The turn to history produced various projects, critical inquiries, and methodological insights—particularly including those from postcolonial, feminist, Marxist, and 'Third World' perspectives, amongst others. For example, Orford and Koskenniemi have both sparked debates about contextualist history.[23] Others have sought to extend the global history

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[17] Robert W. Gordon, 'The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument' in Terrence J. McDonald (ed), *The Historic Turn in the Human Sciences* (University of Michigan Press 1996) 339.

[18] Robert Gordon, 'Critical Legal Histories' (1984) 36(1) Stanford Law Review 57; and Robert Gordon, 'Foreword: The Arrival of Critical Historicism' (1997) 49(5) Stanford Law Review 1023.

[19] Markus Dubber, 'New Historical Jurisprudence: Legal History as Critical Analysis of Law' (2015) 2(1) Critical Analysis of Law 1, 2. On this, see also Markus Dubber, 'Legal History as Legal Scholarship: Doctrinalism, Interdisciplinarity, and Critical Analysis of law' in Markus Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (OUP 2018).

[20] Deborah Z. Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law' (1996) 65(3/4) Nordic Journal of International Law 341, 354.

[21] Orford (n 13).

[22] Thomas Skouteris, 'The Turn to History in International Law' in Anthony Carty (ed), *Oxford Bibliographies in International Law* (OUP 2017) <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0154.xml> accessed 21 November 2021.

[23] Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' in Hélène Ruiz-Fabri, Mark Toufayan, and Emmanuelle Tourme-Jouannet (ed), *International Law and New Approaches to the Third World: Between Repetition and Renewal* (Société de législation compare 2013); and Martti Koskenniemi, 'Vitoria and Us: Thoughts on Critical Histories of International Law' (2014) 22

project to international law,[24] although this has not been free from criticism.[25] Although diverse both in its origins and the kinds of scholarship it produced, we thus get a sense that the *turn* to history resulted in an increased awareness of how international lawyers, through their scholarly interventions, make the history of the field.

In terms of the achievements of this trend, the appraisals seem mixed. Tarazona, for example, has argued that whilst it prompted a growing body of theoretically rich scholarship, less attention was paid to *historiography*—which Tarazona takes to encompass the study of methodology, sources, and techniques of historical production.[26] In sharp contrast, Orford locates the limits of the *turn* precisely in a neurosis about *methods* that it triggered, particularly insofar as this came as a response to charges of anachronism.[27] Similarly, d'Aspremont has questioned whether it lived up to its radical aspirations given the broad failure to dislodge the very disciplinary metanarratives and vocabularies they set out to critique—to this end, d'Aspremont identifies a repression of "disciplinary imagination".[28] Cogan, in contrast, locates the limits in a failure to produce a history in the "vernacular", which would take us beyond the conventional high-political and institutional settings we typically focus on.[29] Although contra Cogan, one can't help but wonder if such perspectives are ever within our reconstructive abilities.[30]

1.3 International Law's Historical 'Turn' and the Methodology Wars

The increased interest in history has not been without disciplinary friction, however, which has occurred between those seeking to use history as a "means of understanding the foundations of the international legal system", and those pursuing a history of international law drawing on largely extra-legal sources—which Fitzmaurice argues are pulling in

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Rechtsgeschichte 119. For more recent reflections on this debate, see the interview between Koskenniemi and Orford: Alexandra Kemmerer, '"We Do Not Need to Always Look to Westphalia…" A Conversation with Martti Koskenniemi and Anne Orford' (2015) 17(1) Journal of the History of International Law 1.

[24] Bardo Fassbender and Anne Peters, 'Introduction: Towards a Global History of International Law' in Fassbender and Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Pres, 2012) 1.

[25] Jacob Katz Cogan, 'Review of Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (2012)' (2014) 108(2) AJIL 371.

[26] Liliana Obregón Tarazona, 'Writing International Legal History: An Overview' (2015) 7(1) Monde(s) 95, 96.

[27] Orford (n 16).

[28] Jean d'Aspremont, 'Critical Histories of International Law and the Repression of Disciplinary Imagination' (2019) 7(1) London Review of International Law 89. A similar point is made in: Jean d'Aspremont, 'Turntablism in the History of International Law' (2020) 22(2-3) Journal of the History of International Law 472.

[29] Jacob Katz Cogan, 'A History of International Law in the Vernacular' (2020) 22(2-3) Journal of the History of International Law 205.

[30] John Henry Schlegel, 'Sez Who? Critical Legal History without a Privileged Position' in Markus Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (OUP 2018).

different directions.[31] Whilst one set of scholars use history less bound by context, the other attempts to bring newfound contextualism to the study of international law.[32] Beneath this methodological divide lies a fundamental debate about how history should be used when engaging with and critiquing international law and international legal institutions.[33]

Wheatley has described this as the breaking out of "method wars".[34] At the core of these methodological skirmishes is a clash about how *time* should figure in international legal scholarship. Although based on Orford's most recent writings, these disciplinary schisms might also be read as revealing a kind of *political* struggle expressed methodologically.[35]

Debates about the dangers of anachronism occurred between those subscribing to a contextual approach influenced by the so-called *Cambridge School* of history and those seemingly less methodologically restricted. For the former, presentism and anachronism are the major disciplinary sins of historical writing.[36] International lawyers commit this sin with particular ease by using the genealogical method, which produces "deplorable" results.[37]

For some, Orford exemplifies this latter approach, where a more conventional *history as method* approach was eschewed for more openly presentist engagements that looked to the past precisely for what it could reveal about the contemporary operation of international law.[38] Orford has defended this more instrumental use of history as a critical mode, characterising the attacks it has garnered as a form of methodological policing.[39] In particular, Orford responded to the sorts of critiques forwarded by Lesaffer, who argued that:

> "[t]his genealogy history from present to past leads to anachronistic interpretations of historical phenomena, clouds historical realities…and gives no information about the historical context of the phenomenon one claims to recognise…It tries to

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[31] Andrew Fitzmaurice, 'Context in the History of International Law' (2018) 20(1) Journal of the History of International Law 5, 6-7.
[32] ibid. Vadi has elsewhere characterised this as the distinction between a "historian's history" and a "jurist's history" approach: Valentina Vadi, 'International Law and Its Histories: Methodological Risks and Opportunities' (2017) 58(2) Harvard International Law Journal 311, 312-3. Cogan similarly identifies a split between international law scholarship that uses history for "intensely internalist" reasons to either provide the field with a historical foundation or in the pursuit of a particular critical agenda, and that body of scholarship using historical contextualisation to make sense of international law and its histories in a much broader sense. See: Cogan (n 25) 373.
[33] Tarazona (n 26) 99.
[34] Natasha Wheatley, 'Law and the Time of Angels: International Law's Method Wars and the Affective Life of Disciplines' (2021) 60(2) History and Theory 311.
[35] Anne Orford, *International Law and the Politics of History* (Cambridge University Pres 2021).
[36] See for example: Quentin Skinner, 'Meaning and Understanding in the History of Ideas' (1969) 8(1) History and Theory 3; and Constantin Fasolt, *The Limits of History* (University of Chicago Press 2004) 7.
[37] Lesaffer (n 9) 34.
[38] As set out in: Orford (n 13); Orford (n 23); and Orford (n 16).
[39] Orford (n 13) 171.

understand the past for what it brought about and not for what it meant to the people living it."[40]

We thus get a sense that whilst for some, anachronism and presentism were the cardinal sins, for others, they formed part of the "soul" guiding international lawyers in writing their disciplinary history.[41]

Some viewed Orford's approach as brazenly opportunistic, with the past not approached on its own terms. Benton forwarded some of the most direct critiques whilst also identifying a mischaracterisation of the work of Skinner and the *Cambridge School*.[42] Benton's interjection was premised on the understanding that contextualism stood for "nothing more than a commitment to empirically careful study that treats political thought as an activity open to investigation and interpretation alongside other historical phenomena."[43] Similarly, Fitzmaurice launched an attack from the perspective of intellectual history and the Cambridge School.[44]

Other critiques focused on a more general methodological looseness in how history was used, with the *sins* committed including anachronism as well as: a general lack of methodical awareness, poor engagement with primary and second sources, and the liberal use of genealogical approaches more concerned with generating data points for resolving contemporary legal problems.[45] Warning of these dangers—particularly in the context of 'critical' work—Purcell advocates for an augmented genealogical approach as a corrective.[46]

In response, Orford defended what the contextualists viewed as methodological opportunism. For Orford, this arose from our desire to make "meaning move across time" in international legal argumentation, which was "necessarily anachronistic".[47] International lawyers were not guided by the same sense of historical time as historians of international law might be, nor would they have the same disciplinary or methodological attachment to it.[48] Rather, the past was looked to in the present as part of some form of legal argumentation, which required legal meaning to move through time. This openly anachronistic "juridical thinking" was a potentially creative way of critiquing and generating

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[40] Lesaffer (n 9) 35.
[41] Tarazona (n 26) 97.
[42] Lauren Benton, 'Beyond Anachronism: Histories of International Law and Global Legal Politics' (2019) 21(1) Journal of the History of International Law 7.
[43] ibid 34.
[44] Fitzmaurice (n 31).
[45] See Vadi setting out some of these critiques: Vadi (n 32) 320-1.
[46] Kate Purcell, 'On the Uses and Advantages of Genealogy for International Law' (2020) 33(1) LJIL 13.
[47] Orford (n 13) 172 & 175.
[48] ibid 175.

insights about the past and present of international law.[49] Adherence to strict contextualism, then, would be to sacrifice some of these benefits, particularly the ability for critical practitioners to "intervene in the development of the law".[50] Orford's position would find support in later comments by Koskenniemi, who would argue that strict contextualism as per the *Cambridge School:* "encourages a historical relativism and ends up suppressing or undermining efforts to find patterns in history that might account for today's experiences of domination and injustice."[51] Adherence to this approach risks shutting down law's *intermingling* of the past and present.[52]

These methodological differences also manifested in international lawyers' use of legal materials, with Orford noting differences in how UN policy documents and other materials were used by Mazower and the approach taken in her own work.[53] For Mazower, these materials were treated as having relatively stable, coherent meanings at particular moments in time.[54] As an international lawyer, however, Orford considered them for the "institutional force" they might possess going forward, where meaning evolved, progressed, or layered over time, rather than in a particular moment.[55] It is in this regard that such materials were engaged with for their "propulsive dimension".[56] Koskenniemi has similarly noted the need for an awareness of the teleological and normative dimensions of legal scholarship, which gives into how contextual meaning is extracted and tracked over time.[57]

The more openly normative use of history was of particular use in the context of critical approaches to international law, where historical engagement can be used to critique contemporary international law and legal institutions and to direct its future evolution. So, for example, Anghie's work on sovereignty relied on an idiosyncratically *historical* approach, which looked to critique and re-situate a foundational concept of international law.[58] Although not without its criticisms,[59] Anghie's approach seems natural given his concern

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[49] ibid 175; and Orford (n 23) 106.
[50] Orford (n 16) 297 & 312.
[51] Koskenniemi (n 23).
[52] ibid; and Martti Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View' (2013) 27(2) Temple International and Comparative Law Journal 229.
[53] Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press 2009).
[54] Anne Orford in Kemmerer (n 23) 3.
[55] ibid.
[56] Wheatley (n 34) 321.
[57] Koskenniemi (n 23) 129.
[58] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007).
[59] Anghie's approach, however, did not avoid critique: Ian Hunter, 'Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations' in Shaunnagh Dorsett and Ian Hunter (eds), *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave McMillan 2010) 11-12; and Ian Hunter, 'The Figure of Man and the Territorialisation of Justice in "Enlightenment" Natural Law: Pufendorf and Vattel' (2013) 23(3) Intellectual History Review 290.

for the *postcoloniality* of international law, which embeds a concern for the present-day functions and dysfunctions of international law in his work.[60]

Anghie's work is broadly illustrative of how history has been used within a range of 'critical' international law scholarship. For TWAIL, this includes deploying "arguments about contemporary political problems that draw on inherited concepts with a history of legal meaning attached to them."[61] In much the same way, the research pursued in this thesis uses history and historiography to develop a critique of ICL scholarship.[62] And although the historiographical perspective does provided a useful set of critical tools,[63] it is ultimately one amongst many possible others. The insights and perspectives it can generate, however, allows us to open up an "imaginative space" where international law and its futures might be reimagined.[64]

It thus appears that at the core of the debate about anachronism lies a difference in why certain international law scholars get drawn to the past. The debate about anachronism is thus revealed as a debate about the proper use of the past and history. In this way, concern for anachronism cuts to the heart of each side's disciplinary enterprises. The methodological *policing* identified by Orford thus did not simply represent methodological vigilance but presented a more serious threat to the critical and political project towards which their scholarship laboured. It was not merely a case of "unrequited love"—with Lesaffer suggesting that methodological refinement would make them compatible.[65] Rather, for certain critical international lawyers, the relationship with history was more casual and, at times, opportunistic. Koskenniemi thus describes it as:

> "[A] kind of experimentation in the writing about the disciplinary past in which the constraints of any rigorous 'method' have been set aside in an effort to create intuitively plausible and politically engaged narratives about the emergence and gradual transformation of a profession".[66]

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[60] Orford would later defend Anghie and other postcolonial historians of international law in the context of a debate about the appropriate role of the imperial past of international law in constructing the discipline: Orford (n 23).
[61] Orford (n 16) 304.
[62] In this regard, I echo Clark's comment that historiography and historical theory are merely "one set of materials for thinking more deeply about method". See: Martin Clark, 'Ambivalences, Anxieties/Adaptations, Advances: Conceptual History and International Law' (2018) 31(4) LJIL 747.
[63] Ntina Tzouvala, 'New Approaches to International Law: The History of a Project' (2016) 27(1) EJIL 215, 224.
[64] Tarazona (n 26) 99.
[65] Lesaffer (n 9).
[66] Koskenniemi (n 3) 9-10.

In terms of how these debates have informed the research undertaken in this thesis, a similarly *opportunistic* quality is present. Indeed, as identified in the introductory chapter, the focus on how the past is used and repurposed by ICL scholars arises out of present-day historiographical concerns. It is hoped that by exploring how ICL scholars draw on history and the kinds of historical knowledge they produce, we can gain insights about the present day operation of ICL and international criminal justice institutions—particularly given the frequency with which a particular understanding of the field's past is invoked. This kind of opportunistic engagement is furthered in Chapters 5 and 8, where I explore the *hidden histories* typically overlooked within mainstream ICL scholarship to draw insights about the present day functions and dysfunctions of the field.

The *turn to history* has left an indelible mark on international law scholarship. And as a discipline "rooted in historical trends and realities to a far larger degree than other realms of law and jurisprudence", it is perhaps little surprise that the *turn to history* has had such a profound impact on the field of international law.[67] The most immediate consequence of this turn is that many—although certainly not all—international lawyers have become keenly aware of the limits and possibilities of history, particularly in terms of what elements of the past the field has tended to neglect or overlook entirely. Furthermore, the enthusiasm present during the *turn* has evidently not waned. As of writing, we find ourselves in a prodigious time for this area of scholarly concern.[68] Perhaps, then, our response to the question of what the net results of the *turn* have been should be much like how Zhou Enlai—the first Premier of the People's Republic of China—purportedly responded when asked what he thought the impact of the French Revolution was in 1972: "Too early to say."[69]

1.4 The Turn to History and the Subfields of International Law:

International law is not the only field to have undergone a historiographical awakening. And in many cognates and subfields, the *turn* to history has manifested with equal intensity.[70]

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[67] David J. Bederman, 'Foreign Office International Legal History' in Matthew Craven, Malgosia Fitzmaurice, and Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff 2007).
[68] Some of the most recent works include: Annabel Brett, Megan Donaldson, and Martti Koskenniemi (eds), *History, Politics, Law: Thinking Through the International* (CUP 2021); Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300-1870* (CUP 2021); Anne Orford, *International Law and the Politics of History* (CUP 2021); Ignacio de la Rasilla, *International Law and History: Modern Interfaces* (CUP 2021); Tzouvala (n 14); and Raphael Schäfer and Anne Peters (eds), *Politics and the Histories of International Law: The Quest for Knowledge and Justice* (Brill 2021).
[69] It should be noted, however, that this is the apocryphal version of events most often referenced. Enlai had actually responded to a question about the Paris riots of 1968, rather than the 1789 French Revolution. See Susan Ratcliffe (ed), *Oxford Essential Quotations* (4th edn, OUP 2016).
[70] Skouteris (n 22).

This has taken place in multiple subject matter areas, with international humanitarian law (IHL),[71] international trade law,[72] international investment law,[73] and international environmental law,[74] all experiencing this trend to varying degrees. In the coming sections, I will explore how this *turn to history* has played out within international human rights law (IHRL) scholarship, followed by international criminal law (ICL). In doing so, we will get a sense of the limits and opportunities for the *turn to history* in future ICL scholarship.

1.4.1 The Turn to History and International Human Rights Law

Of the many subfields to have undergone a *turn* to history, IHRL has arguably experienced it with the most intensity. The rate of scholarly production is made all the more staggering given Cmiel's comments in 2004 that up until the late 1990s, the history of IHRL had received relatively scant attention within the legal academy.[75] And despite the dangers Cmiel warned of—particularly that of anachronism and the politically charged scholarship it might elicit—this does not appear to have slowed things down. Indicative of this, Kerber—the then president of the American Historical Association—even went so far as to opine that: "we are all historians of human rights".[76]

Whilst a full appraisal of this topic is beyond the scope of the present chapter, it is nevertheless helpful to set out some of the main currents. And although much of this work is, to a certain extent, idiosyncratic of IHRL—particularly given its interdisciplinary scope—it is still helpful to explore how scholars working in this field have reflected on the conditions of historical production within it. These debates will be useful when I reflect on how similar conversations amongst ICL scholars have played out. And in this regard, the turn to history within IHRL might signal future directions for ICL scholarship.

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[71] See for example: Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 2(1) EJIL 109. More recently, Moyn has turned his historiographical gaze towards *jus ad bellum* and *jus in bello*: Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (Macmillan 2021).
[72] See, respectively: Michael Fakhri, *Sugar and the Making of International Trade Law* (CUP 2014); and Gabrielle Marceau (eds), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University 2015).
[73] See for example: Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (CUP 2013); Jeanrique Fahner, 'The Contested History of International Investment Law: From a Problematic Past to Current Controversies' (2015) 17(3) International Community Law Review 373; Stephan Schill, Christian Tams, and Rainer Hoffman (eds), *International Investment Law and History* (Edward Elgar 2018); and Borzu Sabahi, Ian Laird, and Giovanna Gismondi, *International Investment Law and Arbitration: History, Modern Practice, and Future Prospects* (Brill 2018).
[74] Peter Sand (ed), *The History and Origin of International Environmental Law* (Edward Elgar 2015).
[75] See Kenneth Cmiel, 'The recent history of Human Rights' (2004) 109(1) American Historical Review 117, 119.
[76] Linda K. Kerber, 'We Are All Historians of Human Rights' (2006) 44(7) Perspectives on History < https://www.historians.org/publications-and-directories/perspectives-on-history/october-2006/we-are-all-historians-of-human-rights> accessed 21 November 2021.

Writing in 2012, one of the leading instigators of this *turn* within IHRL, Samuel Moyn, noted that scarcely a decade ago, little attention was paid to the history and historiography of human rights[77] The present situation could not be more different, with the field now in a state of great historiographical ferment. And much like within international law scholarship, these works have moved beyond a focus on the *past* in a narrow sense and instead looked to the *project* of IHRL history itself. This has, as Alston argued, been conducted as part of a broader "struggle for the soul of the human rights movement" as waged through the "proxy of genealogy".[78] In this regard, the turn to history within IHRL appears to possess a similar presentist edge as it does within international law scholarship.

The historical explorations of the ideas and concepts animating the field of human rights have followed several theoretical, critical, and methodological tracks. Alston has characterised this as entailing both a search for the origins of modern human rights and various other *revisionist* responses.[79] The former project was exemplified by Martinez's work which identifies the slave trade and its abolition as one such origin moment.[80] Whilst Moyn's work exemplified the revisionist project.[81] Pendas has elsewhere characterised these works as part of a "bataille des origines".[82]

Although both projects have their contemporary appeal, they are not without their respective limits. To this end, Moyn has recalled Marc Bloch's warning of the "idol of origins" where the antecedents of contemporary ideas and concepts are too easily identified as the proximate cause of some sub-development.[83] Cmiel had earlier identified the pitfalls of this kind of work, which risks becoming overly dependent on searching for instances of specific linguistic forms throughout history.[84] Even if we take a conceptual or analytical approach rather than a linguistic one, Cmiel warns, this also risks indulging in conceptual

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[77] Samuel Moyn, 'Substance, Scale, and Salience: The Recent Historiography of Human Rights' (2012) 8(1) Annual Review of Law and Social Science 123, 124.
[78] Philip Alston, 'Book Review: Does the Past Matter? On The Origins of Human Rights' (2013) 126(7) Harvard Law Review 2043, 2077.
[79] ibid. Moyn has elsewhere divided the historiography of IHRL scholarship as consisting of "substantive history, scalar history, and…salience history": Moyn (n 77) 123. Weinberger has also identified a split between those pursuing the history of the concept of human rights and those producing histories of the practice of human rights: Lael Weinberger, 'Writing the History of Human Rights: An Introduction' (*Pozen Family Center for Human Rights: The University of Chicago*, 17 October 2017) <https://humanrights.uchicago.edu/blog/2017/10/writing-the-history-of-human-rights-an-introduction> accessed 21 November 2021.
[80] Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights* (OUP 2012).
[81] Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2012).
[82] Devin O. Pendas, 'Towards a New Politics? On the Recent Historiography of Human Rights' (2012) 21(1) Contemporary European History 95, 96.
[83] Moyn (n 81) 41. See also Bloch stating that "…historical phenomenon can never be understood apart from its moment in time" : March Bloch, *The Historian's Craft* (Knopf 1953) 29 & 35.
[84] Cmiel (n 75).

anachronism and the production of teleological, linear narratives. In this sense, it appears the *turn* to human rights history has generated similar methodological unease.

Moyn's intervention can, perhaps, be read as a corrective to these tendencies given his shorter view of the field's history, which singles out the 1970s as the origin moment.[85] This has obvious temporal contrasts with those works placing IHRL firmly within Graeco-Roman philosophies, Judaeo-Christian religious and natural law traditions, as well as other contemporary historical events such as the Enlightenment, the French and American revolutions, and the institutional high-water mark in the UNDHR of 1948.[86] This provides a stark contrast with Moyn's view in which *human rights*—as presently understood—emerged as a by-product of the failure of the utopian alternatives to state socialism in the 1960s and 1970s. Other radical attempts at *origins* scholarship have come from, for example, Mutua,[87] Barreto,[88] and Jensen,[89] who have all in their own ways drawn connections between the normative enterprise of IHRL and the colonial and postcolonial milieu.

Decolonisation has proved an exciting setting for IHRL scholars[90]. Mazower, for example, has identified connections between the end of *Empire* and the emergence of the institutional framework of contemporary IHRL.[91] Similarly, connections have also been identified between *human rights* as a normative and political language and the forces of "neoliberalism".[92] In this regard, the field appears to have enthusiastically taken up Baxi's charge that: "[a]n adequate historiography will…locate the originating languages of human rights far beyond the European spacetime."[93]

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[85] Moyn (n 81).
[86] Ishay is often taken to be the antithesis of Moyn, as Lamb notes: Robert Lamb, 'Historicising the Idea of Human Rights' (2019) 67(1) Political Studies 100. See: Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press 2008). For similar historiographically expansive projects see: Lynn Hunt, *Inventing Human Rights: A History* (W.W. Norton 2007), and Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (University of Pennsylvania Press 2003).
[87] Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002). Also see: Mutua, 'The Ideology of Human Rights' (1996) 36(3) Virginia Journal of International Law 589, 595; and Mutua, 'Savages, Victims, and Saviors: The Metaphor or Human Rights' (2001) 42(1) Harvard Journal of International Law Journal 201.
[88] Jose-Manuel Barreto (ed), *Human Rights from a Third World Perspective: Critique, History and International Law* (CUP 2013).
[89] A.W.B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP 2001).
[90] Steven Jensen, *The Making of International Human Rights* (CUP 2016); and *The Making of International Human Rights: The 1960s, Decolonizations and the Reconstruction of Global Values* (CUP 2016). See also: Dirk Moses, Marco Duranti, and Ronald Burke (eds), *Decolonisation, Self-Determination, and the Rise of Global Human Rights Politics* (CUP 2020).
[91] See for example: Mark Mazower, 'The Strange Triumph of Human Right, 1933-1950' (2004) 47(2) The Historical Journal 379; Mazower (n 53); and Mazower, *Governing the World: The History of an Idea, 1815 to Present* (Penguin 2012).
[92] Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso Books 2019). Moyn has also played on this theme: Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018).
[93] Upendra Baxi, *The Future of Human Rights* (3rd edn, OUP 2002) 42-3.

A growing body of meta-scholarship has also proliferated during this period which has reflected on the *turn to history* within IHRL itself.[94] This has generated a wide range of historiographical insights,[95] and based on the volume of scholarship set out here alone, we begin to see the justification behind Skouteris' comment that: "[n]o other subfield of international law [has] experienced the turn to history so viscerally as the field of human rights."[96] History has thus moved from being a "marginal background enterprise to a controlling vocabulary".[97] And whilst the net result is perhaps too early to tell, we can certainly identify a move away from the previous histories which "reflected an uncritical narrative of relatively steady progress in the evolution of ideas…and the gradual uptake of these ideas in the form of legal norms."[98] It seems, then, that much like international law scholarship, IHRL has been stripped of the certainty its history once enjoyed. And with the previously dominant teleology now either disrupted or on the cusp of disruption, the ground has been cleared for potentially radical reappraisals of the field and the various projects it has encompassed.

1.4.2 The Turn to History in International Criminal Law Scholarship

As one of the fastest-growing subfields of international law, where scholarly production appears to outpace even the substantive evolution of the field itself,[99] ICL has not been spared the *turn to history*. This is a relatively recent development, with historiography previously of little concern to mainstream ICL scholars.[100] The historical work produced in

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[94] See for example: Pamela Slotte and Mia Halme-Tuomisaari (eds), *Revisiting the Origins of Human Rights* (CUP 2015); Reza Afshari, 'On Historiography of Human Rights: Reflections on Paul Gordon Lauren's The Evolution of International Human Rights: Visions Seen' (2007) 29(1) Human Rights Quarterly 1; Stefan-Ludwig Hoffman, 'Human Rights and History' (2016) 232(1) Past & Present 279; Christopher McCrudden, 'Human Rights Histories' (2015) 35(1) Oxford Journal of Legal Studies 179; Ben Golder, 'Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought' (2014) 2(1) London Review of International Law 77; Robert Brier, 'Beyond the Quest for a "Breakthrough": Reflections on the Recent Historiography on Human Rights; Daniel Whelan, 'On Reza Afshari's "On Historiography of Human Rights"' (2019) 41(1) Human Rights Quarterly 209; and Vincenzo Ferrone, 'The Rights of History: Enlightenment and Human Rights' (2017) 39(1) Human Rights Quarterly 130.
[95] For a sample of these from a range of historical and geographical vantage points, see: Jean Quataert and Lora Wildenthal (eds), *The Routledge History of Human Rights* (Routledge 2020).
[96] Skouteris (n 22).
[97] ibid.
[98] Alston (n 78) 2403.
[99] Elies Van Sliedregt, 'International Criminal Law: Over-Studied and Underachieving?' (2016) 29(1) Leiden Journal of International Law 1.
[100] Skouteris (n 22). Indeed, writing only a few years earlier Tallgren argued there had been no "history boom" in ICL: Immi Tallgren, 'Searching for the Historical Origins of International Criminal Law' in M. Bergsmo, C.W. Ling, and Y. Ping (eds), *Historical Origins of International Criminal Law: Volume I* (Torkel Opshal EPublisher 2014) xvi.

this period tended to reflect a "jubilant tone of transhistorical evolution toward the global progress witnessed at present and the striving for a hopefully even brighter future."[101]

Nevertheless, the tides of historiographical change did eventually turn. And in recent years, ICL has entered a lively period for historical study. Several trends can be identified within this, which I will now explore. Although this *turn* has not produced precisely the same historiographical debates as elsewhere, we can nevertheless identify a growing desire for a deeper understanding of ICL's past, as well as a growing interest in how these stories are written. In the following sections, I will set out how the turn has played out within ICL scholarship and any limits to this turn we might identify.

1.4.2(a) History as Rationalisation

The first trend we can identify has taken the form of essentially conventional legal history. To this end, numerous edited collections have been published in recent years, which have sought to reappraise the historical foundations of ICL or specific moments in its history.[102] Much of this work has focused on Nuremberg as a foundational moment, with a range of works engaging either with its perceived historiographical significance or seeking to re-balance our historical focus by looking at less scrutinised moments.[103] Although critical in their own right, many of these works have stayed within the familiar historiographical territory that has dominated the field.[104] In contrast, other works have sought to challenge these temporal and geographical boundaries by establishing new starting points.[105]

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[101] Skouteris (n 22).

[102] Morten Bergsmo & ors (eds), *Historical Origins of International Criminal Law: Vols 1-5* (Torkel Opsahl, 2014-17); Immi Tallgren and Thomas Skouteris (eds*), The New Histories of International Criminal Law:* Retrials (OUP 2019); Kevin Jon Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (OUP 2013).

[103] On the reappraisals of Nuremberg, see for example: Kevin Jon Heller, *The Nuremberg Military Trials and the Origins of International Criminal Law* (OUP 2011). Other works have sought to reappraise Nuremberg by looking at the judgment rendered in relation to industrialists: Grietje Baars, 'Capitalism's Victor's Justice? The Hidden Stories Behind the Prosecution of Industrialists Post-WWII' in Kevin Jon Heller and Gerry Simpson (eds), *the Hidden Histories of War Crimes Trials* (OUP 2013); and Jonathan Kolieb, 'Through the Looking Glass: Nuremberg's Confusing Legacy on Corporate Accountability Under International Law' (2017) 32(2) American University International Law Review 569. For another attempt to *look beyond* Nuremberg, see: Mark Drumbl, 'Stepping Beyond Nuremberg's Halo: The Legacy of the Supreme National Tribunal of Poland (2015) 13(5) Journal of International Criminal Justice 903.

[104] See for example: Yuki Tanaka, Timothy L.H. Cormack, and Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Brill 2011); Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008); Liu Daqun and Zhang Binxin (eds), *Historical War Crimes Trials in Asia* (Torkel Opsahl 2016); and Morten Bergmo, Cheah Wui Ling, and Yi Ping (eds), *Historical Origins of International Criminal Law: Volume 2* (Torkel Opsahl 2014).

[105] See for example: Timothy L.H. McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime' in Timothy LH. McCormack and Gerry J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law 1997); Benjamin E. Brockman-Hawe, 'A Supranational Criminal Tribunal for the colonial Era: The Franco-Siamese Mixed Court' in Kevin Jon Heller & Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (OUP 2013); Gregory S. Gordon,

A second trend encompasses work that has sought to engage with 'history' insofar as it constitutes a consequentialist justification for the field. This interest arose, perhaps, as it was called on to support the substantive growth of ICL as a field itself. It thus appears that from the 1990s onward a theoretically rich body of work was needed to make sense of the rapid pace of institutional and doctrinal development. In this context, 'history' tended to be looked at as a justification for the international criminal trial specifically and how these events drew on or contributed to the production of history. Several pioneering works from the mid-1990s onward picked up this theme.[106] And in this regard, 'history' was looked to as a way of justifying the new institutional forms the international criminal justice project was taking in this period. This, of course, contrasts with what are perhaps the more traditional views of international criminal trials, where the function of the ICT is to "render justice, and nothing else."[107]

However, we should note that it was not only legal scholars who were exhibiting this interest in ICL trials as history-making events.[108] The Nuremberg trial was already undergoing a resurgence amongst historians more generally. And commenting on this resurgence of works on ICL trials and the legacy of the Holocaust, Frei connected it to shifting geo-political conditions within Germany and a proliferation of Holocaust survivor testimony.[109] In this regard, much like the *turn to history* set out above, it thus seems we should not look at it in isolation, reflective as it was of broader scholarly trends.

Nevertheless, ICL scholars did increasingly *turn to history* to rationalise the field's growth, often through the justification of international criminal punishment and by highlighting the history-making function of ICL trials. The focus was thus on international criminal tribunals as "history trials" that both consumed and produced history. On this view, the interest in history arose as these events "negotiate[d] the relationship between the past

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'International Criminal Law's 'Oriental Pre-Birth': The 1894-1900 Trials of the Siamese, Ottomans, and Chinese' in Bergsmo & ors (eds), *Historical Origins of International Criminal Law: Volume 3* (Torkel Osahl 2015); Mark Chadwick, *Piracy and the Origins of Universal Jurisdiction (Brill 2018);* and Gabrielle Simm, 'The Paris Peoples' Tribunals and the Istanbul Trials: Archives of the Armenian Genocide' (2016) 29(1) LJIL 245.

[106] See for example: Lawrence Douglas, 'The Memory of Judgment: The Law, the Holocaust, and Denial' (1995) 7(2) History and Memory 100; Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press 2001); Gerry Simpson, 'Didactic and Dissident Histories in War Crimes Trials' (1997) 60(3) Albany Law Review 801; Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (Transaction Publishers 1997).

[107] As Arendt famously argued. See: Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin 2006) 253.

[108] See, for example: Jeffrey Herf, *Divided Memory: The Nazi Past in Two Germanys* (Harvard University Press 1997); Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (University of North Carolina Press 1998); Mary Fulbrook, *German National Identity After the Holocaust* (Cambridge Polity Press 1999); Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (OUP 2001).

[109] Norbert Frei, 'Review Article: Before and After Nuremberg' (2003) 38(2) Journal of Contemporary History 333.

and future or between nation and humanity."[110] Viewing ICL trials as historical events coincided with a broader attempt to rationalise international criminal punishment, particularly in light of the emergence of a new institutional architecture for the field from the mid-1990s onward. ICL scholars were prompted to consider this rationalisation of international criminal justice with particular intensity as an introspective sensibility took hold following the operationalisation of the ICC.[111]

Also influential was a growing body of transitional justice (TJ) scholarship which diversified the perspectives from which these trials were thought about. Although TJ first emerged at Nuremberg—at least according to Teitel's chronology—the second phase of its development saw a greater focus on history and its relation to the public accountability aims of TJ.[112] A concern for the historical record thus became an important concern in the accountability models taking root in the post-Cold War world across South America, South Africa, and Central and Eastern Europe.[113] TJ thus moved beyond the predominantly retributive models of the first phase—as exemplified by Nuremberg—towards a more holistic understanding of *justice* and what it entailed.[114] A central tenet of this was an understanding that for conflict-ridden societies to transition to peace successfully, there needed to be some process to establish truths about the conflict. Establishing an authoritative account of the conflict or atrocity in question would provide psychological and emotional healing for victims and the affected society.[115]

At the same time, ICL scholarship shifted from relying primarily on deontological and deterrence-based justifications of international criminal punishment to consequentialist understandings, with the history-making functions of these juridical events viewed as increasingly important. Consequently, greater attention was placed on the functions and goals of international criminal trials, with this *historical* function gaining the recognition of the then Secretary-General:

> "In the past decade, the United Nations has established or contributed to the establishment of a wide range of special criminal tribunals. In doing so, it has sought

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[110] Costas Douzinas, 'History Trials: Can Law Decide History' (2012) 8(1) Annual Review of Law and Social Science 273, 279.
[111] See for example: Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13(3) EJIL 561; and Mirjan Damaška, 'What is the Point of International Criminal Justice?' (1998) 83(1) Chicago-Kent Law Review 329.
[112] Ruti G. Teitel, 'Transitional Justice Genealogy' (2003) 16 Harvard Human Rights Journal 69, 71. Note, however, that Zunino contests this genealogy, arguing the discourse of transitional justice didn't emerge until the 1980s: Marcus Zunino, *Justice Framed: A Genealogy of Transitional Justice* (CUP 2019).
[113] Marcos Zunino, 'The Origins of Transitional Justice' (*GroJIL-Blog*, 9 July 2019) <https://grojil.org/2019/07/09/the-origins-of-transitional-justice/> accessed 21 November 2021.
[114] Teitel (n 112) 77.
[115] Martha Minow, *Between Vengeance and Forgiveness* (Beacon 1998). Also see: Teitel (n 110) 78.

> to advance a number of objectives, among which are bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace."[116]

Indeed, of the six primary functions of ICTs we might identify, the historical function is often viewed as linking them: establishing individual accountability, providing a historical record about the atrocities, fostering reconciliation between affected communities, the maintenance of international peace and security, providing justice to individual victims, and promoting the rule of law.[117] The historical dimensions of ICTs have also found jurisprudential support, with the *Erdemović* decision making express reference to this aspect.[118] We thus see how ICL scholars have moved beyond retribution as a justification. Indeed, Douglas has justified ICL trials for their ability to deliver a "didactic trial" where messages regarding the rule of law and a peaceful transition are encoded in the institution's operation.[119] Osiel has similarly identified the pedagogic capacity of ICTs, which can influence collective understandings of historical events in a way that fosters and promotes liberal values.[120]

The historical functions of ICL trials have also been considered as part of the *expressive* justifications of ICL. Expressivist understandings focus on the consequentialist value of ICL trials, particularly their ability to convey a particular message.[121] In light of their expressive potential, Priemel argues that domestic and international trials have been a major site for

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[116] UN Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General' (23 August 2004) UN Doc S/2004/616, para 38.
[117] Caleb H. Wheeler, 'The Scales of Justice: Balancing the Goals of International Criminal Trials' (2019) 30(2) Criminal Law Forum 145.
[118] *Prosecutor v Erdemović* (Sentencing Judgment) IT-96-22-T (5 March 1998) [21].
[119] Lawrence Douglas, 'Perpetrator Proceedings and Didactic Trials' in Antony Duff, Lindsay Farmer, Sandra Marshall, and Victor Tadros (eds), *The Trial on Trial, Volume 2: Judgment and Calling to Account* (Hart Publishing 2006) 191, 198.
[120] Osiel (n 106); and Osiel, 'In Defense of Liberal Show Trials - Nuremberg and Beyond' in Guénaêl Mettraux (ed), *Perspectives on the Nuremberg Trial* (OUP 2008).
[121] See for example: Robert D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43(1) Stanford Journal of International Law 39; Barrie Sander, 'Justifying International Criminal Punishment: A Critical Perspective' in Morten Bergsmo and E.J. Buis (eds), *Philosophical Foundations of International Criminal Law: Foundational Concepts* (Torkel Opsahl Academic EPublisher 2019); Barrie Sander, 'The Expressive Turn of International Criminal Justice: A Field in Search of Meaning' (2019) 32(4) LJIL 851; Carsten Stahn, *Justice as Message: Expressivist Foundations of International Criminal Justice* (OUP 2020); and Daniela Demko, 'An Expressive Theory of International Punishment for International Crimes' in Florian Jeßberger and Julia Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in international Criminal Law* (CUP 2020).

developing micro and macro histories about the events they are concerned with.[122] This is similar to the TJ view, which identifies their value in how they aid post-conflict transition.[123] History aids these transitional processes as *truths* about the conflict can be established, creating a public record and healing victims.[124]

Identifying the expressive potential of ICL trials pushes us to question the kinds of message they might convey and how, if at all, they successfully achieve this.[125] To this end, we might be sceptical of whether they can adequately grapple with the scale of the events over which they assert jurisdiction. Douglas views atrocity trials as a legal technology designed to help us come to terms with events of this nature and scale, including the categories of international crimes themselves.[126] And despite tension between the capacities of this legal technology and the scale of the atrocities themselves, Douglas argues they fail to do justice when they produce partial histories. For this reason, Douglas argues that ICL trials need to be designed from the ground up as didactic exercises.

1.4.2(b) International Criminal Trials as 'Historical' Events

With the understanding that ICTs could be justified to the extent they can contribute to the writing of history—albeit it as one of many aims and functions—having achieved a reasonable degree of disciplinary agreement, subsequent works have attempted a more focused look at precisely *how* these forms of history are produced.[127] Wilson, for example, has identified ICTs not only as prolific producers of historical narratives, but also as spaces where opposing narratives about particular atrocities or historical contexts are actually tested and interact. [128] In this regard, despite the didactic intention of ICTs, the transmission of the message on the precise terms its authors intended is far from guaranteed. As Priemel notes, history enters into the courtroom in many forms and for various functions.[129] Given

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[122] Kim Christian Priemel, 'Historical Reasoning and Judicial Historiography in International Criminal Trials' in Kevin Jon Heller, Frederic Mégret, Sarah Nouwen, Jens David Ohlin, and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (OUP 2020) 523.
[123] Teitel (n 112) 77-8.
[124] Minow (n 115)
[125] Daniel Joyce, 'The Historical Function of War Crimes Trials: Re-Thinking International Criminal Law' (2004) 73(4) Nordic Journal of International Law 461.
[126] Douglas (n 106).
[127] For an early overview of this idea, albeit in the context of a broader study on the defendant in international criminal proceedings, see: Björn Elberling, *The Defendant in international Criminal Proceedings* (Hart 2012) ch 5.
[128] Richard Ashby Wilson, *Writing History in International Criminal Trials* (CUP 2011).
[129] For example, through establishing chronology and causality of certain events, through the theory of the trial, opening and closing statements, briefs, documentary evidence and witness testimony, and the production of the judgment itself. A final moment of historicization occurs when the trial itself is received by the audiences. See: Kim Christian Priemel, 'Cunning Passages: Historiography's Ways in and Out of the Nuremberg Courtroom' (2020) 53(4) Central European History 785, 787.

that narratives and history *can* enter the courtroom at so many different points, it is perhaps little surprise that historiographical consistency has often proved both elusive and illusive.[130] If this feature of ICTs is difficult to escape, recent work has called for ICTs to take a more "responsible" approach, despite it not falling within their primary functions.[131] Although to what extent taking a *responsible* approach will ameliorate the historiographical assumptions, choices, and limitations that inhere in such institutions when they are created remains to be seen.[132]

One way ICTs can act as both *consumers* and *producers* of history is by virtue of their function as archives of evidence. This was certainly the case with the International Military Tribunal at Nuremberg, which was conducted almost entirely through documentary evidence and now constitutes an important historical archive.[133] However, as archives they are far from neutral given that any such evidence—be it documentary or witness—is subject to the rules of evidence and, more broadly, the prosecutorial strategy of a particular case. ICL trials have also shifted more towards witness testimony in recent years,[134] which impacts the kinds of accounts they will produce. Interestingly, we have also seen an increased reliance on historians as expert witnesses in proceedings.[135]

The participants in these events are evidently aware of these functions, with Stolk noting the opening statements of ICL trials providing "[t]he record on which history will judge us tomorrow."[136] The judgments they produce are also inescapably *historical* in nature, containing as they do accounts that ascribe responsibility for their underlying conflicts or atrocities through the narrow notions of legal responsibility, causation, and the categories of crimes relied on. Historical analysis also seeps in when background context is needed, particularly where an atrocity occurs within an *inter* or *intra*-state conflict. However, ICL trials also tend to isolate historical moments from broader historical contexts to distil individual responsibility for a given act or atrocity.[137]

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[130] Sander has recently explored this struggle for consistency, characterising it as a "struggle for historical justice". See Barrie Sander, *Doing Justice to History: Confronting the Past in International Criminal Courts* (OUP 2021) 6.
[131] Aldo Zammit Borda, *Histories Written by International Criminal Courts and Tribunals: Developing a Responsible History Framework* (A.M.C. Asser Press 2021). The sentiment that ICTs should approach this aspect of their function with greater intention and care is shared by Wilson (n 128).
[132] Sander (n 130) 6.
[133] As we see in the digitisation project conducted at Harvard Law School. See: 'Harvard Law School Library Nuremberg Trials Project' < https://nuremberg.law.harvard.edu> accessed 9 January 2022.
[134] Douzinas (n 110) 282.
[135] Richard J. Evans, 'History, Memory, and the Law: The Historian as Expert Witness' (2002) 41(3) History and Theory 326.
[136] Sofia Stolk, '"The Record on Which History Will Judge Us Tomorrow": Auto-History in the Opening Statements of International Criminal Trials' (2015) 28(4) LJIL 993.
[137] Douzinas (n 110) 283-4. See also Wilson (n 128).

That these events are not "uniformly historiographical in character or ambition" is made somewhat of an inevitability given the limits of the trial process itself—despite any such ambitions we might hold for them.[138] The narrow, legalistic truth they produce is ultimately shaped by prosecutorial and defence strategy, procedural and evidentiary rules, and the involvement of witnesses, amongst other aspects.[139] Even plea-bargaining might impact how history is remembered through the judgments they produce.[140] As a result of these limits—and of the legal form itself—they tend to produce mono-causal histories, reductive narratives, and simplified historical truths.[141] The *official* record produced by these trials might also be out of synch with any localised truths about these events within affected communities.[142] There is also the ever-present spectre of 'selectivity' which permeates all stages of the trial process; which covers not only the types of charges brought but also the broader political and social conditions that make ICL trials possible to begin with. This creates a narrow—often one-sided—narrative about a particular event or episode.[143]

We thus see a gap emerge between the expressive aspirations of ICL trials and the realities of the historical narratives and truths they can produce. This issue has often been heightened in specific institutional settings, where the ability of ICL trials and tribunals to produce acceptable historical narratives has come under scrutiny—which has certainly proved true of the experience of the ICTY.[144]

And this certainly appears to have been true in the experience of certain ICL institutions. In addition to the peace and security aims behind the ICTY,[145] Simonovic notes that it was also justified on the basis that it might; deter future atrocities by preventing a climate of

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[138] Priemel (n 122) 538.

[139] For an overview of the various ways memory and history are 'filtered' by the trial process, see: Lawrence Douglas, 'The Didactic Trial: Filtering History and Memory into the Courtroom' (2006) 14(4) European Review 513.

[140] See for example: Regina Rauxloh, 'Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining' (2010) 10(5) International Criminal Law Review 739.

[141] See for example: Tristram Hunt, 'Whose Truth? Objective Truth and a Challenge for History' (2004) 15(1) Criminal Law Forum 193; Gerry Simpson, 'Linear Law: The History of International Criminal Law' in Christine Schwöbel-Patel (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2014); and Barrie Sander, 'History on Trial: Historical Narrative Pluralism Within and Beyond International Criminal Courts' (2018) 67(3) International & Comparative Law Quarterly 547.

[142] Vladimir Petrović, 'Slobodan Milošević in the Hague: Failed Success of a Historical Trial' in Valdimir Tismaneanu and Bogdan C. Iacob (eds), *Remembrance, History, and Justice: Coming to Terms with the Traumatic Pasts in Democratic Societies* (CEU Press 2015).

[143] Asad Kiyani, 'Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity' (2016) 14(4) Journal of International Criminal Justice 939.

[144] On the topic of how international criminal tribunals create history with reference to the experience of the ICTY, see: Ahmad Wais Wardak, Andrew Corin, Richard Ashby Wilson, 'Surveying History at the International Criminal Tribunal for the Former Yugoslavia' (2011) 4(1) The Journal of Eurasian Law 1; and Luigi Prosperi and Aldo Zammit Borda, 'A Partial View of History: ICTY Judgments as 'Juridical Truths'' in Carsten Stahn, Carmel Agius, Segre Brammertz, and Colleen Rohan (eds), *Legacies of the International Criminal Tribunal for the Former Yugoslavia: A Multidisciplinary Approach* (OUP 2020).

[145] As contained in the United Nations Security Council Resolution establishing the tribunal: UNSC Res 827 (25 May 1993) UN Doc S/RES/827.

impunity forming, that the individualisation of guilt would facilitate reconciliation between affected communities, and that a trial could establish a reliable historical record that prevents myths and misunderstandings about the conflict.[146]

However, these goals appear discordant with the reality of its legacy, with a plurality of historical understandings emerging despite the 'official' record produced by the ICTY. This possibility was foreshadowed by Judge Richard Goldstone, who noted in his report of the ICTY that:

> "[W]henever I visit the former Yugoslavia, virtually every visit starts with a history lesson. If I am lucky, it may begin in the Second World War; if I am unlucky, it may begin in the fourteenth century."[147]

This was, of course, exacerbated by the over-representation of one side as perpetrators, amongst other similar representational limits.[148] Thus, in addition to the limits of the adversarial trial itself—which "enhance[s] an oppositional mentality, polarise historical accounts further and widen the chasm rather than construct a common bridge between populations"[149]—the hope that the ICL might produce a uniformly accepted historical record appears somewhat utopian.[150] Despite the calls for the ICTY to be viewed as an archive and "living memorial",[151] misunderstandings about the ICTY and its mandate complicated the process of producing historical *truths.*[152] This was complicated by ethnic and regional identity,[153] and the difficulties experienced when the indicted sought re-entry into their respective communities.[154]

We thus get a sense that whilst ICL scholars have increasingly looked to the historiographical capacities of ICL trials as a justification for both specific instances of

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[146] Ivan Simonovic, 'The Role of the ICTY in the Development of International Criminal Adjudication' (1999) 23(2) Fordham International Law Journal 440, 446.
[147] Judge Richard Goldstone, 'Conference Luncheon Address' (1997) 7(1) Transnational Law & Contemporary Problems 1, 10.
[148] Simonovic (n 138).
[149] Wardak, Corin, and Wilson (n 144) 38.
[150] Subotić argues that there has been an overreliance on the ICTY to produce a "first draft" history of the conflict, with resources diverted from other initiatives. See: Jelena Subotić, 'Legitimacy, Scope, and Conflicting Claims on the ICTY: In the Aftermath of Gotovina, Haradinaj and Perišić' (2014) 13(2) Journal of Human Rights 170, 181.
[151] Mirsad Tokača, 'History, Myths, and the Promotion of Truth: Transforming the ICTY Legacy into a Living Memorial' in Richard H. Steinberg (ed), *Assessing the Legacy of the ICTY* (Brill 2011) 101.
[152] Kelly Askin, 'Historical Reflection and Peace Building for the Region' in Richard H. Steinberg (ed), *Assessing the Legacy of the ICTY* (Brill 2011).
[153] Sanja Kutnjak Ivković and John Hagan, 'The Legitimacy of International Courts: Victims' Evaluations of the ICTY and Local Courts in Bosnia and Herzegovina' (2017) 14(2) European Journal of Criminology 200.
[154] Susane Karstedt, '"I Would Prefer to be Famous": Comparative Perspectives on the Re-entry of War Criminals Sentenced at Nuremberg and The Hague' (2018) 28(4) International Criminal Justice Review 372.

international criminal punishment as well as the field more broadly, this aspect has not been without critique.

1.4.2(c) History and International Criminal Law Scholarship: The Limits of the 'Turn'

With the above in mind, we will now consider the limits of this *turn to history,* which has, as we have seen, entailed both a general revisionist trend where key moments in the history of the field have been returned to, as well as a *turn to history* as a justification for the project as a whole. As was noted above, however, one of the achievements of the *turn to history* within both general international law and, in particular, IHRL scholarship was that it brought about a new found historiographical sensitivity, such that the history of their respective fields were not invoked with the same certainty as a few decades previously. In doing so, international law and IHRL scholars have been identified as *producers* of history, which has triggered a wave of methodological reflection. However, a question thus remains as to what extent this kind of introspection is present within ICL scholarship.

As we have seen, ICL scholarship has been identified as a relative latecomer to the *turn to history* as historiographical exploration. However, whilst Tallgren noted the lack of a "history boom" in 2014,[155] there have nevertheless been some positive trends in recent years. The edited collection put together by Tallgren and Skouteris marks an important step, in this regard, as do the efforts of other scholars writing from a variety of 'critical' perspectives.[156] Tallgren and Skouteris' volume is particularly noteworthy as one of the primary objectives driving the project was an attempt to bring the "structure and function" of ICL histories to the fore.[157]

In terms of the insights these efforts have produced, a number of historiographical tendencies can been noted, in particular. Firstly, and more generally, a persistent and in many respects idiosyncratic *Whiggish historiography* has been identified as a pervasive force in the writing of ICL's histories.[158] This finds expression in our disciplinary interest—and perhaps even *self-interest,* given the ends towards which ICL as a professional practice labours—to tell linear histories of the development of the field.[159] We thus see little deviation

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[155] Tallgren (n 100) xvi.
[156] Immi Tallgren and Thomas Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (OUP 2019).
[157] ibid 6.
[158] On the 'Whiggish' tendencies of ICL scholarship, see: Immi Tallgren and Thomas Skouteris, 'Editor's Introduction' in Immi Tallgren and Thomas Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (OUP 2019) 1.
[159] On the linearity of ICL histories, see Simpson (n 141) and Tallgren (n 100).

from the dominant narrative arc that leads us seamlessly from "Tokyoberg" to The Hague.[160] To this end, a number of critical works have sought to pathologize this pervasive tendency in our efforts to give historical substance to the field—with the later chapters of this thesis pursuing a similar interest.[161] And secondly, and relatedly, scholars seeking to do 'critical' historiographical work have sought out *discontinuities* that might disrupt these Whiggish and linear disciplinary narratives. These discontinuities are important, as Mégret notes, as they can tell us as much, if not more, about the history of the field than the conventional understandings can.[162] So, for example, Nesiah has attempted to tell a counter-narrative of the 'anti-impunity' project that international criminal justice institutions are said to give effect to, by highlighting the forms of impunity that have been marginalised in the process.[163] And similarly, Gevers and Haslam have attempted to reclaim those events and perspectives that have been marginalised by the dominant historical master-narrative of ICL.[164]

Despite the best efforts of these scholars, however, these insights do not appear to have found much resonance within the broader expanse of ICL scholarship. Indeed, as Mégret has noted, historical research on international criminal justice still remains poor, with the historical dimensions of the discipline eliciting only a passing interest.[165] To this end, the field does not appear to have moved far beyond the *linear narratives* or *jubilant tones* that have traditionally dominated our engagements with the field's past. ICL histories also still tend to be relatively self-serving, where we tend to simply "read the present back into the past".[166]

In this regard, engaging with the historiographical tendencies of those writing about ICL presents an opportunity to explore the conditions that make the production of historical—or, perhaps more accurately, *historicised*—knowledge about ICL possible. Much as the *turn to history* provided a way for international lawyers to explore the "history of the uses of the

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[160] See: Gerry Simpson, 'History of Histories' in Kevin Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (OUP 2013) 3; and similarly in Simpson, 'Opening Reflections: Tokyoberg' in Viviane E. Dittrich, Kerstin von Lingen, Philipp Osten and Jolana Makraiová (eds), *The Tokyo Tribunal: Perspectives on Law, History and Memory* (Torkel Opsahl Academic EPublishers 2020) xvii.
[161] Amongst a number of possible examples, see: Gerry Simpson, 'Unprecedents' in Thomas Skouteris and Immi Tallgren (eds), *The New Histories of International Criminal Law: Retrials* (OUP, 2019);
[162] Frédéric Mégret, 'International Criminal Justice History Writing as Anachronism: The Past that Did Not Lead to the Present' in Immi Tallgren and Thomas Skouteris (eds), The New Histories of International Criminal Law: Retrials (OUP 2019) 74.
[163] Vasuki Nesiah, 'Doing History With Impunity' in Karen Engle, Zinaida Miller, and D. M. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (CUP 2016).
[164] Christopher Gevers, 'The "Africa Blue Books" at Versailles: The First World War, Narrative, and Unthinkable Histories of International Criminal Law' and Emily Haslam, 'Writing More Inclusive Histories of International Criminal Law: Lessons from the Slave Trade and Slavery' in Immi Tallgren and Thomas Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (OUP 2019).
[165] Mégret (n 162) 72.
[166] ibid 89.

legal imagination in the past…[and] in the present",[167] so too might a turn to historiography elicit a similar effect amongst ICL scholars. And with particular regard to generating 'critical' insights about the present-day operation and dysfunctions of ICL and ICL institutions, by identifying ourselves as active participants in the making of ICL's histories, we open up the possibility that the past might be reengaged with from the particular critical vantage points we inhabit. In doing so, we equip ourselves with the tools needed to move beyond the well-trodden historical territory we tend to stick to.[168] As a deeply anxiogenic and crisis-prone field,[169] such reflections may help us understand the role of particular disciplinary histories in conditioning the expectations that give rise to these tendencies.

It is at this point of possibility that this thesis aims to make an intervention. And if Chapters 4 and 6 can be read as an attempt to pathologize the historiographical tendencies of ICL scholars and scholarship, then Chapters 5, 7, and 8 can be understood as an attempt to offer a corrective.

1.5 Conclusion

As we have seen, a sense of history permeates much of what we do as international lawyers. This is true in a methodological sense insofar as the essence of international legal argumentation involves transmitting "concepts, languages, and norms across time and space",[170] particularly when the demands of legal research often require us to deal with a range of historical materials. And this is also true in a more acutely normative sense insofar as a range of historicised notions, figures, and events litter our discourses and guide disciplinary action. In this regard, as Kennedy notes, an "argument about a rule or principle, or institutional technique in international law is almost always an argument about history."[171] For some, this historical sensibility operates latently, forming a backdrop to whatever analysis or argument is undertaken. Whilst for others, it manifests in a more open, and at times opportunistic, manner. Taken together, we get a sense of how historical narratives

[167] Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300-1870* (CUP, 2021) 4.
[168] d'Aspremont (n 28).
[169] Frédéric Mégret, 'International Criminal Courts and Tribunals: The Anxieties of International Criminal Justice' (2016) 29(1) Leiden Journal of International Law 197; Sergey Vasiliev, 'The Crises and Critiques of International Criminal Justice' in Kevin Jon Heller, Frédéric Mégret, Sarah Nouwen, Jens David Ohlin, and Darryl Robinson (ed)s, *The Oxford Handbook of International Criminal Law* (OUP 2020); and Joseph Powderly, 'International Criminal Justice in an Age of Perpetual Crisis' (2019) 32(1) LJIL 1.
[170] Orford (n 13) 175.
[171] Kennedy, 'The Disciplines of International Law and Policy' (n 5).

and methods pass seamlessly through international legal discourses.[172] Perhaps, then, the achievement of the *turn to history* has been to find new ways of making the implicit ways this occurs within our disciplinary discourses explicit. And whilst the actual achievements of the *turn* have not avoided critique,[173] we might say that the achievement is found in how it is no longer tenable to talk of the field's history with the same level of certainty than was acceptable before the historiographical tide turned.

Such a project is not without risks, however. And as we have seen play out amongst international law and IHRL scholars, this embrace of history and historiography has, at times, revealed a shadowy disciplinary past. This risk is particularly acute in fields that have previously enjoyed a strong sense of moral, and thus disciplinary, certainty.[174] Understood as such, Alston's comment that the *turn to history* within IHRL constituted a struggle for the 'soul' of the discipline appears not only a description of a scholarly trend, but also a warning for any observers located in other fields.[175]

Another risk that been identified as attendant with the *turn to history*, is a fear that the use of history as a critique of law and legal institutions undermines the autonomy and doctrinal rigour of legal scholarship in favour of something more *political* in nature.[176] As Peters et al have noted, however, this is inevitable given that international law emerges from particular political contexts and will be shaped by "personal beliefs, institutional allegiances, and instrumental considerations,"[177] with these *political* dimensions becoming particularly acute when the work of scholarship itself is embroiled in some contemporary controversy.[178] The pertinent question to ask, then, is not *whether* our accounts of the past might be political, but instead why and in what ways they might be. Indeed, for certain critical international law scholars it is precisely because this form of historical critique can be used to address contemporary concerns so effectively that it has been deployed with

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[172] Thomas Skouteris, 'Engaging History in International Law' in José María Beneyto and David Kennedy (eds), *New Approaches to International Law: The European and the American Experiences* (Springer 2012) 99-100.
[173] See for example d'Aspremont arguing that it has not resulted in us moving beyond familiar historiographical territory: Jean d'Aspremont, 'Martti Koskenniemi, the Mainstream, and Self-Reflectivity' (2016) 29(3) LJIL 625. See more generally: d'Aspremont, *The Critical Attitude and the History of International Law* (Brill 2019).
[174] On the risks posed by engaging in 'critical' scholarship in such fields: Michele Farrell, 'Complicity, Critique and I' in Christine Schwöbel (ed), *Critical Approaches to International Law: An Introduction* (Routledge 2014).
[175] Alston (n 78) 2077.
[176] Jörg Kammerhoffer, 'The Challenges of History in International Investment Law: A View from Legal Theory' Stephan W. Schill, Christian J. Tams, and Rainier Hoffman (eds), *International Investment Law and History* (Edward Elgar 2018).
[177] Anne Peters, Raphael Schäfer, and Randall Lesaffer, 'Politics and the Histories of International Law: An Introduction' in Anne Peters and Raphael Schäfer (eds), *Politics and the Histories of International Law* (Brill 2021) 2-3.
[178] ibid 3.

such enthusiasm.[179] And whilst the *turn* itself might have been the product of a move from "ambivalence to anxiety", it has nevertheless generated "creative" moments and energy.[180]

The opportunities presented by turning to history in this manner have thus opened up a space where international law can be questioned and alternative narratives envisioned.[181] The work cohering under the banner of TWAIL is one such example of this, which uses a critically informed historicism to critique current international legal practice and envision new directions for the field.[182] It is on these terms that the research undertaken in the later chapters of this thesis looks to the 'past' of ICL as both a source of critique and a way to envision new disciplinary futures.

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[179] For this reason, as Purcell notes, the "historical mode of analysis remains one of the most potent means of explaining and critiquing international law." See: Purcell (n 46) 34.
[180] Clark (n 62) 747.
[181] Janne E. Nijman, *Seeking Change by doing History* (Amsterdam University Press 2018); and Nijman, 'An Enlarged Sense of Possibility for International Law: Seeking Change by Doing History' in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Futures* (OUP 2021).
[182] Whilst this tendency is present to varying degrees in all TWAIL scholarship, as we will see in Chapter 3, a particularly good example is found in: Luis Eslava, Michael Fakhri, and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (CUP 2017).

Chapter 2: Periodisation: Managing Time and Narrative in the History of International Criminal Law

2.1 Chapter Introduction

Although often overlooked, the presentation of time is one of the most important aspects of history writing and can have a profound impact on how the past is represented and thus the kind of historical knowledge that is produced.[1] One way of managing time within historical writing is periodisation. Understood as a concept that "makes change over time a manageable topic, and therefore history teaching feasible",[2] periodisation helps us to think through historical time by capturing and making intelligible the processes of historical change.[3] Despite the importance of time to both the production of history and of historical understanding more generally, international criminal law (ICL) scholars have paid scant attention to how time and historical change are handled and presented within ICL scholarship. With this lacuna in mind, my interest in the present chapter lies in exploring how ICL scholars carve up, divide, and give shape to the expanse of time that has passed since the *dawn of the discipline* to the present day. Based on this interest, I will forward two arguments, the implications of which will be explored more fully in Parts II and III of the thesis. Firstly, that within ICL scholarship the field's history tends to be divided into a number of distinct phases of development. And secondly, that how each of these phases or periods is presented shapes how we understand the field and its history.

Given that my interest lies in periodisation as a technique of historical narration and how this can be used to understand ICL scholarship, the present chapter will start by setting out a broadly narrative understanding of history, with a particular focus on how this view has been absorbed into international law scholarship. Following this, I will then provide an overview of periodisation as a concept and technique. In applying this understanding to how ICL's histories have been presented, I will argue that the dominant accounts of the field carve up the development of ICL into five distinct but synergetic periods, each of which has a distinct narrative and theme attached to it. These help to structure and convey the

[1] On the tendency of historical writing to overlook 'time' see: Lynn Hunt, *Measuring Time, Making History* (CEU Press 2008) 3.
[2] Peter Stearns, 'Periodisation in World History Teaching: Identifying the Big Changes' (1987) 20(4) The History Teacher 561.
[3] Peter Stearns, *World History: The Basics* (Taylor & Francis 2010) 74.

narrative they capture. Dissecting and responding to these themes provide the focus of Parts II and III of the thesis.

2.2 History, Narrative, and the Literary Challenge

To understand periodisation as a narrative technique, I will first situate it within a broadly narrative and literary understanding of history. Although the writing of history has always had a narrative function, this is not necessarily the disciplinary ideal under which it has laboured. A narrative view became particularly prominent—and arguably contentious—as 'postmodern' historians rebelled against what they viewed as an excessively empirical mainstream. And as Munslow has noted, it was this concern for the "narrative-linguistic and its implications" for historical knowledge that characterised the *postmodernist* turn.[4] This interest arose as a result of the erosion of the certainty of knowledge often associated with *postmodernity*—indeed, as Ryan notes, narrative is "what is left when belief in the possibility of knowledge is eroded."[5] The so-called *grand narratives* that sought to provide sweeping explanations of knowledge came under particular scrutiny.[6] They were also viewed as possessing an omnipresence, with Barthes remaking: "[l]ike life itself, it is there, international, transhistorical, transcultural."[7]

However, it was not only the postmodernists who considered historical knowledge in such terms. And in the work of Carr, for example, you can note a distinctly narrative and literary understanding in his argument that: "[t]he facts speak only when the historian calls on them: it is he who decides to which facts to give the floor, and in what order or context".[8] Although this did not necessarily lead Carr to the same epistemic extremes as certain postmodernists.[9] Similarly, a *narrative* turn was also arguably underway thanks to the earlier efforts of the *Annalistes*, such as Georges Duby and Le Roy Ladurie.[10] Also influential was the emergence of other linguistic approaches, such as narratology from the

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[4] Alun Munslow, 'What History Is' (2001) 2 History in Focus <https://archives.history.ac.uk/history-in-focus/Whatishistory/munslow6.html> accessed 21 November 2021.
[5] Marie-Laure Ryan, 'Narrative' in David Herman, Manfred Jahn, and Marie-Laure Ryan (eds), *Routledge Encyclopaedia of Narrative Theory* (Routledge 2010).
[6] ibid and Jean-François Lyotard, *The Postmodern Condition* (Trns Geoff Bennington and Brian Massumi, University of Michigan Press 1984).
[7] Roland Barthes, 'An Introduction to the Structural Analysis of Narrative' (1975) 6(2) On Narrative and Narratives 237.
[8] E.G. Carr, *What is History?* (1st edn, Penguin Books 1961).
[9] Mink for example viewed narratives—including historical narratives—as a form of "cognitive instrument": Louis Mink, 'Narrative Form as a Cognitive Instrument' in *Historical Understanding* (New York 1987) 185.
[10] Peter Burke, 'History of Events and the Revival of Narrative' in Peter Burke (ed), *New Perspectives on Historical Writing* (2nd edn, Pennsylvania State University Press 2001) 284.

1960s onwards.[11] Although there was cross-pollination between the two, narratology looked more closely at specific narrative structures,[12] rather than a more general concern for the "epistemological status of narrative as a form of explanation".[13]

If historians simply produce *verbal fictions,* the matter of *narration* takes on a renewed significance, particularly given the distance between the author and the past they attempt to represent.[14] For Hayden White, history, as a literary form, consisted of "symbolic structures" and "extended metaphors" that gained meaning through our literary culture, rather than as "unambiguous signs of the events they report."[15] In this way, White's understanding went to the very foundations of historical knowledge and its connection to the past it attempts to represent.

Other postmodernist and narrative concerned historiographers sought to bridge this gap between the *past* and its representation as history. One attempt was to view the past as essentially formless until it was given shape and meaning at the moment of reconstruction.[16] In this way, narrative provides the formless past with a shape—such as a chronology, characters, a plot or metanarrative.[17] For Stone, "narrative" referred to the "organisation of material in a chronologically sequential order and the focusing of the content into a single coherent story, albeit with sub-plots."[18] These are not simply chronicles with beginning and endpoints but are imbued with themes and arguments that provide coherence.[19] The result of this has been characterised as an *effet du réel* or 'reality effect' where the past is made *real*.[20]

In White's view, histories contain a certain amount of data, theoretical concepts for explaining that data, a narrative structure that shapes their presentation, and "deep structural content", which serves as the "accepted paradigm of what a distinctly *historical* explanation should be."[21] The process of narrativisation has been characterised as a

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[11] Ann Rigney, 'History as Text: Narrative Theory and History' in Nancy Partner and Sarah Foot (eds), *The SAGE Handbook of Historical Theory* (Sage 2013) 183.
[12] On this distinction see: Kent Puckett, *Narrative Theory: A Critical Introduction* (CUP 2016).
[13] Rigney (n 11).
[14] Hayden White, 'The Historical Text as Literary Artefact' in *Tropics of Discourse: Essays in Cultural Criticism* (Johns Hopkins University Press 1978) 82.
[15] ibid 91.
[16] See for example: Hayden White, 'The Question of Narrative in Contemporary Historical Theory' (1984) 23(1) History and Theory 1, 26-7.
[17] Simon Gunn, *History and Cultural Theory* (Harlow 2006) 27.
[18] Lawrence Stone, 'The Revival of Narrative: Reflections on a New Old History' (1979) 85(1) Past & Present 3, 3.
[19] ibid 4.
[20] See: Alun Munslow, 'Preface' in Keith Jenkins, *Rethinking History* (Routledge Classics edn, Routledge 2003) xiv; and Hayden White, 'Historical Discourse and Literary Writing', in K Korhonen (ed), *Tropes for the Past: Hayden White and the History/Literature Debate* (Brill 2006) 30.
[21] Hayden White, *Metahistory: The Historical Imagination in 19th-Century Europe* (Johns Hopkins University Press 1973) ix.

process of "emplotment"— which is the "encodation of facts contained in the chronicle as components of specific kinds of plot structures"—with the historian selecting specific configurations depending on the audience.[22] Markers are used to support the progression of the narrative—such as the adoption of a treaty, the publication of text, or some other occurrence.[23]

This view has obvious contrasts with the pursuit of 'objective' history, given that it opens up the possibility of creating other plausible accounts of the past. However, this does not necessarily deprive history of its factual basis but rather highlights how our literary and narrative preferences shape how we understand the *past*. In this way, history—as an "expression of a particular way of being in the world"—tells us as much about its producers as its consumers.[24] However, highlighting the constructed nature of history has provoked a defensive posture amongst some. For example, Windschuttle has characterised the influence of literary and social theorists as "murdering" the past and the discipline of history itself.[25] This reflects a broadly empirical view, which, as Fasolt argues, has *seduced* historians into avoiding methodological and epistemic introspection, which might have revealed these limits.[26]

This angst is misplaced, however, as identifying the literary dimensions of history is merely to recognise that it "both partakes in the world of literary forms, and at the same time is a rigorous intellectual practice which seeks to achieve historical truth."[27] Indeed, whilst historical narratives might be constructed in several configurations, this is not to say all possess equal validity. As White has argued: "the facts of the matter set limits on the kinds of stories that can be properly (in the sense of both veraciously and appropriately) told about them only if we believe that the events themselves possess a 'story' kind of form and 'plot' kind of meaning."[28] The validity of any of these configurations will ultimately be tested by social mores, norms, tastes, and morals.

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[22] White (n 14) 83-4.
[23] Jean d'Aspremont, 'Critical Histories of International Law and the Repression of Disciplinary Imagination' (2019) 7(1) London Review of International Law 89, 94.
[24] Robert Doran, 'The Work of Hayden White 1: Mimesis, Figuration and the Writing of History' in Nancy Partner and Sarah Foot (eds), *The Sage Handbook of Historical Theory* (SAGE 2012)115.
[25] Keith Windschuttle, *The Killing of History: How Literary Critics and Social Theorists are Murdering Our Past* (Encounter Books 2000).
[26] Constantin Fasolt, 'The Limits of History In Brief' (2005) 6(5) Historically Speaking 5.
[27] Ann Curthoys and John Docker, 'The Boundaries of History and Fiction' in Nancy Partner and Sarah Foot (eds), *The SAGE Handbook of Historical Theory* (SAGE 2012). This idea exists in expanded form in: Anne Curthoys and John Docker, *Is History Fiction?* (2nd edn, University of Michigan Press 2005).
[28] Hayden White, 'Historical Emplotment and the Problem of Truth' in Keith Jenkins (ed), *The Postmodern History Reader* (1st edn, Routledge 1997) 394.

Rather than leading to a "loss of a sense of history",[29] this approach allows us to explore the conditions under which it is produced. History is thus not "relegated…to the dustbin of an obsolete episteme",[30] or signalling the "disintegration of style and the collapse of history".[31] Rather, it might be established on firmer foundations. Far from the *end of history*, it reveals how the:

> "[P]eculiar ways in which the past was historicised…has now come to an end of its productive life; the all-encompassing 'experiment of modernity'—of which metanarratives were a key constitutive part—is passing away in our postmodern condition."[32]

Coming to terms with the constructed nature of history thus provides a starting point for the introspection need to be free from the b*urdens of history*.[33]

Although a brief overview of what has expanded to become a voluminous and diverse body of work, it is hoped that in light of the above, we are now more familiar with a broadly narrative and literary understanding of both the nature of historical knowledge and the production of history itself. In the chapters that follow, I adopt a broadly narrative view of history; that the recollection and production of *history* entails an attempt to represent a past that is recoverable only on limited, contingent terms.

2.2.1 History, Narrative, and Law

The literary and narrative dimensions of history have also been scrutinised within legal studies. To this end, *narrative* has been drawn on to gain insight into legal institutions, legal processes, and the law itself. Tait and Norris, for example, have argued that the :

> "[l]aw is full of stories, whether these are stories that are told in the courtroom as lawyers try to weave together compelling and competing versions of an event, in the legislative histories that subtend a body of statues, or in stories about the origins and acceptance of legal systems."[34]

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[29] Frederic Jameson quoted in Anders Stephanson, 'Regarding Postmodernism—A Conversation with Frederic Jameson' (1989) 21 Social Text 3, 12.
[30] Andreas Huyssen, 'The Search for Tradition: Avant-Garde and Postmodernism in the 1970s' (1981) 22 New German Critique 23, 35.
[31] Hal Foster, *Recodings: Art, Spectacle, Cultural Politics* (Bay Press 1985) 127.
[32] Keith Jenkins, Why History? *Ethics and Postmodernity* (Routledge 1999) 57.
[33] Hayden White, 'The Burden of History' (1966) 5(2) History and Theory 111.
[34] Allison Tait and Luke Norris, 'Narrative and the Origins of Law' (2011) 5(1) Law and Humanities 11.

Similarly, Amsterdam and Bruner have characterised the law as “awash with storytelling”, which is essential to the conduct of law and legal processes as well as how we make sense of them.[35]

Interest in the literary and narrative dimensions of law intensified, in particular, with the onset of *postmodernity* which triggered a shift away from "positivism, neutrality, and objectivism" as the dominant standards for legal scholarship and decision making, with interpretivism and constructivism providing alternate standards for the construction of legal reality.[36] Also influential were the works Delgado and Cover, who looked at how narratives shaped legal discourses. Commenting on this, Cover noted that:

> "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning...Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which to live."[37]

Similarly, Delgado argued that: "stories, parables, chronicles, and narratives" provided a background against which legal discourse could occur.[38] Narrative is thus not the "other" of law but is how legality and its associated normativity are "created, suspended, broadened, and debated."[39]

Preceding the influence of postmodernism and other critical theorists was the influence of the law and literature movement. This project had roots at least as far back as Benjamin Cardozo, who, in 1925, noted a reluctance amongst lawyers and jurists to self-identify as writers.[40] The movement began in earnest with the publication of White’s *The Legal Imagination*.[41]

The interest in the narrative dimensions of law pursued several tracks. Solum, for example, distinguishes between the ‘causal’ and ‘normative’ uses of narrative: "narratives which primarily aim to give causal explanations and those narratives which primarily aim at influencing the normative evaluation of the actions and events recounted in the narrative."[42]

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[35] Anthony G. Amsterdam and Jerome S. Bruner, *Minding the Law* (Harvard University Press 2009) 110.
[36] Richard K. Sherwin, 'The Narrative construction of Legal Reality' (2009) 6 Journal of the Association of Legal Writing Directors 88, 118-9.
[37] Robert M. Cover, ‘Foreword: Nomos and Narrative’ (1983) 97(4) Harvard Law Review 4.
[38] Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 87(8) Michigan Law Review 2411.
[39] Gal Hertz, 'Narratives of Justice: Robert Cover's moral Creativity' (2020) 14(1) law and Humanities 3.
[40] Benjamin N. Cardozo, ‘Law and Literature’ in Margaret E. Hall (ed), *Selected Writings of Benjamin Nathan Cardozo* (Fallon Law Book Company 1948).
[41] James Boyd White, *The Legal Imagination* (1st edn, Harvard University Press, 1973).
[42] Lawrence Solum, 'Legal Theory Lexicon: Narrative and Normativity' (*Legal Theory Blog,* 16 December 2018) <https://lsolum.typepad.com/legaltheory/2018/12/legal-theory-lexicon-narrative-and-normativity.html> accessed 23 November 2021.

A distinction might also be made between law *in* literature versus law *as* literature.[43] The former captures how writers of literary texts might relate to or represent legal matters, which involves an attempt to understand law through the canon of literary texts.[44] Law 'as' literature, on the other hand, rests on an understanding where legal texts are studied in much the same way as literary ones, with the focus on drawing out the literary dimensions of legal materials. This could cover a concern for: "identifying the meaning of a text, the issue of authorial intention, the rhetorical use of argumentation, and the analysis of the narrative structures of legal texts and literary compositions".[45]

With these distinctions in mind, we can identify at least four types of legal narrative inquiry. Firstly, there is the exploration of the narratives contained within different legal materials. Baron and Epstein, for example, have looked at how "communications within law can also be understood as stories".[46] This could cover reading the law of contracts as telling a story about free will and choice.[47] Secondly, literature and narrative understandings might be used to make sense of the law. Here, stories from literature are used as an interpretive backdrop to a particular legal decision, rule, or doctrine.[48]

Thirdly, we might consider how narratives are used in legal processes. This might occur as we reconstruct the facts of a particular case as part of a legal argument.[49] Narrative might also have a role in shaping the rhetorical presentation of a case or assessments of the probability or plausibility of a particular legal claim.[50] It could also capture a kind of "judicial emplotment" where narrative is used in setting out the jurisprudential development of a specific rule or doctrine.[51] On this third view, narrative permeates each stage of the legal process. It manifests in documentary forms such as: "charges of indictment, formal disciplinary complaints, legal briefs, appellate judgments, and legal commentaries [that]

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[43] Robert Weisberg, 'Law, Literature, and Cultural Unity: Between Celebration and Lament' in Austrin Sarat, Catherine O. Frank, and Matthew Anderson (eds), *Teaching Law and Literature* (Modern Language Association 2011) 86-88.
[44] Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2017) 289.
[45] ibid 289.
[46] Jane B. Baron and Julia Epstein, 'Is Law Narrative?' (1997) 45(1) Buffalo Law Review 141, 142.
[47] ibid.
[48] See for example: Elisabeth Scweiger and Aoife O'Leary McNeice, '*Pride and Prejudice*: Jane Austen and the (In)Ability to Speak International Law' in Sofia Stolk and Vos Renske (eds), *International Law's Collected Stories* (Palgrave 2020).
[49] Bernard Jackson, *Law, Fact and Narrative Coherence* (Deborah Charles Publications 1988).
[50] Bernard Jackson, 'Narrative Theories and Legal Discourse' in Christopher Nash (ed), *Narrative in Culture: The Uses of Storytelling in the Sciences, Philosophy and Literature* (Routledge 1990) 23–50. See also Greig Henderson, *Creating Legal Worlds: Story and Style in a Culture of Argument* (University of Toronto Press 2015).
[51] Andrew Benjamin Bricker, 'Is Narrative Essential to the Law?: Precedent, Case Law and Judicial Emplotment' (2019) 15(2) Law, Culture, and the Humanities 319.

contain narrative elements, as do orally transmitted opening and closing statements, cross-examinations, and judges' announcements of the sentence."[52]

Fourthly, narrative might help us to understand law at the discursive level. Here, we pay close attention to how legal scholarship draws on and uses particular historical narratives. In scrutinising debates on human rights, we can identify certain narrative tropes that have animated the disciplinary discourses. Mutua, for example, has remarked that: "[t]he human rights movement is marked by a damning metaphor. The grand narrative of human rights contains a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviours, on the other."[53] This might also cover the 'framing' of international law and how certain narratives have shaped our understanding of a particular legal issue.[54] The research pursued in this thesis falls within this fourth register, given that my concern lies with how we draw on particular historical narratives to frame our discourses about the development of ICL.

Uniting these various projects is a concern for how *narrative* manifests in law, legal processes, and our discourses about it. Common to all, however, is the explanatory nature of narratives. Indeed, this is supported etymologically, with Mitchell noting the roots of the word 'narrative' as deriving from the Latin verb 'narrare' meaning to tell or recount, which is itself derived from the Latin term 'gnarus' (knowing).[55] In this sense, although we often emphasise the descriptive and representational dimensions of narratives, they are primarily cognitive instruments that make the "flux of experience comprehensible."[56] A narrative view of law thus attends to: "characters and events, how they are described, which textual and rhetorical elements serve to elaborate their content, and the communicative processes through which the lawgiver transmits the law to its audience."[57]

Rather than acting only as a way of chronicling events into a coherent sequence, narrative constitutes an "epistemological category".[58] By focusing on this aspect of the

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[52] Greta Olson, 'Narration and Narrative in Legal Discourse' (*The Living Handbook of Narratology,* 31 May 2014) <https://www.lhn.uni-hamburg.de/node/113.html> accessed 23 November 2021.
[53] Makau W. Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law Journal 201.
[54] Sara Dehm, 'Framing International Migration' (2015) 3(1) London Review of International Law 133; Anna Grear, '"Framing the Project" of International Human Rights Law: Reflections on the Dysfunctional "Family" of the Universal Declaration' in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (OUP 2012); and Anne Van Aaken and Jan-Philip Elm, 'Framing in and Through International Law' in Andrea Bianchi and Moshe Hirsch (eds), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (OUP 2021).
[55] Jeong-Hee Kim, *Understanding Narrative Inquiry: The Crafting and Analysis of Stories as Research* (SAGE 2016) 6.
[56] Mink (n 9).
[57] Assnat Bartor, 'Reading Biblical Law as Narrative' (2012) 32(3) Prooftexts 292, 292-3.
[58] L. Gregory Jones, 'Rhetoric, Narrative, and the Rhetoric of Narratives: Exploring the Turns to Narrative in Recent Thought and Discourses' (1993) 11 Issues in Integrative Studies 7.

narratives underpinning domestic or international law, we can "elucidate how meaning is made in legal contexts."[59] We thus get a sense of how narratives and narrative structures operate as "mental tools that shape, influence, and manipulate the understanding of international law."[60] This allows us to generate insights about how legal realities are constructed and modelled.[61] In particular, it also allows us to push back against the values of "[o]bjectivity, neutrality, and acontextual comprehensiveness" which have traditionally acted as the standards against which legal analysis is measured.[62] These insights thus allow us to navigate and work through the normative world in which legal rules and institutions interact with other cultural forces in the production of legal meaning.[63] Importantly, it also leads us to ask questions regarding authorship and who establishes and oversees the conditions of narration.[64]

2.2.2 International Law and the Stories We Tell: A Narrative View

International lawyers have also drawn on narrative understandings as of late. Bianchi, for example, has argued that *stories* are the "medium by which we perform our profession's multifarious tasks".[65] Similarly, in the production of legal commentary, narratives form the backdrop against which the evolution of rules, doctrines, and norms can be understood. In this way, narratives shape and enable legal argumentation.[66]

Choosing an appropriate narrative backdrop thus becomes a significant analytical choice when trying to understand a particular area of international law. In this way, the production of international legal knowledge is revealed as an interventionist act,[67] with the choice of narrative backdrop a deeply normative exercise. Often, this narrative choice entails the selection of an appropriate historical context to situate the discussion within, which has a profound impact on how the discourse about international law is structured. Indeed, as Bianchi has noted:

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[59] Baron and Epstein (n 46) 149.
[60] Julia Otten, 'Narratives in International Law' (2016) 99(3) Critical Quarterly for Legislation and Law 187, 188.
[61] Sherwin (n 36) 94; Flora Di Donato, *The Analysis of Legal Cases: A Narrative Approach* (Routledge 2019) 3.
[62] Sherwin (n 36) 89.
[63] Cover (n 37) 4-5.
[64] Lianne J.M Boer, 'Narratives of Force: The Presence of the Writer in International Legal Scholarship' (2019) 66 Netherlands International Law Review 1, 4.
[65] Bianchi (n 44) 292.
[66] Otten (n 60) 216.
[67] Mathew Craven, 'Theorising the Turn to History In International Law' in Anne Orford, Florian Hoffmann, and Martin Clark (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016).

> "How a story is built and how events are spoken, written, or thought about can be characterised in narrative terms. The narrative is the structure in which the story is embedded or the background against which the story is told. It provides the framework for storytelling that carries as much argumentative weight as the logic of legal distinctions."[68]

This understanding presents a challenge to how we typically understand the production of knowledge about international law and its history. A tension arises, however, as the "narrative of law cannot afford to admit its constructedness or arbitrariness: it cannot afford to confess that it is only one amongst many narratives created to impose order on chaos."[69] This also raises issues with the narrator's identity, with the reliability of narration becoming of acute concern.[70] For critical international law scholars, in particular, identifying unreliable narration becomes an important task given the language of international law is often used as a "vocabulary to further their professional projects."[71]

Within international legal discourse articulating a particular narrative shapes our understanding through acts of inclusion and exclusion. Indeed, as White has argued, narratives and the narrative structures that give them shape, act as a kind of "heuristic which self-consciously eliminates certain kinds of data from consideration as evidence."[72] In determining where emphasis should be placed, narratives are also necessarily value-laden. These values are often shaped by disciplinary traditions, professional culture, individual preferences, and other vested interests.[73] And it is these inclusionary and exclusionary acts that I will keep in mind as I progress through the remainder of this chapter and the thesis as a whole.

2.3 Periodisation: Time, Narrative, and the Structure of History

With the narrative and literary dimensions of historical and legal knowledge in mind, I will now look more closely at one technique that can shape and structure particular narratives. As noted in the introduction to this chapter, the presence of *time* is a universal although

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[68] Bianchi (n 44) 292.
[69] Maria Aristodemou, *Law and Literature: Journeys from Here to Eternity* (OUP 2000) 140.
[70] Bianchi (n 44) 292.
[71] Matthew Windsor, 'Narrative Kill or Capture: Unreliable Narration in International Law' (2015) 28(4) LJIL 743.
[72] White (n 21) 130.
[73] Bianchi (n 44) 292.

often overlooked, feature of narrative.[74] Indeed, history itself is premised on a distinction between the *past* and *present*.[75] Grappling with how time figures in a particular work thus becomes one of the most pressing tasks of the historian—something, perhaps, suggested in Bloch's characterisation of history as the "science of men in time".[76] In this sense, how time is managed shapes a particular historical account and makes it possible to begin with; as Anagol has noted, a focus on chronological divisions distinguishes history from other disciplines.[77]

One of the ways that time can be managed within a particular account of the past is through an overarching periodisation which is, essentially, a way of categorising the past into distinct periods. This kind of temporal categorisation is fundamental to most historical works—as Croce famously remarked, to "think history is do divide it into periods."[78] Periodisation is a long-established technique in writing history, with even Aztec and Sumerian histories relying on some temporal structure where events could be situated.[79] These periods act as an analytical prism through which events or specific blocks of time can be "organised into meaningful clusters in order to better understand the reasons for the occurrence of events or trends."[80] Periodisations facilitate historical analysis by providing a temporal schema where events can be located and contextualised.[81] And in this way, they "make change and continuity over time both more intelligible and more manageable."[82]

Periodisations are not neutral descriptors, however, with even the designation of periods through the use of chronological devices such as 'BC' (*Before Christ*) and 'AD' (*Anno Domini*) universalising a particular temporal schema. Periodisations also reflect our changing worldview and, more generally, where and how we place ourselves *within*

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[74] Mark Currie, *About Time: Narrative, Fiction and the Philosophy of Time* (Edinburgh University Press 2007) 2.
[75] As Lorenz notes: "Historians always periodize time because the differentiation between past and present is already a form of periodization." See: Chris Lorenz, 'The Times They Are a-Changin: On Time Space and Periodisation in History' in Mario Carretero, Stefan Berger, and Maria Grever (eds), *Palgrave Handbook of Research in Historical Culture and Education* (Palgrave 2017).
[76] Marc Bloch, *The Historian's Craft* (Peter Putnam trs, Manchester University Press 2004) 23. Similarly, see Wickramasinghe noting that: "Time is the most important denominator in any history writing and history is, I believe, the science of the consciousness of time." See: Nira Wickramasinghe, 'History Outside the Nation' (1995) 30(26) Economic and Political Weekly 1570, 1570.
[77] Padma Anagol, 'Agency, Periodisation and Change in the Gender and Women's History of Colonial India' (2008) 20(3) Gender & History 603, 609.
[78] Bernadetto Croce, *History: Its Theory and Practice* (Douglas Ainslie trs, Brace & Company 1921) 112
[79] Luigi Cajani, 'Periodization' in Jerry H. Bentley (ed), *The Oxford Handbook of World History* (OUP 2012).
[80] William E. Butler, 'Periodization and International Law' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (2nd edn, Edward Elgar 2020) 379.
[81] A Gangatharan, 'The Problem of Periodization in History' (2008) 69 Proceedings of the Indian History of Congress 862.
[82] Peter Stearns, 'Periodization in World History: Challenges and Opportunities' in R. Charles Weller (ed), *21st-Century Narratives of World History: Global and Multidisciplinary Perspectives* (Palgrave MacMillan 2017) 83.

history.[83] And given that periodisations are a way of designating meaning to "clumps of time", what is meaningful will also change over time.[84]

Although often appearing to capture some immutable temporal truth, periodisation is amongst the most prominent and least scrutinised aspects of history.[85] Bentley has thus referred to it as one of the "more elusive tasks" of historical scholarship.[86] Periodisations are particularly problematic precisely because they appear to offer an immutable truth, which gives them a "rigidifying power".[87] And if all histories are a product of the exercise of selective judgment about when a history should begin, end, and in what temporal context they should be analysed, this raises questions of authorial inclusion and exclusion.[88] Establishing such a schema involves more than simply identifying and designating appropriate turning points to begin or end a period. It also involves establishing criteria or principles that allow us to "sort through the masses of information and recognise patterns of continuity and change."[89]

2.4 Dividing Up Time: Periodisation, Continuity, Change

Although time might be a universal feature of historical narratives,[90] this is not to say that time itself is universal. Periodisation involves more than organising or arranging time; it is also the process of designating meaning to the units of time that have been created.[91] There might be, for example, 'macro' or 'micro periods, as well as metaphorical or thematic ones.[92] The *Annales* historians, for example, used the macro-narrative device of the *longue durée* to think about the evolution of societies over longer expanses of time. The manipulation of the scale of time can thus shape the kind of analysis engaged in—which often also shapes the object captured, be it states or particular institutions.

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[83] Hakan T. Karateke, 'The Challenges of Periodisation: New Patterns in Nineteenth-Century Ottoman History' in H. Erdem Çipa and Emnine Fetvaci (eds), *Writing History at the Ottoman Court: Editing the Past, Fashioning the Future* (Indiana University Press 2013) 129.
[84] Lauren McArthur Harris, 'Conceptual Devices in the Work of World Historians' (2012) 30(4) Cognition and Instruction 312, 323.
[85] William A. Green, 'Periodization in European and World History' (1992) 3(1) Journal of World History 13.
[86] Jerry H. Bentley, 'Cross-Cultural Interaction and Periodization in World History' (1996) 101(3) The American Historical Review 749.
[87] Green (n 85).
[88] Craig Benjamin, 'Beginnings and Endings' in Marnie Hughes-Warrington (ed), *Palgrave Advances in World Histories* (Palgrave MacMillan 2005) 90.
[89] Bentley (n 86).
[90] Anagol (n 77).
[91] Harris (n 84) 323.
[92] Lorenz (n 75) 122.

Whilst these periods are typically premised on some identifiable historical occurrence or event—such as the 'Iron Age' or the 'Bronze Age'—metaphorical and thematic periods capture the progression of time in a more openly normative manner. References to the 'Renaissance' or 'Enlightenment', for example, contain appraisals of particular societal developments—in the case of the Renaissance, it conveys the idea of artistic and cultural *rebirth*. When using thematic periodisations, scale can be manipulated to convey particular understandings of the progression of time. We see this in, for example, the use of macro-epochs such as 'Antiquity', the 'Middle-Ages', and 'Modernity to divide up the totality of human history. A more recent example is the term 'Anthropocene', which captures the expanse of time in which humans have impacted the Earth's geology and ecosystems. We might also note the use of other such markers which combine descriptive and metaphorical elements, such as the eras of 'industrialisation', 'democratisation', 'decolonisation', or 'globalisation'.

Although distinguishing between the various types of periodisations might be desirable, this is not always clear where they are mixed—such as where a periodisation combines metaphorical and temporal elements.[93] An example of this would be the so-called "long nineteenth century" and the "short twentieth century" with which it is paired.[94] In this way, time and scale can be manipulated and deployed to convey continuity or change between periods. These temporal descriptors are particularly effective at carrying specific themes which shape how the past it captures is to be understood, such as the rise and fall of societies or transcendence into new ways of thinking or organising society.[95] They can also take on distinctly ideological undertones, such as in Marxist historiography or the *Sonderweg* thesis of German historiography.[96] In these examples, we see how the use of a given periodisation has implications for how a historical narrative is conveyed. Stories of continuity, change, progression, or regression can be constructed depending on the schema and descriptor adopted. In this regard, it blends descriptive, discursive, and normative elements to carry a particular narrative. And it is precisely this malleability that has ensured they remain an ever-present feature of our discourses about time.[97]

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[93] Lorenz (n 75) 122.
[94] See, for example, the use of this term by Hobsbawm across his three volumes dealing with this period: Eric Hobsbawm, *The Age of Revolution: Europe 1789-1848* (Weidenfeld & Nicolson, 1962); *The Age of Capital: 1848-1875* (Weidenfeld & Nicolson 1975); *The Age of Empire: 1875-1914* (Weidenfeld & Nicolson 1987); and *The Age of Extremes: The Short Twentieth Century, 1914-1991* (Weidenfeld & Nicolson 1994).
[95] Stearns (n 82) 43; and Green (n 85) 14.
[96] Jürgen Kocka, 'Looking Back on the Sonderweg' (2018) 51(1) Central European History 137.
[97] Susan Stanford Friedman, 'Alternatives to Periodization: Literary History, Modernism, and the "New" Temporalities' (2019) 80(4) Modern Language Quarterly 379.

Much of this narrative utility is rooted in how periodisations can simplify and generalise the expanse of time they capture to produce a coherent account of the past.[98] As Boydston notes: "[they] bring order and meaning to an otherwise unruly tangle of data and permit us to hold steady the otherwise constant flurry of difference and change."[99] To do so, granularity is sacrificed for the sake of coherence whilst also homogenising the progression of time.[100] This quality prompted Frederic Jameson to describe them as "fatally reductive" in contrast to the "unified inner truth" they purport to convey.[101]

Temporal homogenisation is particularly problematic in the context of 'Global' or 'World' histories, where the geographic point of articulation will limit the regional applicability of any such periodised schema.[102] Critical scholars have thus questioned the extent to which these temporal schemes can explain the trajectory of societies whose geography lies beyond the primary region of analysis.[103] There is also an element of disenfranchisement in these periodisations, with divisions into pre and post-colonial history distancing peoples from their indigenous metanarratives. For feminist historians, they have proved similarly problematic, with Kelly arguing that one of the primary tasks of women's history is to "call into question accepted schemas of periodisation."[104] Similarly, Boydston has remarked that they tend to: "reduce the mess and variability of lived experience to a few elements that are allowed to stand, falsely, as a substitute for that experience, and to collapse complicated and distinct historical processes into stable, materialised representations."[105] This, Boydston argues, is inevitable as periodisation is an act of categorisation, which entails acts of concealment and misrepresentation. This is particularly problematic as periodisations also tend to reify and reconstitute the homogenised past they purport to represent.[106]

In these critiques, we can note a similarity to how postcolonial studies scholars have critiqued the underlying temporality history. Most prominently perhaps, Chakrabarty has argued that the conventional idea of time which underlies the discipline of history understands it as a "ceaseless infolding of unitary historical time" which is not an "adequate

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[98] Randall Lesaffer, 'The End of the Cold War: An Epochal Event in the History of International Law?' (2010) Tilburg Working Paper Series on Jurisprudence and Legal History, No.10-013 <https://pure.uvt.nl/ws/portalfiles/portal/1453613/end_of_cold_war_ssrn.pdf> accessed 23 November 2021.
[99] Jeanne Boydston, 'Gender as a Question of Historical Analysis' (2008) 20(3) Gender & history 558, 560.
[100] ibid; and Kathleen Davis, *Periodisation & Sovereignty: How Ideas of Feudalism & Secularization Govern the Politics of Time* (University of Pennsylvania Press 2008) 3.
[101] Frederic Jameson, *The Political Unconscious: Narrative as a Socially Symbolic Act* (Cornell University Press 1982) 27.
[102] Stearns (n 82).
[103] Bentley (n 86) 749.
[104] Joan Kelly, 'Did Women Have a Renaissance?' in Renate Bridenthal and Claudia Koonz (eds), *Becoming Visible: Women in European History* (Houghton Mifflin Co 1977) 20.
[105] Boydston (n 99) 560.
[106] Lynn Abrams, 'The Unseamed Picture: Conflicting Narratives of Women in the Modern European Past' (2008) 20(3) Gender & History 628, 640.

intellectual resource for thinking about the conditions for political modernity in colonial and postcolonial India."[107] Chakrabarty thus looks to relativise this temporality—in his words to "provincialise" it—which has reified European modernity as the silent referent of all history.

We thus begin to get a sense of the pitfalls and potentialities of periodisation, particularly as it is used to anchor historical narratives. It helps us avoid getting lost in the chaotic detail of the past by ordering the assemblage of facts and events it captures, which it achieves by using temporal markers to identify and represent patterns of continuity and discontinuity—for example, through the designation of turning points.[108] However, whilst on the one hand they make history and historical change coherent, they also constrain as much as they represent. Periodisations also have a tendency to present the movement of historical time with a progressive edge as periodisations assume "that change is neither random nor constant, but that, at certain points in time, factors converge to change the basic context for the ways societies operate."[109] Altwicker and Diggelman have thus identified periodisation as one of the techniques deployed in international law scholarship to convey a progressive, teleological view of the field.[110] It is this side of periodisation that I will explore in the context of ICL in the chapters that follow.

2.5 Periodising the Histories of International Law

International law scholarship has not avoided the pitfalls of periodisation. Indeed, as Sandberg notes, "[p]eriodisation is endemic but hidden in legal discourse."[111] There is a close connection between how we write about law and time given time itself is essential to the "classical liberal model of law as unified, fixed, and self-sufficient."[112] In light of our understanding of the normative dimensions of periodisation, a question thus arises as to what ideological or political ends the dominant periodisations of international law's histories work.

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[107] Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press 2000) 15.
[108] Harris (n 84) 322.
[109] Stearns (n 3) 74-5.
[110] Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?' (2014) 25(2) EJIL 425, 433-437.
[111] Russell Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education* (Routledge 2021) ch 5.
[112] John Harrington, 'Time as a Dimension of Medical Law' (2012) 20(4) Medical Law Review 491, 496-8. See also Mawani for a similar characterisation: Renisa Mawani, 'Law as Temporality: Colonial Politics and Indian Settlers' (2014) 4(1) Irvine Law Review 65, 70.

As a starting point, we can note a tendency to use a "telescope rather than a microscope" within international law scholarship.[113] This preference impacts the kinds of subjects captured in our analysis. For this reason, we tend to see histories that prefer larger structures—such as the state or international institutions—rather than individuals. And this is true even as international law has shifted from a *state sovereignty-centred approach* to a *human-centred* one.[114]

There is still a tendency to tell this history through states and international institutions. We can note this in Grewe's classic *The Epochs of International Law*.[115] Grewe tells the history of international law by dividing it into a sequence of periods or 'epochs': the late Middle Ages, the Spanish Age (1494-1638), the French Age (1638-1815), the British Age (1815-1919), the interwar period (1919-1944), the Cold War and the Rise of the Third World (1945-1989), and lastly from 1990 in which a single superpower has dominated. In each epoch, the history of international law is structured with reference to the geopolitics of the global superpowers and their impact on the international legal order. States thus constitute the protagonists, with Grewe telling a teleological narrative in which the international legal system shifts from "national sovereignty… towards a universal public interest."[116] Grewe's history thus uses periodisation to tell a particular narrative about international law.[117] Jouannet employed a similar schema to Grewe, although using fewer phases: modern, classical, and contemporary.[118]

Surveying the historiographical tendencies of international law scholars, Lesaffer has identified three main types of periodisation. Grewe's work is emblematic of the "hegemonic approach", where the determinant for each phase is the "predominant power of that day and age."[119] Additionally, there is also the "Eurocentric approach"—which focuses on the development of international law from a *European* to a *universal* system of law—and the "state-centric" approach—which focuses on the emergence of the sovereign state.[120]

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[113] Valentina Vadi, 'The Power of Scale: International Law and Its Microhistories' (2018) 46(4) Denver Journal of International Law and International Policy 315.
[114] Indeed, as the Appeals Chamber famously noted in the landmark *Tadić* decision, the proliferation and gradual acceptance of human rights norms has brought about significant changes in international law, notably that: "[a] state-sovereignty-oriented approach has gradually been supplanted by a human-being-oriented approach." See: *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 97.
[115] Wilhelm G. Grewe, *The Epochs of International Law* (Michael Byers trs, Walter de Gruyter 2000) 715.
[116] ibid.
[117] Grewe's work did not escape critique, however, with Koskenniemi calling it a "disturbing book": Martti Koskenniemi, 'Book Review: The Epochs of International Law. By Wilhelm Grewe. Translated and revised by Michael Byers' (2002) 51(3) International & Comparative Law Quarterly 746.
[118] Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law* (CUP 2014) 13.
[119] Lesaffer (n 98) 5.
[120] ibid 5-7.

Ignacio de la Rasilla adds a further three types to Lesaffer's: those charting the intellectual frameworks of international law as found in its canonical texts; the institutional approach; and an international normative approach.[121]

In addition to these thematic periodisations, international law scholars frequently employ "context-breaking" events to manage the field's history and convey particular narratives.[122] Here, ideas such as the *age of rights* are revealed as deeply normative assertions regarding the perceived progression of time and the evolution of international law.[123] These periodisations have come under scrutiny as the field has *turned to history*. A climate of postmodern scepticism towards disciplinary meta-narratives and teleological descriptions of its history have been critiqued from various critical perspectives.[124]

However, although problematic for the reasons set out above, they might nevertheless be helpful. Raab, for example, argues for their retention as they allow us to settle the appropriate "landmarks" to be used in managing time within a particular historical account, which helps convey narrative. And at the heart of narrative, for Raab, are periodisations.[125]

With a view towards engaging with periodisations more critically, there are two points worth bearing in mind. Firstly, periodisations are not facts; they are conceptual devices that help us organise our understanding of the past and assist us in producing historical knowledge.[126] In this way, they tell us as much about the scholar constructing them or putting them to use as they do the periodisation itself.[127] In this way, periodisations can be used to identify and engage with the normative and teleological assumptions behind a particular account. Secondly, having identified the existence of these periodisations, we can read any historical episodes or occurrences they might marginalise by reading them against the periodisation contrapuntally. That is, by reading a hidden, silenced, or suppressed historical episode against the dominant periodisation and the narrative to which it is attached, you can draw out its limits and flattening tendencies. It is this opportunistic yet critical approach I adopt in the remaining chapters of this thesis.

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[121] Ignacio de la Rasilla, 'The Problem of Periodization in the History of International Law' (2019) 37(1) Law and History Review 275, 285-8.
[122] Martti Koskenniemi, 'Vitoria and Us: Thoughts on Critical Histories of International Law' (2014) 22 Rechtsgeschichte: Legal History 119, 119.
[123] See: Louis Henkin, *The Age of Rights* (Columbia University Press 1990); and Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers 2006).
[124] Lesaffer (n 98)
[125] Theodore Rabb, 'Narrative, Periodization, and the Study of History' (2007) 8(3) Historically Speaking 2, 4.
[126] Peter Stearns, 'Periodisation in World History Teaching: Identifying the Big Changes' (1987) 20(4) The History Teacher 561, 561.
[127] Green (n 85) 53; also see Oliver Diggelmann, 'The Periodization of the History of international Law' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012).

2.6 Managing Time in the Histories of International Criminal Law

With reference to the scholarly accounts of ICL, we can note a reliance on a similar form of periodisation that shapes how the history of the field is presented and understood. Whilst various works have identified that the history of ICL tends to be broken down into several distinct phases, none have made specific reference to periodisation as a technique and structure of history writing. This captures what Heinze has characterised as the successive "waves" of development ICL has experienced.[128] Although slight variations might exist, this constitutes the *accepted account* of the field's history.[129] This way of dividing and structuring ICL's history is present in a wide variety of works and tends to encompass between three to five distinct phases of development which typically capture the pre-history of ICL proper, the Nuremberg and Tokyo tribunals, the institutional and disciplinary stagnation of the Cold War, the great resurgence from the 1990s onward, and the present era in which the field of international criminal justice has achieved its disciplinary ideal in the ICC.[130]

This structure maintains a narrative arc from "Tokyoberg to The Hague", which itself helps to maintain a sense of linear institutional and disciplinary development.[131] And as I will show in the following section, as well as in more detail in Chapters 4 and 6, we can identify this periodised schema in the leading treatises, textbooks, and miscellaneous works of scholarship which attempt to give an overview of or chronicle the history of ICL to the present day. By paying attention to this historiographical tendency, we can get a sense of how ICL scholars create and maintain the *accepted account* of the field's history. In particular, it gives us a sense of what thematic and temporal markers form part of the 'interpretive canon' we employ when engaging with ICL and its past and present.[132]

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[128] Alexander Heinze, 'Attacked, Applaud, Threatened, Universalised. Or: A Wednesday at the International Criminal Court' in Alexander Heinze and Viviane E. Dittrich (eds), *The Past, Present and Future of the International Criminal Court* (TOAEP 2021) 93-4.

[129] Sarah Nouwen, 'Justifying Justice' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012).

[130] See for example: Christine Schwöbel-Patel, 'The Market and Marketing Culture of International Criminal Law' in Christine Schwöbel-Patel (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2014) 266. Gevers captures a similar divide of these four phases, although refers to the four key "episodes" in ICL's history: Christopher Gevers, 'The 'Africa Blue Books' at Versailles: The First World War, Narrative, and Unthinkable Histories of International Criminal Law' in Immi Tallgren and Thomas Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (OUP 2019) 162. Teitel refers to a similar division beginning with Nuremberg, albeit in the context of transitional justice, rather than ICL: Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 Harvard Human Rights Journal 69, 70-1. Similarly, Bohrer outlines the broad shape of this progression, although his focus is more narrowly on the phases that captures the developments occurring before Nuremberg: Ziv Bohrer, 'International Criminal Law's Millennium of Forgotten History' (2016)34(2) Law and History Review 393.

[131] As noted by: Gerry Simpson, 'History of Histories' in Kevin John Jeller and Gerry Simpson (eds), The Hidden Histories of War Crimes Trials (OUP 2013) 3.

[132] Koskenniemi makes a similar point in relation to history: Martti Koskenniemi, 'A History of International Law Histories' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 945.

The first phase in the accepted account of the development of the field is a loose 'pre-history' phase in which any developments not entailing *individual* criminal responsibility directly under international law are considered preparatory acts for the doctrinal innovation of the Nuremberg trials.[133] Popularly referenced events in this phase include the 'trial' of Peter Von Hagenbach in 1474, the development of the Lieber Code during the American Civil War era, the criminalisation of piracy, the criminalisation of the international slave trade, and the attempted trial of Kaiser Wilhelm II.[134] The narrative attached to this phase is one of transhistorical anticipation, with any events captured appraised based on their contribution to or similarity with the form of international criminal responsibility that emerged at Nuremberg.

Following this pre-history phase, the next substantive phase is linked to the trial of Nuremberg itself. As the first instance of ICL *stricto sensu,* it marks "year zero" in the history of ICL.[135] This phase also covers several doctrinal developments in the immediate post-War years, which consolidated and expanded the principles arising from the trial and judgment of the IMT, as well as the first moves towards settling a draft code of international crimes.[136] There is an inaugural sensibility to this phase, as it was at Nuremberg for the first time that state sovereignty had been pierced and individual criminal responsibility under international law had been achieved. This marked the beginning of a shift from a *Hobbesian* order of supreme state sovereigns to human-centred world order. The first and second phases identified here will be the focus of Chapter 5, with the Chapter 5 that follows constituting a critical response to this dominant account.

The next phase is marked by the gradual loss of momentum in the ILC's project to draft a code of international crimes and a slowdown in the development of ICL between the early 1950s and late 1980s. This period of arrested development is generally defined by the Cold

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[133] This is the phase that is the central concern in Bohrer's study: Bohrer (n 130).

[134] Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmshurst (eds), *An Introduction to International Criminal Law and Procecure* (3rd edn, CUP 2014) 109; Antonio Cassese*, International Criminal Law* (2dn, OUP 2008) 37-40; Kai Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part* (1st edn, OUP 2013) 1-4; Gerhard Werle and Florian Jesseberger, *Principles of International Criminal Law* (3rd edn, OUP 2014) 1-2; Hector Olásolo, 'Historical Evolution of International Criminal Law' in Olásolo, *International Criminal Law, Transnational Criminal Organizations and Transitional Justice* (Brill 2018); William Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 1-5; and David M. Crowe, 'War Crimes and Genocide in History, and the Evolution of Responsive International Law' (2009) 37(6) Nationalities Papers 757.

[135] Sergey Vasiliev, 'The Making of International Criminal Law' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Law Making* (Edward Elgar 2016) 354.

[136] Such as, for example: UNGA Res 95(I) (11 Dec 1946) UN Doc A/RES/95; UNGA Res 177(II) (21 Nov 1947) UN Doc A/RES/177(II); ILC, 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal' (1950) 2 UNYBILC 374, 374-378; and Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

War politics that stifled the substantive development of ICL. Thematically, it has close links to the previous phase insofar as this loss of momentum contrasts sharply with the progress made in the previous phase. And given the lack of institutional development that Nuremberg appeared to signal was possible, it is presented as a period of silence and stagnation as no such developments were possible.

The next phase occurs from the early 1990s onwards and is inaugurated by the cessation of the Cold War. The main developments are the ad hoc tribunals, the successes of which triggered a renewed enthusiasm for projects such as the draft code of international crimes and the draft statute for a permanent international criminal court. Although shortcomings might be identified, the movement towards institutional permanence in the International Criminal Court (ICC) is considered the primary achievement. The themes most often employed are *renaissance* and *rebirth*, which are used to capture a sense that this era saw the jubilant revival of the spirit of Nuremberg. Chapter 6 will provide a detailed outlining of the third and fourth phases identified here, with Chapter 7 and 8 providing a critique and a critical re-reading, respectively.

In terms of what follows this fourth phase, it is somewhat unclear the extent to which the years after the establishment and operationalisation of the ICC represent a distinct new phase or simply a continuation of this period.[137] Given the prevalence of various crises that have faced the ICC—and the *project* of international criminal justice more broadly—over the last two decades, one might be tempted to identify the emergence of a fifth phase that is characterised by a profound and seemingly ever-present sense of *crisis*.[138] This sense of crisis, which itself might also reflect a deeper sense of disciplinary ennui,[139] has ebbed and flowed in the years after the ICC began to operate. To this end, a number of recent works have identified the anxiogenic and crisis prone tendencies of ICL scholars.[140] The extent to which this represents a new substantive phase of ICL's development, or simply a new scholarly sensitivity towards institutional challenges, however, remains to be seen. In any

[137] Indeed, neither Gevers or Schwöbel-Patel indicate the existence of a fifth phase in their taxonomy: Gevers (n 130) 162; and Schwöbel-Patel (n 130) 266.
[138] See for example: M. Cherif Bassiouni, 'The ICC—Quo Vadis?' (2006) 4(3) Journal of International Criminal Justice 421; Darryl Robinson, 'Inescapable Dyads: Why the International Criminal Court Cannot Win' (2015) 28(2) LJIL 323; and Eki Yemisi Omorogbe, 'The Crisis of International Criminal Law in Africa: A Regional Regime in Response?' (2019) 66 Netherlands International Law Review 287.
[139] For example, as we see in: M.R. Damaska, 'What is the Point of International Criminal Justice?' (1998) 83 Chicago-Kent Law Review 329; I. Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 EJIL 561; and Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21(4) LJIL 925.
[140] Frédéric Mégret, 'International Criminal Courts and Tribunals: The Anxieties of International Criminal Justice' (2016) 29(1) Leiden Journal of International Law 197; Sergey Vasiliev, 'The Crises and Critiques of International Criminal Justice' in Kevin Jon Heller, Frédéric Mégret, Sarah Nouwen, Jens David Ohlin, and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (OUP 2020); and Joseph Powderly, 'International Criminal Justice in an Age of Perpetual Crisis' (2019) 32(1) LJIL 1.

event, I will not deal with this potential new 'phase' to any great extent in the chapters that follow, with my focus falling primarily on the development of ICL from the Nuremberg IMT up to the establishment of the ICC.

The phasal sequencing of ICL's history helps to convey a progressive account of the development of ICL. This new legal order was inaugurated at Nuremberg and represented the gradual humanisation—and institutionalisation—of international law. It was brought about by piercing state sovereignty and the possibility of individual criminal responsibility directly under international law. This disciplinary narrative is a teleological story about the progression towards a cosmopolitan international order and the place of ICL in bringing this about. And it is this kind of account that I will reflect on in the concluding chapter of this thesis.

Considered in light of the understanding of 'periodisation' set out above, however, one cannot help but be suspicious not just of the narrative itself but also of the structures that help to create it. As we will see in the chapters that follow, the disciplinary narrative it upholds is deeply progressive—which is characteristic of the narrative effect such a periodisation tends to create. Indeed, as Sandberg has noted, periodisations "provide the means by which the past is simplified to provide a narrative of progress."[141] When these periodisations are repeated within a particular body of scholarship they are naturalised through repetition and take on an axiomatic quality; over time not being viewed as forms of *history* at all.[142] With this in mind, my focus in the remaining chapters of this thesis will be on engaging with and critiquing these periodisations. More specifically, I will attempt to use the *hidden histories* and stories overlooked by these mainstream accounts, which, I will argue, disrupt this periodisation and the narrative it anchors.

2.8 Conclusion

As we have seen, periodisation provides the assemblage of past facts and occurrences that constitute *history* with a shape and structure. And by placing blocks of time and the events they capture in sequential order, it helps us understand their relation to each other. In this way, periodisation can: "bring order and meaning to an otherwise unruly tangle of data and permit us to hold steady the otherwise constant flurry of difference and change."[143]

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[141] Sandberg (n 111) 112.
[142] ibid 108.
[143] Boydston (n 99) 560.

Although these structures are endemic within legal discourses, they slip by largely unnoticed.[144] And through dint of scholarly repetition, they can conceal their essentially narrative nature.[145] In this way, they achieve a rigidifying power over the past and constrain what sorts of history is possible. And as with other forms of categorisation—temporal or otherwise—periodisation is a "simplifying, consolidating, and universalising process"[146]. To simplify, however, they must exclude. And in this way they exert an "exclusionary force" over that which they purport to capture and represent.[147] These dual gestures of inclusion and exclusion dictate what history is possible and what narrative is told.[148] This contrasts with their appearance as natural temporal divisions. In this way, much of their discursive power comes from this ability to hide their constructed nature.

A consequence of this is that they risk repressing disciplinary imagination.[149] Established and conventional chronologies like this "hamper fresh thinking; naturalise particular views of history; and are often value-laden, preventing critical scrutiny of their assumptions and agendas."[150] As Rehder has argued, they do the thinking for us.[151] And in this way, they operate as an exercise of power, with this power finding expression through "constructing and perpetuating a field of knowledge".[152] As such, they have been viewed with a scepticism that befits such a "delusionary vision of the past".[153] Despite the deep structural and normative power they can exert on how we write and think about the past, periodisations—as with *time* more generally—have received scant attention in international law and ICL scholarship. And it is with this lacuna in mind that I have drawn on periodisation as a heuristic to think through how the histories of ICL are recorded and presented within our scholarly discourses.

As identified within ICL scholarship, this consists of a tendency to carve up the field's history into five broad phases. And although distinct, they are synergetic and help to carry a metanarrative about the development of the field. As will be explored in later chapters, this metanarrative is ultimately a teleological story about the progressive advance of international institutions. In this regard ICL does not necessarily differ from international

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[144] Sandberg (n 111) 109.
[145] ibid 107.
[146] Boydston (n 99) 560.
[147] Davis (n 100) 3-4.
[148] Sandberg (n 111) 112.
[149] d'Aspremont (n 23).
[150] Anagol (n 77).
[151] Robert Rehder, 'Periodisation and the Theory of Literary History' (1995) 22 Colloquim Helveticum: Cahiers Suisses de Literature Comparee 117, 120-121.
[152] Sandberg (n 111) 112. Davis has similarly characterised periodisation as a fundamentally political technique: Davis (n 100) 5.
[153] Leonard Orr, 'Modernism and the Issue of Periodisation' (2005) 7(1) CLC Web: Comparative Literature and Culture 2.

law, which, as Bianchi notes, can be understood as a "field shaped by metanarratives, involving matters such as universality and progress."[154]

As will be argued in Parts II and III of this thesis, however, this progressive narrative is made possible precisely by what it leaves out, with periodisation playing an important role in this. The periodised schema that dominates ICL helps to maintain various narrative silences in our accounts of the development of ICL. These silences are the product of a tendency to focus on institutional developments when recounting the history of ICL. This narrative naturally takes on a progressive edge, given that ICL has, over time, moved from a system of exemplary justice at Nuremberg to a state of permanence in the ICC. However, as will be argued, this progressive narrative is simply one amongst many possible others. And if narratives are a way of both remembering and forgetting, this is also true of ICL and its histories where *silences* get buried "under disciplinary traditions or set aside on the basis of vested interests."[155] If these disciplinary narratives are value-laden, as Bianchi suggests, my interest lies in identifying the *values* that determine what gets included and excluded.

Although this exploration may not necessarily end in finding a way to do away with these periodisations and metanarratives entirely,[156] we might nevertheless find ways of engaging with them, and the past, more critically and in a way that disrupts the logic they impose on that past.[157] Indeed, as Perkins has noted, they are "necessary fictions" even if only as an object towards which our critique might be directed given we "require the concept of a unified period in order to deny it".[158] In this regard, without wanting to either reject or replace the periodisations identified and explored in this thesis, I will use them as a jumping-off point to launch a broader critique of the historiographical tendencies of ICL scholars. I thus follow Brown in identifying them as a: "challenge and an opportunity, a resource and a corrective."[159]

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[154] Bianchi (n 44) 294.
[155] ibid 292.
[156] As Perkins argues "we cannot write history without periodising it". See: David Perkins, *Is Literary History Possible?* (John Hopkins University Press 1992) 64-5. On the inescapable necessity of periodisations, see: Marshall Brown, 'Periods and Resistances' (2001) 62(4) Modern Language Quarterly 309.
[157] Ksenia Polonskaya, 'Metanarratives as a Trap: Critique of Investor–State Arbitration Reform' (2020) 23(4) Journal of International Economic Law 949.
[158] Perkins (n 156) 64.
[159] Brown (n 156) 316.

Chapter 3: Silence and the History of International Criminal Law

3.1 Introduction

Having identified the historiographical trends associated with the *turn to history* across international law and its subfields, I will now focus on fleshing out the approach I will take in the remaining chapters. This consists of two elements. Firstly, as my work draws on Third World Approaches to International Law (TWAIL) scholarship, Sections 2 through 5 will give a broad overview of this body of work, emphasising how history is put to use by TWAIL scholars. Although later chapters are not necessarily always explicitly 'TWAILian' in terms of the scholarship they cite, they will never the less use critical strategies borrowed from this body work. And secondly, Sections 6 and 7 of this chapter will set out the argumentative strategy I adopt, which will also help to explain the structure of the thesis. To this end, in Section 6, I introduce the work of Michel-Rolph Trouillot, an anthropologist turned historiographer who forwarded an understanding of history as comprised of silences conditioned by power. As later chapters of the thesis seek to uncover moments in ICL's past marginalised by mainstream accounts, this work will provide a helpful way of framing this historiographical *silencing.* Similarly, Section 7 of this chapter sets out a narrative technique that will influence the 'contrapuntal' or 'counter-storytelling' approach I adopt in later chapters. This technique will be used when, having set out the dominant accounts of the development of ICL, I read these *silenced* histories against the dominant disciplinary histories. In this regard, the present chapter provides an opportunity to set out the approach and structure of the remainder of the thesis.

3.2 The Emergence of a 'Third World' Critique

TWAIL has recently been described as a "movement encompassing scholars and practitioners of international law and policy who are concerned with issues related to the Global South in its broad conception."[1] And although often treated in relatively homogenous terms, it captures a broad spectrum of disciplinary influences and theoretical and methodological approaches. As it cohered under the 'TWAIL' moniker, the direct roots can

[1] As quoted from the website of the recently launched *TWAIL Review*. See: *TWAIL Review* <https://twailr.com/about/founding-statement/> accessed 20 September 2021.

be traced to 1996-97.[2] The label provided a shorthand for shared scholarly concerns for international law's past, present, and future, particularly as experienced from the *Global South*. For Gathii, the first TWAIL conference aimed to consider "whether it was feasible to have a third world approach to international law and what the main concerns of such an approach might be."[3] Also of acute concern was the superficiality of decolonisation in the international legal order.[4] It drew on and reacted to older 'Third World' international law scholarship,[5] as well as a diverse array of theoretical influences. It was hoped that by breaking with this established knowledge and methodologies, international law could be reappraised and rewritten from the perspective of the historically marginalised.[6]

TWAIL thus critiqued and unsettled established conceptual precepts and foundational moments[7], with a particular view towards drawing out the close relationship between international law and the imperial setting. In doing so, TWAIL scholars undermined the logic and internal coherence of the dominant accounts of international law.[8] This has included, for example, challenging the very framing of *international law* as *international*.[9] As it has

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[2] Although it should be noted that close variations of the moniker can be found earlier. See for example: B.S. Chimni, 'Towards a Third World Approach to Non-Intervention: Through the Labyrinth of Western Doctrine' (1980) 20 Indian Journal of International Law 243; and Frederick E. Snyder and Surakiart Sathirathai (eds), *Third World Attitudes Towards International Law: An Introduction* (Martinus Nijhoff Publishers 1987).

[3] James Thuo Gathii, 'TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative bibliography' (2011) 3(1) Trade Law & Development 26, 28.

[4] See Chimni: "The threat of recolonization is haunting the third world. The process of globalisation has had a deleterious effect on the welfare of third world peoples." In B.S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8(1) International Community Law Review 3.

[5] For example, Chimni writes of being motivated by the failure to glance inwards towards issues of socioeconomic inequality and marginalisation, as well as the limits of statehood. See: ibid 4; and B.S. Chimni, 'The World of TWAIL: Introduction to the Special Issue' (2011) 3(1) Trade Law & Development 14, 19.

[6] Antony Anghie, 'Imperialism and International Legal Theory' in Anne Orford and Florian Hoffman (eds) *The Oxford Handbook of the Theory of International Law* (OUP 2016) 163-4.

[7] It entailed, for example, a reappraisal of established moments in the history of the field, such as decolonisation. See, for example, Sundhya Pahuja, 'Postcoloniality of International Law' (2005) 46(2) Harvard International Law Journal 459, 462 & 467; James Thuo Gathii, 'Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy' (2000) 98(6) Michigan Law Review 1996; and Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (CUP 2005).

[8] See, for example, Anghie's notion of the "dynamic of difference" as animating the project of international law. This reimagined the central issue of the international legal order as how to address and manage cultural difference, rather than how to create order amongst equal sovereigns: Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2001-2) 34 New York University Journal of International Law & Politics 513, 519.

[9] See for example: Luis Eslava & Sundhya Pahuja. 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45(2) Journal of Law and Politics in Africa, Asia and Latin America-Verfassung und Recht in Übersee 195; and Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (CUP 2003).

evolved, a wide range of scholarship has been drawn on for its theoretical and critical content, including postcolonial,[10] feminist,[11] and Marxist work.[12]

In terms of the origins of TWAIL, we should first note a divergence in terms of how its genesis is understood and portrayed. Firstly, TWAIL can be viewed as emerging in a particular *moment* in critical international law scholarship. On this view, TWAIL is presented as connected to a lineage of Critical Legal Studies (CLS) and the New Approaches to International Law (NAIL), with the institutional setting of Harvard Law School in the mid-1990s proving pivotal,[13] as it was here for the first time the moniker was adopted. This early group of scholars had shared interests in postcolonialism, critical race theory, and law and development studies and responded to an older body of *Third World* international law scholarship.[14]

Secondly, we might view it as part of a longer extant critical sensibility born of the decolonial and post-colonial moment.[15] This work was united by a commitment to exploring international law from the perspective of newly independent states and those impacted by colonialism, with a critical sensibility informed by the Global South coalitionary movements of the time.[16] This work had a notably internationalist outlook with a sense of optimism in the ability of international law to bring about a more participatory international legal order.[17] They also sought to reclaim *Third World* contributions to the development of international

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[10] Given that TWAIL is a critique concerned with the postcolonial setting of international law, the influence of postcolonial studies work permeates TWAIL scholarship. Beyond this more general influence, we can also see the influence of this body of scholarship in TWAIL's concern with subalternity, for example: Makau Mutua, 'What is TWAIL?' (2000) 94 Proceedings of the Annual Meeting (ASIL) 31, 37. On the influence of postcolonial studies more generally, see: Pahuja (n 7).

[11] See for example: Vasuki Nesiah, 'The Ground beneath Her Feet: "Third World" Feminisms' (2003) 4(3) Journal of International Women's Studies 30; M. Fagbongbe, 'The Future of Women's Rights from a TWAIL Perspective' (2008) 10(4) International Community Law Review 401; Vasuki Nesiah, 'Decolonial CIL: TWAIL, Feminism, and an Insurgent Jurisprudence' (2018) 112 AJIL: Unbound 313; and Giovanna Maria Frisso, 'Third World Approaches to International Law: Feminists' Engagement with International Law and Decolonial Theory' in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagements with International Law* (Edward Elgar 2019)

[12] See: Robert Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism' (2016) 4(1) London Review of International Law 81; and George Forji Amin, 'Letter to the Journal: A Marxist and TWAIL Reading of the Oxford Handbook of the Sources of International Law' (2020) 19(1) Chinese Journal of International Law 183.

[13] Gathii (n 3) 27-9.

[14] Balakrishnan Rajagopal, 'International Law and its Discontents: Rethinking the Global South' (2012) 106 Proceedings of the Annual Meeting (ASIL) 176.

[15] See, for example: R. P. Anand, 'Attitudes of Asia-African States Towards Certain Provisions of International Law' (1966) 15(1) The International and Comparative Law Quarterly 55; Anand, *New States and International Law* (Vikas Publishing House 1972); Mahammed Bedjaoui, *Towards a New International Economic Order* (Holmes and Meier Publishers 1979); and Taslim Olawale Elias, *Africa and the Development of International Law* (Martinus Nijhoff 1972).

[16] On this *Third World* coalitionary sentiment, see: Rajagopal (n 14).

[17] Anand (n 15).

law, which has been described as a *contributionist* outlook.[18] There was also a commitment to the idea that international law could effectively further Global South interests.[19] Despite later Third World scholars rejecting these premises, they can be viewed as part of a common *tradition* of scholarship.[20]

On this second reading, however, the TWAIL moniker appears anachronistic and, indeed, it has been criticised on this basis.[21] Problems arise when labels such as *TWAIL 1* and *TWAIL 2* are used to capture generational differences, which risks both essentialising the differences between them and being progressivist in tone.[22] Whilst providing an answer to this epochal debate is beyond the scope of the present chapter, it is nevertheless worth noting when trying to place the emergence of TWAIL.

Genealogical controversies aside, the impact of TWAIL has been at once profound and modest. Gathii gives us a sense of the profound achievement of TWAIL by showing the sheer volume of scholarship that has been generated under the TWAIL banner.[23] And to this end, TWAIL has firmly established itself as part of the canon of *critical* approaches to international law research—even earning inclusion in research handbooks.[24] TWAIL has also been kept alive through dedicated conferences, workshops, and research symposia.

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[18] James Thuo Gathii, 'Africa' in Bardo Fassbender, Anne Peters, Simone Peter, and Daniel Hogger (eds), *The Oxford Handbook of the History of International Law* (1st edn, OUP 2012) 407-8; Chimni (n 5) 18-19; and Anghie (n 6) 161.

[19] Although perhaps this view was itself a defensive posture towards the prevailing view at the time that viewed international law as possessing universal qualities, whilst also being essentially European in origin. See for example: R.Y. Jennings, 'The Progress of International Law' (1958) 34 British Yearbook of International Law 334, 350; J.H.W. Verzijl, 'Western European Influence on the Foundations of International Law' (1955) 1(4) International Relations 137; Joseph L. Kunz, 'Pluralism and Legal and Value Systems and International Law' (1955) 49(3) AJIL 370, 371; and C.W. Jenks, 'Law and the Pursuit of Peace' in Law in the World Community (Longmans 1967) 56. For a brief overview of some of these scholarly responses, see Gustavo Gozzi, *Rights and Civilisations: A History and Philosophy of International Law* (Trns Filippo Valente, CUP 2019) 268-272.

[20] See for example: Karin Mickelson, 'Rhetoric and Rage: Third World Voices in international Legal Discourse' (1998) 16(2) Windsor International Law Journal 353.

[21] Georges Abi-Saab, 'The Third World Intellectual in Praxis: Confrontation, Participation, or Operation Behind Enemy Lines?' (2016) 37(11) Third World Quarterly 1957. Also see: Robert Knox, 'A Critical Examination of The Concept Of Imperialism In Marxist And Third World Approaches To International Law' (PhD thesis, London School of Economics 2014) 111.

[22] Karin Mickelson, 'Taking Stock of TWAIL Histories' (2008) 10(4) International Community Law Review 355, 361; and Georges R.B. Galindo, 'Splitting TWAIL?' (2016) 33(3) Windsor Yearbook of Access to Justice 37, 48-9.

[23] James Thuo Gathii, 'The Agenda of Third World Approaches to International Law (TWAIL)' forthcoming in Jeffrey Runoff and Mark Pollack (eds), *International Legal Theory: Foundations and Frontiers* (CUP 2022) (Forthcoming) <https://ssrn.com/abstract=3304767> accessed 21 September 2021.

[24] Barbara Harlow, 'Third World Approaches to International Law: An Essay in Bibliography' in Sophia McClenne and Alexandra Schulthesis Moore (eds), *The Routledge Companion to Literature and Human Rights* (Routledge 2015); Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 205-226; Usha Natarajan, 'Third World Approaches to International Law (TWAIL) and the Environment' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law: A Handbook* (Edward Elgar 2017); and Ignacio de la Rasilla, *International Law and History: Modern Interfaces* (CUP 2021) 117-151.

And in the coming years, its critical mission will undoubtedly be kept alive by platforms such as the *TWAIL Review*.[25]

In terms of the more modest side of these achievements, there is nevertheless lingering anxiety about its material impact despite expansion and proliferation.[26] This angst has often been aired within discussions about TWAIL *praxis* and whether TWAIL's founding aims have been met.[27] Although perhaps the achievements of individual TWAILers helps to ameliorate this.[28] Nevertheless, despite any mainstream academic or institutional resistance to TWAIL,[29] it would be myopic to deny its broader impact as both an *approach* to international law research and as a movement.

3.3 TWAIL: Methodology, Approach, or Sensibility?

Having outlined TWAIL's genesis, a question remains as to how best to characterise it. This is particularly pertinent given the nebulous term 'approach' contained in the name. With that said, I will now briefly consider what it means to characterise TWAIL as an 'approach' to international law research and whether any core elements can be identified—be they methodological, theoretical, or critical.

The most immediate comparison with 'approach' might be methodology, which is typically taken to mean the broad strategy adopted to answer a particular research

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[25] *TWAIL Review* (n 1).

[26] See: Usha Natarajan, John Reynolds, Amar Bhatia & Sujith Xavier, 'Introduction: TWAIL—On Praxis and the Intellectual' (2016) 37(11) Third World Quarterly 1946; and James Thuo Gathii, Henry J. Richardson III and Karen Knop, 'Introduction to Symposium on Theorizing TWAIL Activism' (2016) 110 AJIL Unbound 18.

[27] On TWAIL and praxis, see: Usha Natarajan, John Reynolds, Amar Bhatia, and Sujith Xavier (eds), *Third World Approaches to International Law: On Praxis and the Intellectual* (Routledge 2019).

[28] Fakhri has recently been appointed as a Special Rapporteur on the Right to Food by the UN Human Rights Commission: 'Mr Michael Fakhri—Special Rapporteur on Right to Food' (*United Nations Human Rights: Office of the High Commissioner*) <https://www.ohchr.org/EN/Issues/Food/Pages/Michael_Fakhri.aspx> accessed 21 September 2021. Okafor has served as a UN Independent Expert on Human Rights and International Solidarity since 2017, having formerly served as a former Chairperson of the United Nations Human Rights Council Advisory Committee. Okafor reflected on these experiences as TWAIL praxis in: Obiora Chinedu Okafor, 'Praxis and the International (Human Rights) Law Scholar: Toward the Intensification of TWAILian Dramaturgy' (2016) 33(3) Windsor Yearbook of Access to Justice 1. Okafor has also suggested how a more effective praxis might be generated: Obiora Chinedu Okafor, 'Enacting TWAILian Praxis in Non-Academic Habitats: Toward a Conceptual Framework' (2016) 110 AJIL Unbound 20. Achiume is currently a Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, and has produced scholarship working from both a CRT and TWAIL perspective: 'Ms. E. Tendayi Achiume, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance' (*United Nations Human Rights: Office of the High Commissioner*) <https://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/CurrentMandateHolder.aspx> accessed 21 September 2021.

[29] Although as Esalava suggests, the institutional resistance to TWAIL scholarship might be beginning to wane, as the reference to TWAIL work in a recent International Court of Justice Advisory Opinion suggests. See: Luis Eslava, 'TWAIL Coordinates' (*GroJIL-Blog*, 1 April 2019) <https://grojil.org/2019/04/01/twail-coordinates/#_ednref6> accessed 21 September 2021.

question. It reaches beyond methods alone and might also capture the formulation of the research question, theoretical assumptions and frameworks, and any conceptions. In legal research, this might encompass the scholar's notions about the nature of law and legal institutions, which would shape the questions asked, sources drawn on, and any methods used.[30] We can also note the normative dimensions of methodology.[31] Arguably, this proves problematic in characterising TWAIL given its heterogeneity.

TWAIL scholars have reflected on this question of characterisation, particularly the propriety of describing TWAIL as a *methodology*. Rejecting this, Burgis-Kasthala has argued we can speak only of a TWAIL sensibility at best.[32] Similarly, Eslava and Pahuja have characterised it as a "political grouping or strategic engagement with international law" rather than *method* or *methodology*.[33] More recently, Eslava has once again characterised it as a "movement" and "sensibility" rather than a school of thought or doctrine.[34] Mickelson locates this sensibility within a broader "tradition" of Third World scholarship rather than a set framework.[35] And similarly, Anghie argues it consists of a set of analytical tools rather than a fixed methodology.[36] It thus displays similarities to postcolonial studies' characterisation as a "political project" rather than a disciplinary field.[37]

For Gathii and Okafor, the existence of an underlying sensibility and unifying set of ideas gives it a degree of cohesiveness despite its existence as an "expansive, heterogeneous, and polycentric dispersed network and field of study."[38] One precept is a tendency to ask certain foundational questions about the nature of international law. This provides a critical location where TWAIL scholars can meet, despite any theoretical or methodological differences. In this way, the 'approach' the moniker refers to is looser than methodology whilst allowing for a sufficient degree of cohesion to say whether a work is TWAILian—without relying on self-identification alone.

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[30] Robert Cryer, Tamara Hervey, Bal Sokhi-Bulley, and Alexandra Bohm (eds), *Research Methodologies in EU and International Law* (Bloomsbury 2011) 2.
[31] Pauline Westerman, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline* (Hart Publishing 2011) 87. See also Koskenniemi's comment regarding the absence of a "meta-standpoint" from which methods or politics can be discussed outside of their particular methodological or political contexts: Martti Koskenniemi, 'Letters to the Editors of the Symposium' (1999) 93 AJIL 351, 352.
[32] Michelle Burgis-Kasthala, 'Scholarship as Dialogue? TWAIL and the Politics of Methodology' (2016) 14(4) Journal of International Criminal Justice 922.
[33] Eslava and Pahuja (n 9).
[34] Eslava (n 29).
[35] Mickelson (n 21) 362.
[36] Antony Anghie, 'TWAIL: Past and Future' (2008) 10(4) International Community Law Review 479, 480-1.
[37] Robert J.C. Young, 'Postcolonial Remains' (2012) 43(1) New Literary History 19, 20.
[38] Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10(4) International Community Law Review 371, 376-7; and Gathii (n 3) 27.

As a movement and network, there are also social dimensions to the constitution of TWAIL as *disciplines* are also social communities rather than simply idiosyncratic bodies of knowledge and expertise.[39] To be *disciplined* is to learn to embody and perform the "academic genres" that constitute a discipline's theories and practices and the "social relations and embodied subjectivity" that construct it as a body of knowledge.[40] Within these success requires the performance of "its genres, and to speak and write and embody its favourite discourses, myths, and narratives."[41] The *movement* is also constituted through citation practices within TWAIL scholarship, which establishes canonical texts that ground the critique.[42]

Also aiding the formation of TWAILian identity is a 'mainstream' to which they respond and critique. The idea of a 'mainstream' is used as a conceptual device and normative premise that grounds the TWAIL critique, particularly insofar it fails to take into account the concerns regarding the international legal order that TWAILers share. With the perils of using the 'mainstream' in a flattening manner in mind,[43] the term acts as a shorthand for broadly shared methodological, normative, and political commitments within an identified body of scholarship. It often captures work exhibiting strict adherence to methodological and normative positivism, which displays an abiding faith in the rule of international law, its purported universality,[44] and a progressivist understanding of its evolution and teleology.

3.4 The 'Core' of TWAIL Scholarship?

Although perhaps embarking with the more modest goal of seeing "whether it was feasible to have a third world approach to international law and what the main concerns of such an approach might be", it is evident that TWAIL has now coalesced into an approach with a core set of concerns.[45] But what exactly does this approach consist of? Can we identify a

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[39] Moti Nissani, 'Fruits, Salads, and Smoothies: A Working Definition of Interdisciplinarity' (1995) 29(2) Journal of Educational Thought 121, 122.
[40] Terry Threadgold, 'Everyday Life in the Academy: Postmodernist Feminisms, Generic Seductions, Rewriting, and Being Heard' in Carmen Luke (ed), *Feminisms and Pedagogies of Everyday Life* (SUNY Press 1996) 281.
[41] ibid.
[42] See the bibliography of TWAIL scholarship recently put together by Gathii: James Thuo Gathii, 'The Promise of International Law: A Third World View' (2021) 36(3) American University International Law Review 377.
[43] Which, as d'Aspremont has argued, is a particular risk when the idea of a cohesive "mainstream" is used uncritically: Jean D'aspremont, 'Martti Koskenniemi, the Mainstream, and Self-Reflectivity' (2016) 29(3) Leiden Journal of International Law 625, 627-8.
[44] With a commitment to universalism giving it a 'Eurocentric' quality.
[45] Gathii (n 3) 28.

standard set of theoretical or methodological commitments, or does it resist any such homogenisation?

Although exhibiting much diversity, TWAIL coheres around several core elements. Gathii identifies three central themes and concerns: the role of international law in constituting order and disorder, the centrality of history, and a commitment to reforming and remaking international law.[46] Elsewhere, Eslava identifies five "coordinates" which act as a meeting point: "history matters", "empire moves", "the South moves", "the struggle is multiple", and the "struggle is here".[47] These largely match the core objectives earlier identified by Mutua:

> "The first is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialised hierarchy of international norms and institutions that subordinate non-Europeans to Europeans. Second, it seeks to construct and present an alternative normative legal edifice for international governance. Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World."[48]

Okafor has similarly identified a set of techniques and sensibilities—drawn from TWAIL's interactions with CLS, feminist, NAIL, Marxist, poststructuralist, and CRT scholarship—which unite the TWAIL project: a deep commitment to *world* history and an understanding that historical perspective is key to generating contemporary insight; taking the equality of Third World peoples seriously; and an insistence on thinking through the "various ways of offering epistemic and ideational resistance to the global hegemonies that their work often unearths or explains.[49] For Okafor these are representative of the "shared ethical commitment" uniting TWAILers.[50]

Central to this 'shared ethical commitment' is the idea of the *Third World,* as rooted in material reality. Mutua identifies the *Third World* as a reflection of "geographic, oppositional, and political realities that distinguish it from the West", which captures a "stream of similar historical experiences across virtually all non-European societies".[51] It tends to be used adaptively, which captures experiences "not solely defined by victimhood but by a

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[46] Gathii (23).
[47] Eslava (n 29).
[48] Mutua (n 10).
[49] Obiora Chinedu Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) 43(1&2) Osgoode Hall Law Journal 171, 178-180.
[50] ibid 176.
[51] Mutua (n 10) 35.

hegemonic and a counter-hegemonic Global South",[52] as well the ways that marginalisation occurs.[53] For Chimni, the continued utility of the term lies in its ability to point to structural constraints on the world economy, which continue to marginalise certain classes of individuals.[54] The *Third World* has thus been used in historical, critical, and normative registers to act as a metaphor for "human suffering caused by capitalism and colonialism on the global level, as well as for the resistance to overcoming or minimising such suffering."[55]

3.4.1 The Historical Sensibility of TWAIL

Of the characterisations of TWAIL set out above, common to all is an interest in history. Indeed, despite the variation between them, all of those identified note the presence of a distinctive historical sensibility amongst TWAILers. To this end, Mutua has identified TWAIL as a "historically located intellectual and political movement"[56]. But how and why do TWAIL scholars engage with history?

In terms of the 'why', there are three dimensions we might note. Firstly, the TWAIL interest in history arises from a sensitivity towards and interest in present-day conditions of marginality experienced within the *Third World* and how these conditions exhibit the legacies of imperialism and colonialism. To explore this 'postcolonial contemporary',[57] international law's pasts are engaged.[58]

Secondly, TWAIL's engagement with and use of history is shaped by the theory and critical strategies of other bodies of scholarship. This includes feminist, CLS, NAIL, Marxist, poststructuralist, and CRT work[59]—all of which, to varying degrees, have used *history* critically. Certain NAIL scholars looked to history to expose the blind spots and biases of particular international legal concepts,[60] and thus carried forward many of the critical

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[52] Rajagopal (n 14) 176.
[53] Balakrishnan Rajagopal, 'Locating the Third World in Cultural Geography' (2000) 15(2) Third World Legal Studies 1, 1-3.
[54] Chimni (n 4) 5.
[55] Boaventura De Sousa Santos, 'Epistemologies of the South and the Future' (2016) 1(1) From the European South 17, 18. Grovogui has similarly identified the symbolic dimensions of the term: Siba Grovogui, 'A Revolution Nonetheless: The Global South in International Relations' (2011) 5(1) The Global South 175, 176.
[56] Mutua (n 10) 38.
[57] On the postcolonial contemporary, see: Jini Kim Watson and Gary Wilder, 'Thinking the Postcolonial Contemporary' in Watson and Wilder (eds), *The Postcolonial Contemporary: Political Imaginaries for the Global Present* (Fordham Press 2018).
[58] Sundhya Pahuja's, 'Letters from Bandung: Encounters with Another International Law' in Luis Eslava, Vasuki Nesiah, & Michael Fahkri (eds), *Bandung, Global History, and International Law Critical Pasts and Pending Futures* (CUP 2017).
[59] Okafor (n 49) 178.
[60] Ntina Tzouvala, 'New Approaches to International Law: The History of a Project' (2016) 27(1) EJIL 215, 224.

strategies of CLS.[61] This was catalysed by the initial institutional setting of TWAIL, with David Kennedy of Harvard Law School providing doctoral supervision to this new generation of TWAIL scholars such as Gathii, Anghie, and Rajagopal.[62]

Thirdly, following on from the second and first, TWAIL scholars have identified the marginalisation of particular histories within mainstream international law scholarship. TWAIL scholarship is thus intended as a corrective to an identified *mainstream* of international law scholarship, which has overlooked, obscured, downplayed, or elided entirely the histories of imperialism and colonialism, which still bear relevance to the contemporary functions and dysfunctions of the international legal order.

3.4.2 TWAIL History as Postcolonial Critique?

Although the institutional setting and the broader influence of CLS and NAIL contributed to the emergence of TWAIL as a historically rooted critique, the field of postcolonial studies also made a significant contribution.[63] As a cross-disciplinary body of work "devoted to the academic task of revising, remembering, and crucially, interrogating the colonial past",[64] postcolonial studies scholars have a wide-ranging interest in the past and history. And as Bhambra notes, postcolonial arguments have enjoyed some of their most notable successes in challenging the "insularity of historical narratives and historiographical traditions emanating from Europe."[65]

Much as with TWAIL scholarship, the *postcolonial* interest in history follows two broad lines of critique and inquiry. Firstly, there is a concern for reclaiming the histories of imperialism and colonialism that have been lost or marginalised. These have attempted to re-write history through re-centring this colonial history, to find "new political, social, and psychic possibilities beyond colonialism."[66]

And secondly, there is a related concern that manifests in a critique of the form of history itself. This interest finds its origins in the *locus classics* of postcolonial studies, *Orientalism*,[67] which was concerned with the representations of the non-Western world. Said's concern lay in how: "European culture was able to manage—and even produce—

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[61] Bianchi (n 24) 142. On CLS scholar's interest in history, see: Alan Hunt, 'The Theory of Critical Legal Studies' (1986) 6(1) Oxford Journal of Legal Studies 1, 37-43.
[62] Andrew F. Sunter, 'TWAIL as Naturalized Epistemological Inquiry' (2007) 20(2) Canadian Journal of Law and Jurisprudence 475, 485.
[63] For an overview of some of these synergies, see: Rajagopal (n 53).
[64] Leela Gandhi, *Postcolonial Theory: A Critical Introduction* (Allen & Unwin 1998) 4.
[65] Gurminder K Bhambra, 'Postcolonial and Decolonial Dialogues' (2014) 17(2) Postcolonial Studies 115.
[66] Jyotsna G. Singh, 'Introduction' in Jyotsna G. Singh and David D. Kim (eds), *The Postcolonial World* (Routledge, 2017) 3-4.
[67] Edward Said, *Orientalism* (Vintage 1979).

the Orient politically, sociologically, militarily, ideologically, scientifically, and imaginatively during the post-enlightenment period."[68] Having identified a relationship between knowledge, culture, and power, Said's interest lay in how the non-Western could be represented across a range of cultural forms and how these, in turn, shaped non-European identity. Later postcolonial studies scholars built on Said's work, often through focused critique.[69] Within postcolonial legal studies, this line of critique has manifested in concern for how legal ideas create and sustain these relationships and their supporting notions of difference,[70] and the "emerging legalities and legal consciousness" arising from the material injustice that followed the colonial era.[71]

Understanding the representational limits of history in this way produced scepticism about the nature and capacities of historical knowledge. And on this basis, postcolonial studies scholars have shared an interest in the kinds of logic, rationales, assumptions, and methodologies that underpin contemporary historiography, which draw heavily from European experience. There is thus a guiding interest in how non-European experiences can be represented in light of the dominance of these historiographical frames.[72] In this way, as Gunn notes, it "provides the greatest challenge to conventional historical practice."[73]

In the postcolonial engagement with history, we also see a resemblance to TWAIL insofar as the past is engaged with on presentist terms. For postcolonial studies scholars, this is born of a concern for the "postcolonial contemporary".[74] As Young notes, postcolonial critique is concerned with history "only to the extent that history has determined the configurations and power structures of the present."[75] This also gives postcolonial scholarship a political edge,[76] given the concern for how colonial pasts continue to shape political and social lives in the—supposedly—post-colonial present.[77] History is thus valuable because the colonial past: "lives on, ceaselessly transformed in the present into

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[68] ibid.
[69] Singh (n 66) 6. See also Homi Bhabha, *The Location of Culture* (1st edn, Routledge 1994).
[70] Alpana Roy, 'Postcolonial Theory and Law: A Critical Introduction' (2008) 29(1) Adelaide Law Review 315, 335.
[71] Eve Darian-Smith, 'Postcolonial Theories of Law' in Reza Banaka & Max Tavers (eds), *Law and Social Theory* (Bloomsbury 2013) 249.
[72] Simon Gunn, *History and Cultural Theory* (Harlow 2006) 9. See for example: Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press 2000).
[73] Gunn, ibid 156.
[74] Watson and Wilder (n 57).
[75] Robert J.C. Young, *Postcolonialism: An Historical Introduction* (Blackwell Publishers 2001) 57-58.
[76] ibis 4–6; and John McLeod, 'Introduction' in McLeod (ed), *The Routledge Companion to Postcolonial Studies* (Routledge 2007) 8.
[77] Paul Gilroy, *Postcolonial Melancholia* (Columbia University Press 2005).

new social and political confirmations."[78] And in this regard, the presentist orientation gives postcolonial history an ameliorative and therapeutic edge.[79]

Furthermore, both TWAIL and postcolonial studies critique the foundational historiographical assumptions underpinning their respective disciplines, particularly the progressive and universalistic frames typically drawn on.[80] History provides a counter to these, as it allows for their respective disciplinary pasts to be reframed through the history of colonial encounters. TWAIL scholars, much like postcolonial studies scholars, thus reject the Eurocentric historical narratives which populate their respective fields by drawing out the European historical macro-narrative they are structured around and within.

3.5 How Do TWAILers Put History to Use?

Having identified the centrality of history to the critical sensibility of TWAIL, I will now set out how it is put to use within TWAIL scholarship. With that said, we can identify at least three dimensions to this. Firstly, TWAILers use history to engage in critical discourse about international law and international legal institutions. Secondly, the past is engaged with on expressly presentist terms, which shapes the kind of *history* produced. And thirdly, the past and history are used in a normative, future-looking manner. I will now outline each in turn.

As noted, common to TWAIL work is a historical sensibility through which international law is understood, analysed, and critiqued.[81] Imperial and colonial histories, in particular, are used to explore the internal biases and hypocrisies of contemporary international law. And by reclaiming the imperial context from international law's histories, we are provided with an understanding that contrasts sharply with the progressive, utopian terms in which it is typically presented. This historical perspective provides the basis for an external critique,[82] which "point[s] toward the ideological and political bias of supposedly neutral

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[78] Robert J.C. Young, 'Postcolonial Remains' (2012) 43(1) New Literary History 19, 22.
[79] ibid.
[80] Young has, for example, argued the incorporation of all human history into a linear chronology is the *West's* greatest myth: Robert J.C. Young, *White Mythologies: Writing History and the West* (2nd edn, Routledge 1990) 3 & 34. Similarly, Chakrabarty has argued that incorporating all human history into a Eurocentric Spatio-temporal framework universalises a progressive understanding of time and history: Dipesh Chakrabarty, 'Postcoloniality and the Artifice of History: Who Speaks for "Indian" Pasts?' (1992) 37 Representations 1. It is thus the "seeming inevitability of historical progress" that postcolonial scholars seek to challenge: Iain Chambers, 'History After Humanism: Responding to Postcolonialism' (1999) 2(1) Postcolonial Studies 37, 38.
[81] Gathii (n 3) 34; and Mickelson (n 21) 397-8 & 406.
[82] Here drawing on the distinction between "internal" and "external" methods or critiques of law. Schwartz defines "internal" methods as those approaches that reflect the viewpoint of a participant in a legal system, where law is appraised using internally established modes and methods of legal rationality. External methods, in contrast, depart from received professional opinion, or social or institutional restraints, and draw on

legal rules."[83] Thus, foundational concepts and forms of international law such as sovereignty,[84] decolonisation,[85] human rights,[86] and customary international law[87] have been reframed and critiqued through this colonial lens. In this way, history provides TWAILers with a tool to be used in their analyses of international law and international institutions[88].

Relatedly, using history to develop a critical discourse about contemporary international law gives these engagements a distinctly presentist edge.[89] History is used to gain insight into the 'postcolonial contemporary'. And in doing so, TWAIL work has generated numerous insights about the functions and dysfunctions of contemporary international law and international institutions. For example, this perspective has identified the similarities in the rationales that facilitated imperial projects such as colonialism and the disciplinary logics of contemporary International law.[90] The history and development of the International legal system is thus viewed as being marked more by continuity with the colonial context than by rupture from it.[91] In this, we see how TWAILer's reflections on the past have generated insights and theories about the current operation of the international legal order and the substance of International law itself.[92] In this way, and despite any charges of anachronism that might be levelled,[93] the very utility of the past, history, and historiography lies in their ability to gain perspective on the contemporary.

Regarding the normative and future-looking engagement with the past by TWAILers, we should, as a preliminary point, note that this is not necessarily different to any other such engagement with the past by international law scholars. Indeed, any such call to history

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conceptual and theoretical content from "extra-legal disciplines". See Richard L. Schwartz, 'Internal and External Method in the Study of law' (1992) 11(3) Law and Philosophy 179, 179-180.

[83] Andreas L. Paulus, 'International Law After Postmodernism: Towards Renewal or Decline of International Law' (2001) 14(4) Leiden Journal of International Law 727, 731-2.

[84] Anghie (n 7).

[85] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011).

[86] Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002).

[87] B.S. Chimni, 'Customary International Law: A Third World Perspective' (2018) 112(1) AJIL 1.

[88] Gathii (n 23) 35.

[89] On the presentist orientation of TWAIL and, in particular, the scholarship of Anghie, see: Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' (2012) IILJ Working Paper 2012/2, 11-16 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2090434> accessed 2 December 2021.

[90] Anghie (n 6) 163-4.

[91] On this theme see, for example, Pahuja who has rejected the break with the imperial past that decolonisation was supposed to have brought about: Pahuja (n 85). Okafor is similarly sceptical of any such claims of "newness" as it relates to the operation of international law and international institutions: Okafor (n 41).

[92] George Rodrigo Bandeira Galindo, 'Force Field: On History and Theory of International Law' (2012) 20 Rechtsgeschichte - Legal History 86, 94.

[93] Anne Orford, 'International Law and the Limits of History' in W. Werner, A. Galán, and M. De Hoon (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (CUP 2015) 304.

necessarily has a normative edge. However, what is idiosyncratic is how openly normative it is; that history is looked to precisely to help divine future directions for international law. Mutua, for example, has noted TWAIL as concerned with presenting an alternative "legal edifice" for international governance and using these insights to ameliorate the underdevelopment of the *Third World*.[94] Similarly, Gathii notes a commitment to reforming and remaking international law as one of the dominant themes of TWAIL work[95], with this vision imagined from the vantage point of the *Third World*.[96] And whilst TWAILers might differ in terms of whether they adopt a predominantly *reformative* or *radical* approach, they are nevertheless united as a "historically located intellectual and political movement" that engages a historical sensibility to galvanise a movement seeking a "new compact of international law."[97]

The historiographical project of TWAIL is thus not to try and edge towards a utopian ideal of objective, value-free history. Indeed, as Kinealy has noted, this is an ideal that violates itself.[98] Rather, TWAILian historiography consists of an attempt to reinscribe a value-laden reappraisal of the history of international law. In this way, it embraces what has been characterised as history in its *anarchic*, rather than *archaic*, mode.[99]

It is this TWAILian sensibility that will animate the project contained in this thesis in both general and more specific ways. In terms of the more general influences, the TWAILian use of history as a critical strategy to unsettle contemporary disciplinary understandings and a scepticism towards established narratives and received historical wisdom is present throughout. As is a more general commitment to using this re-reading of ICL's past to imagine new histories. Chapter 5 will bear the influence of TWAIL scholarship more directly when I use recent writings on ICL's silencing of race to reflect on the *We Charge Genocide* episode. In addition to drawing on TWAIL scholarship throughout, Chapters 5 and 8 also bear the influence of this body of work insofar as they explore engagements with particular international legal norms not typically caught by the familiar institutional concerns of

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[94] Mutua (n 10). Okafor has similarly identified a "shared ethical commitment" amongst TWAILers to "expose, reform, or even retrench" the features of the international legal system that maintain and perpetuate the marginalisation of the Third World: Okafor (49) 171.
[95] Gathii (n 23).
[96] Gathii (n 42).
[97] Mutua (n 10) 38. See also Chimni describing TWAIL as an "attempt to understand the history, structure, and process of international law from the perspective of third world states": B.S. Chimni, 'The Past, Present, and Future of International Law: A Critical Third World Approach' (2007) 8(2) Melbourne Journal of International Law 499.
[98] As Kinealy argues: "Fundamentally, the concept of a value-free history, whilst noble in its intentions, is flawed in its execution. In striving for objectivity, that very purpose itself violates the concept, as the quest reflects the writer's own value-system and is set in the context within which the historian is writing." See: Christine Kinealy, *A Death-Dealing Famine: The Great Hunger in Ireland* (Pluto Press 1997) 2.
[99] Russell Sandberg, 'Why Past is the Future' (*SLSA Blog*, Undated 2021) <http://slsablog.co.uk/blog/blog-posts/why-the-past-is-the-future/> accessed 21 September 2021.

international law and ICL scholars. In this regard, I draw on TWAIL scholarship both for its methodological influence, as well as the substantive critiques of international law and ICL that have emerged from it.

3.6 What Gets Left on the Cutting Room Floor: 'Silence' and the Making of History

If history can be appropriately characterised as a type of narration,[100] this opens up the possibility that a particular account might be narrated otherwise. This possibility has animated the works of postmodern, postcolonial, and various other 'critical' approaches to history, with the concern for *unreliable narration* a recurrent theme and source of angst. However, if narration also entails the vocalisation of a particular voice in preference to others, the task of the 'critical' scholar is to find ways of amplifying those voices that have been drowned out. With these possibilities and limits in mind, our attention turns to the terms of narration themselves. Why do certain narratives emerge over others, and what makes them possible to begin with?

These sorts of questions have focused on historiographers concerned with the narrative dimensions of history, such as Hayden White, who have used an understanding of narrative and narrative structures to explore the nature of historical knowledge. For White, if a given historical account contains data, concepts for explaining that data, a narrative structure that shapes its presentation, and other structural content,[101] gaps necessarily emerge given that the end product represents only one of many possible accounts that might have been produced.

A similarly porous account of the production of history was developed by anthropologist turned historiographer Michel-Rolph Trouillot, which I will now focus on. In *Silencing the Past: Power and the Production of History* (hereafter *Silencing*),[102] Trouillot conceptualised history as comprised of 'silences' which inhere at each stage of the production process. Although accepting the narrative dimensions of history, Trouillot broadens his focus to capture the various stages in the production process at which 'silences' shape the narrative that is eventually produced. On Trouillot's reading, histories necessarily contain gaps, omissions, and silences. And it is this sense of porousness that will guide my understanding

[100] As discussed in Chapter 2.
[101] Hayden White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe* (Johns Hopkins University 1973) 30.
[102] Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History* (20th Anniversary Edition, Penguin Random House 2015).

of history in this thesis. To this end, in this section, I will briefly outline Trouillot's work, which will help us understand later chapters of this thesis.

3.6.1 'Silence' and the Processes of Historical Production

When it was published in 1995, the reception of *Silencing* was immediately critical. And whilst ostensibly concerned with the narrower topic of the historiography of the Haitian Revolution (1791-1804), it was initially critiqued as "excruciatingly patronising and self-consciously didactic",[103] as well as a "rambling, intensely personal discussion of a number of seemingly unconnected themes."[104] At the same time, others argued it suffered from a lack of serious engagement with the existing scholarship on the topic.[105] The responses to it eventually warmed, however, with later reviews more positively engaging with the ideas it contained.[106] As evidence of this, it has garnered a significant volume of citations across a range of disciplines, which were identified as having reached 1,691 in 2013,[107] which have increased to 6,282 as of writing.[108]

Although Trouillot's work is often reduced to the argument that "any historical narrative is a particular bundle of silences" and that "[power] precedes the narrative proper, contributes to its creation and to its interpretation",[109] equally important are Trouillot's thoughts on the *processual* nature of history. Trouillot thus argues that given: "history reveals itself only through the production of specific narratives. What matters most are the process and conditions of such narratives."[110] For Trouillot, by focusing on *process* rather than the nature of history alone, we can discover how the "differential exercise of power…makes some narratives possible and silences others", as well as where and how *power* interjects.[111]

Grounded in Foucault's charge that the question of 'how' power operates must be answered before identifying 'who' exercises it,[112] Trouillot argues that "[p]ower does not

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[103] David Nicholls, 'Review: *Silencing the Past* by Michel-Rolph Trouillot' (1996) 28(3) Journal of Latin American Studies 724.
[104] Franklin W. Knight, 'Review: *Silencing the Past* by Michel-Rolph Trouillot' (1997) 77(3) Hispanic American Historical Review 483-4.
[105] Raymond Smith, 'Review: *Silencing the Past* by Michel-Rolph Trouillot' (1997) 71(1/2) New West Indian Guide 118.
[106] Alyssa Goldstein Sepinwall, 'Still Unthinkable? The Haitian Revolution and the Reception of Michel-Rolph Trouillot's Silencing the Past' (2013) 19(2) The Journal of Haitian Studies 75, 77-8.
[107] ibid 79.
[108] *Google Scholar* rankings search conducted on 15 April 2021.
[109] Trouillot (n 102) 27 & 29.
[110] ibid 25.
[111] Ibid 25.
[112] Michel Foucault, 'On Power' in Lawrence D. Kritzman (ed), *Michel Foucault: Politics, Philosophy, Culture—Interviews and Other Writings* (Routledge 1988) 103.

enter the story once and for all, but at different times and from different angles. It precedes the narrative proper, contributes to its creation and to its interpretation." Building on this, he thus argues that 'power' and the silences it creates, thus shape the production of 'history' at four crucial moments: "the moment of fact creation (the making of sources); the moment of fact assembly (the making of archives); the moment of fact retrieval (the making of narratives); and the moment of retrospective significance (the making of history in the final instance)."[113] Narrative creation is thus just one stage in the process of production.

Trouillot draws on the analogy of a sports commentator to illustrate the limits of historical narration. For Trouillot, even if we could postulate the possibility of a fully objective commentator who could note "all that was mentioned and collected", any account thus produced would exhibit "unequal frequency of retrieval, unequal (factual) weight)" with some "strings of facts...recalled with more empirical richness than others".[114] Ultimately, only occurrences strictly relevant to the game would be recorded, with certain witnesses, participants, and events considered of marginal relevance.[115]

Silences are thus both inherent and essential to narration. And if every occurrence, event, or material fact was included, the coherence of the account would suffer. Referencing Hayden White, Trouillot reminds us that specific narrative tropes and structures help to shape these accounts and can be "emplotted" to tell them according to particular plot structures.[116] This does not necessarily reduce history writing to a fictive endeavour. Instead, it acknowledges the possibility that an assemblage of facts may be arranged in various configurations to convey particular narratives.[117] In doing so, specific ways of telling the story are silenced and closed off, with *power* and *silence* existing "as part of the production itself and as part of its result."[118] Trouillot's processual understanding thus warns us to be "suspicious of the ways in which this dominant discourse has produced a single truth about history."[119]

In terms of where we can situate Trouillot's work within the broader corpus of critical historiography, he seems to fall within postmodern, postcolonial, and positivist approaches. His concern for *power* appears to draw him closer to Foucault, although, at the same time, he seems to have much in common with the avowedly postmodern work of Hayden White

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[113] Trouillot (n 102) 26.
[114] Michel-Rolph Trouillot, 'Silencing the Past: Layers of Meaning in the Haitian Revolution' in Gerald Sider and Gavin Smith (eds), *Between History and Histories: The Making of Silences and Commemorations* (University of Toronto Press 2016) 43.
[115] ibid 44; and Trouillot (n 102) 50.
[116] Hayden White, 'The Historical Text as Literary Artefact' in *Tropics of Discourse: Essays in Cultural Criticism* (Johns Hopkins University Press 1978) 83-4.
[117] E.H.G Carr, *What is History?* (1st edn, Penguin Books, 1961) 11.
[118] Trouillot (n 114) 38.
[119] ibid.

and Keith Jenkins. Additionally, his awareness of the materiality of history prevents his complete detachment from positivist and empirical approaches. Trouillot's work also seems to find comfort in the works of Michel de Certeau, who understood the labour of history as an attempt to fill the void between the *dead past* and the *living present*. For de Certeau, history was only possible because the past was dead, which allowed for its exhumation and autopsy.[120] The mainstream view thus laboured *against death* insofar as it sought to resurrect that past.[121] As a movement between the absence and presence of the past,[122] Trouillot similarly views it as lingering beyond its *death*, noting: "[the] chronological boundaries of the production process....both starting earlier and going on later than most theorists admit."[123] Trouillot also pointed out that these discussions of the dead past also took place beyond the professional guild of historians, particularly in the public sphere.[124]

Trouillot thus diverges from the empiricist view where historians "reveal the past, to discover or, at least, approximate the truth", which worked to hide "tropes of power behind a naive epistemology".[125] However, Trouillot does not necessarily take this to an epistemic extreme given his refusal to deny the "autonomy of the sociohistorical process" and the materiality of the past through history.[126] Similarly, the possibilities of history are also ultimately constrained by socially imposed constraints on the types of truth claims it can make, which must be renewed by the "immediate producer" and the "audience".[127] In this way, the need for credibility—particularly amongst the social body to whom it is directed—determines whether a narrative is accepted as history or fiction[128].

3.6.2 'Silence' and the History of International Criminal Law

Although having little impact on legal scholarship generally, the spirit of Trouillot's account has nevertheless been picked up by certain critical international law scholars. In writing about the formation of customary international law, Schweiger, for example, has written about the silences that shape legal knowledge production—although not drawing on Trouillot to do so.[129] Beyond the *silences* that inhere in the production of international law

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[120] Michel de Certeau, *The Writing of History* (Columbia University Press 1985) 5 & 6.
[121] ibid.
[122] ibid.
[123] Trouillot (n 102) 26.
[124] ibid 22.
[125] ibid 5.
[126] ibid 5-6.
[127] ibid 6.
[128] ibid 8.
[129] Elisabeth Schweiger, 'Listen Closely: What Silence Can Tell us About Legal Knowledge Production' (2018) 6(3) London Review of International Law 391.

itself, other work has focused on how certain types of 'silence' shape our understanding of international law, often through the lens of narrative. If narratives are a way of "organising, coping with, even acting on the world" that represent experience and perspective, gaps and silences within these are particularly concerning.[130]

This concern has manifested in various attempts at amplification. Some of these have addressed specific gaps within international law scholarship—such as the Cold War,[131] revolutions,[132] and other events.[133] Other works have sought to explore the perspectival silences created by the dominant approaches to International law. Indeed, TWAIL itself is a movement born of this concern. TWAIL grounds itself as a critique that looks to amplify the *Third World* and Global South voices that mainstream approaches have marginalised. Feminist work has similarly attempted to draw attention to a specifically gendered marginalisation of voices, perspectives, and views on international law.[134]

Within ICL scholarship, several blind spots have similarly been identified. Heller and Simpson have addressed this theme directly in their concern for unrooting the "hidden histories" of war crimes trials.[135] Other attempts have tended to focus on the conventionally identified origins of the field, with our focus on the Nuremberg and Tokyo Tribunals drawing our gaze away from the "longer historical chain" of the development of ICL.[136] Others still have illuminated the oft-overlooked contributions of specific participants in the Nuremberg Trial,[137] as well as a tendency to focus on Nuremberg to the detriment of the Tokyo[138] and Asia-Pacific settings more generally.[139] The post-War domestic trials have also been

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[130] Kim L. Schepple, 'Foreword: Telling Stories' (1989) 87(8) Michigan Law Review 2073, 2075.
[131] Matthew Craven, Sundhya Pahuja, and Gerry Simpson (eds), *International Law and the Cold War* (CUP 2019).
[132] Kathryn Greenman, Anne Orford, Anna Saunders, and Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (CUP 2021).
[133] Luis Eslava, Michael Fakhri, and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (CUP 2017).
[134] See, for example: Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000); and Catherine O'Rourke, 'Feminist Strategy in International Law: Understanding Its Legal, Normative and Political Dimensions' (2017) 28(4) EJIL 1019.
[135] Kevin Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (OUP 2013).
[136] Ziv Bohrer, 'The (Failed) Attempt to Try the Kaiser and the Long (Forgotten) History of International Criminal Law' (2020) 53(1) Israel Law Review 159.
[137] David M. Crowe (ed), *Stalin's Soviet Justice: 'Show' Trials, War Crimes Trials, and Nuremberg* (Bloomsbury 2020); and Francine Hirsch, *Soviet Judgment at Nuremberg: A New History of the International Military Tribunal After World War II* (OUP 2020).
[138] Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (Routledge 2008); Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP, 2008); Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard University Press 2008); Yuki Tanaka, Tim McCormack, and Gerry Simpson (eds), *Beyond Victor's Justice?: The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff 2011); Yuma Totani and David Cohen, *The Tokyo War Crimes Tribunal: Law, History, and Jurisprudence* (CUP 2018); and Kerstin von Lingen (ed), *Transcultural Justice at Tokyo: The Allied Struggle for Justice, 1946-1948* (Brill 2018).
[139] Kirsten Sellars (ed), *Trials for International Crimes in Asia (*CUP 2016); Kerstin von Lingen (ed), *War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945-1956: Justice in Time of Turmoil* (Palgrave Macmillan 2016); and Sandra Wilson, Robert Cribb, Beatrice Trefalt, and Dean Aszkielowicz,

highlighted to counter-balance the Nuremberg focus[140]. Similarly, we have also seen concern for the dearth of gendered perspectives within Nuremberg scholarship,[141] and the forms of criminality pursued there.[142] Haslam has also attempted to look beyond this familiar historiographical territory by extending our gaze to the 19th-century slave trading trials.[143] Bohrer has attempted to amplify the silences of what he identifies as a "millennium" of *forgotten history*.[144] Although given Bohrer's tendency to simply seek out greater detail on and to convey the significance of disciplinary plot-points that are by now broadly familiar to us, one can't help but wonder the extent to which, if at all, this effort explores historical *terra incognita*.

The approach set out here and which will be adopted in the remaining chapters of this thesis is inspired by a number of recent works of critical ICL scholarship which have, in their own ways, pursued a broadly similar strategy of counter-storytelling. For example, a sensitivity towards the *silences* of ICL's (possible) histories is at the heart of Tallgren and Skouteris' attempt to reclaim the "exclusions" of what is typically left out in the dominant historical rationalisations of the field, with a particular concern for writing more "inclusive" histories.[145] This strategy has been adopted by a number of scholars working on various 'critical' ICL projects. So, for example, Nesiah has mounted a critical re-reading of the history of the concept of *humanity* with reference to the evolution of *crimes against humanity* as a legal category.[146] As part of this genealogical (re)tracing, Nesiah inhabits the relatively under-scrutinised historiographical territory of the Atlantic slave trade and its abolition, and thus reclaims moments of 'erasure' created by the dominant understandings.

Gevers attempts a similar project, and in doing so draws on Trouillot's idea of *silences* in much the same way I do in this thesis.[147] Gevers' concern for *silence* is as much material

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Japanese War Criminals: The Politics of Justice after the Second World War (Columbia University Press 2017).

[140] Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (CUP 2011).

[141] See, for example: Immi Tallgren, 'Absent or Invisible? 'Women' Intellectuals at the Dawn of the Discipline' in Frédéric Mégret and Immi Tallgren (eds), *The Dawn of a Discipline: International Criminal Justice and its Early Exponents* (CUP 2020). See also: Isabelle Delpia, 'Women and International (Criminal) Law' (2014) 39 Clio: Women, Gender, History 179.

[142] Grietje Baars, *The Corporation, Law and Capitalism* (Brill 2019) ch 3.

[143] Emily Haslam, 'Silences in International Criminal Legal Histories and the Construction of the Victim Subject of International Criminal Law: The Nineteenth Century Slave Trading Trial of Joseph Peters' in Christine Schwöbel (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2014).

[144] Ziv Bohrer, 'International Criminal Law's Millennium of Forgotten History' (2016) 34(2) Law and History Review 393; and Bohrer (n 136).

[145] Immi Tallgren and Thomas Skouteris, 'Editor's Introduction' in Immi Tallgren and Thomas Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (OUP 2019) 6.

[146] Vasuki Nesiah, 'Crimes Against Humanity: Racialized Subjects and Deracialized Histories' in Immi Tallgren and Thomas Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (OUP 2019).

[147] Christopher Gevers, 'The "Africa Blue Books" at Versailles: The First World War, Narrative, and Unthinkable Histories of International Criminal Law' in Immi Tallgren and Thomas Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (OUP 2019).

as it is historiographical. And in addition to highlighting the historiographical *silencing* of the episode he is concerned with within contemporary ICL scholarship. Gevers also speaks to the *silencing* of particular histories within the historical context with which he is concerned as it occurred. What these works have attempted to achieve—albeit it from different methodological and historiographical starting points—is to identify and explore the possibility of other histories of ICL. Simpson has characterised this as the pursuit of the "shadow history" of the field.[148] This is the history of ICL told through the historical events and occurrences that failed to be transformed into the disciplinary precedents that typically draw our gaze.

It appears, then, that I am not alone in my concern for the *silences* contained within ICL's histories—something that seems an inevitability given that narratives always have "gaps, silences, ignorance".[149] Gaps and silences inhere in the act of *narration*,[150] which necessarily entails the intervention of a *narrator*.[151] Following Trouillot, however, my concern lies in not just the fact of forgetting but why such silencing occurs at each stage of production. As Trouillot notes:

> "Silences are inherent in history because any single event, however defined, enters history with some of its constituting parts missing. Something is always left out, while another one is recorded. There is no perfect closure of any event, however one chooses to define the boundaries of that event. Thus whatever becomes fact does so with its own inborn absences, specific to its production. In other words, the very mechanisms that make any historical recording possible also ensure that historical facts are not created equal. They reflect differential control of the means of historical production at the very first engraving that transforms an event into a fact."[152]

An awareness of these silences and where they occur will shape my exploration of the historical sensibilities of ICL scholars in the coming chapters. And, in particular, with the periodised schema set out in the preceding chapter in mind, I will focus closely on how it shapes and frames our attempts to construct the history of ICL through our scholarly discourses. If, as will be argued, this schema prefigures what gets recorded and how it is

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[148] Gerry Simpson, 'Unprecedents' in in Immi Tallgren and Thomas Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (OUP 2019).
[149] Maria Aristodemou, *Law and Literature: Journeys from Here to Eternity* (OUP 2000) 2.
[150] Joseph R. Slaughter, 'Life, Story, Violence: What Narrative Doesn't Say' (2017) 8(3) Humanity 467, 473-4.
[151] Matthew Windsor, 'Narrative Kill or Capture: Unreliable Narration in International Law' (2015) 28(4) LJIL 743.
[152] Trouillot (n 114).

presented, my interest also lies in what falls outside this. In this sense, my concern for periodisation lies in how it makes the field's history *thinkable*—to borrow from Trouillot.

3.7 Reading Between the Lines: A Contrapuntal Approach

If, as per Trouillot, the act of narration necessarily entails acts of inclusion and exclusion, we open up the possibility that these accounts might be re-articulated. And further, if, following Cover, an exploration of these narratives allows us to identify the normative worlds in which legal rules and institutions interact and produce legal meaning, re-articulating these narratives also presents us with the opportunity to re-conceptualise this normative space.[153] My concern in this thesis thus lies not only in acts of amplification but also in the re-articulation of the normative terrain we inhabit and construct through ICL's histories. This re-articulation uses a counter-narrative approach by reading these *silenced* stories and historical occurrences against the dominant disciplinary narrative.[154]

In Parts II and III of this thesis, I will use a counter-narrative approach to challenge the dominant historical narratives present within ICL scholarship. This 'counter-history' or 'counter-narrative' approach is not to be confused with that of *counterfactual* history, which is an "explicit or implicit past-tense, hypothetical, conditional conjecture pursued when the antecedent condition is known to be contrary to fact."[155] In this historiographical mode, alternative versions of the past are generated by altering some aspect of it, leading to different outcomes from those understood as having occurred.[156] This also means that counter-narratives do not necessarily suffer from the same critiques of ahistoricism as counterfactuals do, as they typically meet the established methodological demands of historical research.[157] Although counterfactual histories have been fruitfully put to use in engaging with the limits and possibilities of international law,[158] my focus is on putting to

[153] Robert Cover, 'The Supreme Court 1982 Term—Foreword: Nomos and Narrative' (1983) 97(1) Harvard Law Review 4.
[154] Aristodemou (n 149)140.
[155] Catherine Gallagher, *Telling it Like it Wasn't: The Counterfactual imagination in History and Fiction* (University of Chicago Press 2018) 2.
[156] Richard J. Evans, *Altered Pasts: Counterfactuals in History* (2014) xi; and Hilary P. Dannenberg, 'Counterfactual History' in David Herman, Manfred Jahn, and Marie-Laure Ryan (eds), *Routledge Encyclopaedia of Narrative Theory* (Routledge 2010).
[157] Mads Mordhorst, 'From Counterfactual History to Counternarrative History' (2008) 3(1) Management & Organizational History 5, 18.
[158] See for example: Ingo Venzke, 'What If? Counterfactual (Hi)Stories of International Law' (2018) 8 Asian Journal of International Law 403; and Mohsen Al-Attar, 'Subverting Eurocentric Epistemology: The Value of Nonsense when Designing Counterfactuals' in Ingo Venzke & Kevin Heller (eds) *Contingency in International Law: On the Possibility of Different Legal Histories* (OUP 2021).

use past occurrences that did occur but have been overlooked and denied historical significance within mainstream accounts.

Counter-narratives are stories told which "offer resistance, either implicitly or explicitly, to dominant cultural narratives."[159] Their critical power lies in an ability to "splinter widely accepted truths" where a given dominant narrative makes "grand claims about what is to be taken as truth."[160] They are relational in nature and derive much of their shape and power from their position in relation to what they are countering.[161] This gives them a shifting, dynamic quality.[162]

For Golsan, a counter-history approach like this entails exploring the crossroads where *established* history and "competing or different versions of the past, or even different pasts, encounter one another, often with explosive and even destructive consequences."[163] This also has similarities to Foucault's "counter-memory", which captures the remaining or resistant memories that withstand officially sanctioned accounts of historical continuity.[164] By unearthing and amplifying these, a different understanding of time could be generated, resisting the positivist, teleological models of history.[165] It has been understood and deployed as a "practice of memory formation that is social and political, one that runs counter to the official histories of governments, mainstream mass media, and the society of the spectacle.[166]

To recover voices and perspectives typically marginalised within dominant historiographies, counter-histories and counter-narratives provide a way of making apparent the conditions that sustain these conditions of dominance and suppression.[167] Counter-narrative histories thus "create new spaces and possibilities for the theorising of a different form of knowledge."[168] Critical Race Theory (CRT) scholars have used a similar

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[159] Molly Andrews, 'Opening to the Original Contributions: Counter-narratives and the power to oppose' in Michael Bamberg and Molly Andrews (eds), *Considering Counter-Narratives: Narrating, Resisting, Making Sense* (John Benhamins Publishing Company 2004) 1.
[160] Kagendo Mutua, 'Counternarrative' in Lisa M. Given (ed), *The SAGE Encyclopaedia of Qualitative Research Methods* (SAGE 2008).
[161] Marianne Wolff Lundholt, Cindie Aaen Maagaard, and Ankie Piekut, 'Counternarratives' in Joseph Falkheimer, kirk Hallahan, Julian J.C. Raupp, and Benita Steyn (eds), *The International Encyclopaedia of Strategic Communication* (Wiley & Sons 2018) 1-2.
[162] Andrews (n 159) 2.
[163] Richard J Golsan, *Vichy's Afterlife: History and Counterhistory in Postwar France* (University of Nebraska Press 2000) 18.
[164] See: Michel Foucault, *Language, Counter-Memory, Practice: Selected Essays and interviews* (Cornell University Press, 1977).
[165] Michel Foucault, 'Nietzsche, Genealogy, History' in J.D. Faubion (ed), *Aesthetics, Method, Epistemology, Volume 2* (Penguin 1998) 385.
[166] TJ Demos, 'Sites of collective counter-memory' (2012) (*Animate Projects: Sites of Collective Memory* 2012) <http://animateprojectsarchive.org/writing/essays/tj_demos> accessed 2 December 2021. See also: Reiko Tachibana, *Narrative as Counter-Memory: A Half-Century of Postwar Writing in Germany and Japan* (SUNY Press 1998).
[167] Mutua (n 160).
[168] ibid.

"counter-storytelling" approach, which is a "method of telling the stories of those people whose experiences are not often told."[169] This allowed the (re)narrator to expose, analyse, and challenge the dominant narrative, which contained the "majoritarian stories of racial privilege."[170] By amplifying these marginalised voices and stories, we can "strengthen the traditions of social, political, and cultural survival and resistance."[171]

Delgado popularised this approach as one of the tools available to CRT scholars, with stories useful as they:

> "[C]reate their own bonds represent cohesion, shared understandings, and meanings. The cohesiveness that stories bring is part of the strength of the outgroup. An outgroup creates its own stories, which circulate within the group as a kind of counter-reality."[172]

Counter-storytelling thus has a dual purpose: to firstly expose the premises, assumptions, and hegemonizing tendencies of the dominant account, and secondly to amplify those voices and experiences that have been marginalised. In this way, it has destructive and constructive functions.[173]

Counter-storytelling has been used in international law scholarship across various critical projects. For example, Mutua's characterisation of the international legal system as an "illegitimate...predatory system that legitimises, reproduces and sustains the plunder and subordination of the third world by the West" presents a markedly different narrative of the evolution of international law than ordinarily found within the *mainstream*.[174] Similarly, Beard re-works the conventional narrative regarding the supposed origin of the international legal order by contrasting the Peace of Westphalia in 1648 with the discovery of the *New World*—here, the *sovereign order* brought about by Westphalia is juxtaposed with the disorder brought about by colonialism.[175] A similar approach has also been deployed in Kumar's re-working of the narrative of the Grenada Revolution (1979-1983) and the U.S. Invasion of Grenada (1983) against the backdrop of the Cold War.[176] Although a small

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[169] Daniel G. Solórzano and Tara J. Yosso, 'Critical Race Methodology: Counter-Storytelling as an Analytical Framework for Education Research' (2000) 8(1) Qualitative Inquiry 23, 32.
[170] ibid.
[171] ibid.
[172] Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 87(8) Michigan Law Review 2411, 2412.
[173] ibid 2415.
[174] Mutua (n 10) 31; and Mutua,'Savages, Victims, and Saviours: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law Journal 201.
[175] Jennifer Beard, 'The International Law in Force: Anachronistic Ethics and Divine Violence' in Fleur Johns, Richard Joyce, and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge 2011).
[176] Vidya Kumar, 'On Scripts and Sensibility: Cold War International Law and Revolutionary Caribbean Subjects' (2020) 21(8) German Law Journal 1541.

sample, these examples show how counter-narratives have been used to re-narrative dominant accounts of international law and its sub-fields.

Understood as ways of "organising, coping with, even acting on the world", stories and narratives can be used to represent experiences and introduce new points of view.[177] They are thus not simply an attempt to reject whatever account is identified as dominant. Instead, it is something closer to Said's "contrapuntal" approach, which reads the counter-narrative against the dominant one as a way of exposing its limits.[178] Said drew from music theory to characterise the distinct but intertwined harmonies in a musical composition. Although often hidden or silenced by the dominant harmony drawing our focus, they can be retrieved and amplified to change the overall sound of the piece. Reading history *contrapuntally* is thus a way of identifying and reclaiming the contexts, histories, and narratives hidden from view whilst also keeping in mind their relationship to the dominant account. First used in the essay "Reflections on Exile"[179] and later expanded in *Culture and Imperialism*, Said's thinking on contrapuntal readings responded to criticisms of his earlier work that identified a tendency to view the relationship between *coloniser* and *colonised* in binary terms.[180]

An example of this contrapuntal approach in action is Said's reading of Austen's *Mansfield Park* (1814), which is set in the imperial metropole of England and charts the Bertram family who had been enriched through sugar plantations in Antigua. For Said, there is a curious dynamic present in the text, as although the colonial setting is essential to the story, it is conspicuously absent from it. By re-reading this narrative to include the colonial setting, new possibilities in the text are opened up. In this case, it means understanding: "what is involved when an author shows…that a colonial sugar plantation is seen as important to the process of maintaining a particular style of life in England."[181] The intention was not to overwrite one narrative with another, instead to signal the *wholeness* of the text, which contained overlapping, enmeshed, and mutually constituting narratives.

Understanding *contrapuntal* reading also helps us situate the kind of critique mounted by TWAIL scholars, particularly in their use of history. As we have seen, TWAIL scholars often use a critical re-reading of international law's history as part of a critique of the contemporary international legal order. In doing so, these engagements with history take on a *contrapuntal* edge. So, for example, Anghie re-historicised the concept of sovereignty

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[177] Schepple (n 130).
[178] Edward Said, *Culture and Imperialism* (Random House 1993).
[179] Edward Said, 'Reflections on Exile' in Edward Said (ed), *Reflections on Exile and Other Essays* (Granta 2002).
[180] For example, the critiques against essentialism found in the works of Bhabha: Rahula Rao, 'Postcolonialism' in Michael Freeden, Marc Stears, Lyman Tower Sargent (eds), *The Oxford Handbook of Political Ideologies* (OUP 2013) 6.
[181] Said (n 178) 66 & 78.

by placing it within the context of colonialism and using the differences between the 'mainstream' and 'critical' accounts as a starting point for his critique.[182] And in this way, Anghie's account allows us to have a "simultaneous awareness both of the metropolitan history…and of these other histories against which (and together with which) the dominating discourse acts."[183]

Much like Said, then, TWAIL scholars read against the grain of these dominant accounts of international law to uncover the "submerged but crucial presence of empire in canonical texts."[184] Similarly, in much the same way that Said illustrated the "complementarity and interdependence instead of isolated, venerated, or formalised experience that excludes and forbids the hybridising intrusions of human history"[185], the history of international law presented within much TWAIL scholarship is not simply a tale of co-option. Instead, international law contains within itself the hegemonizing tendencies exploited in the name of imperial ventures.[186]

As Said has written: "[t]he power to narrate, or to block other narratives from forming and emerging, is very important to culture and imperialism, and constitutes one of the main connections between them."[187] If the act of narration is an exercise in power, then so too is *counter-narrating* a way of resisting it. In this regard, the counter-narrative, contrapuntal approach I adopt in Parts II and III provide a way of identifying and resisting the dominant accounts of ICL whilst also exploring what other histories are possible. For example, when dealing with how Nuremberg figures within our disciplinary discourses, I use the story of the *We Charge Genocide* to reflect on not only the limits of these narratives but also what these *silences* can tell us about the contemporary limits of international crime. Similarly, when I outline how the Cold War narrative of silence and stagnation produces a specific understanding of the evolution of ICL and ICL institutions, I use the example of social movements during the Vietnam War to show how ICL norms lived a life outside the institutional settings we typically focus on.

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[182] Anghie (n 7).
[183] Said (n 178) 59-60.
[184] Bill Ashcroft and Pal Ahluwalia, *Edward Said: The Paradox of Identity* (Routledge 1999) 93.
[185] Edward Said, 'Jane Austen and Empire' in Moustafa Bayoumi and Andrew Rubin (eds), *The Edward Said Reader* (Vintage 2000) 367.
[186] Pahuja refers to this as the "imperial" and "counter-imperial" qualities of international law. See: Pahuja (n 85) 1.
[187] Said (n 178) xiii.

3.8 Conclusion

TWAIL engages with history in, essentially, two registers: excavation and reconstruction. This captures the critical and imaginative modes through which TWAIL scholars approach international law, and which have allowed TWAILers to "excavate alternative international normative projects and movements".[188] It is this dual aim of excavation and imagination that animates the project undertaken in this thesis. I will accomplish this by attempting to uncover the hidden, suppressed, or lost disciplinary pasts that have been marginalised within and by the dominant accounts of the development of ICL. Parts II and III of this thesis show this influence directly, which attempt to identify and critique these accounts whilst also exploring other ways this history might be told.

In mounting this historiographical critique, I also draw on the counter-storytelling and counter-narrative techniques deployed across various critical scholarship bodies—including CRT, TWAIL, and other 'critical' international law work. This technique is sharpened by my understanding of history as comprised of *silences*—as drawn from Trouillot's work. To this end, Parts II and III of this thesis use this understanding and technique to unsettle the dominant historiographical tendencies present within ICL scholarship, as well as to explore new possibilities for how the history of ICL might be told.

[188] Eslava (n 29).

Part II

Chapter 4: Nuremberg and the Birth of a Discipline

4.1 Introduction

As identified in Chapter 4, the history of ICL tends to be divided into five distinct yet interdependent phases of development. The first is a pre-history phase that precedes the beginning of the field proper. As I will show, this covers a range of events and historical episodes that are given varying degrees of historical and precedential weight. The second phase marks the birth of ICL in substantive terms, as it was during this phase that the institutional forms the field is now familiar with emerged for the first time. The inaugural event in this phase is the trial and judgment of the International Military Tribunal at Nuremberg ('Nuremberg IMT' or 'Nuremberg' hereafter), which was followed by several closely linked developments up until the early 1950s that consolidated its legacy. [1]

Presented as such, Nuremberg marks "year zero" in the grand history of ICL,[2] as it was here, for the first time, that *individual* criminal responsibility under international law for international crimes was successfully imposed.[3] In the present chapter, I will explore the implications this understanding has for how the history of ICL is understood and presented. Firstly, by designating the origin of ICL proper as the trial and judgment of the IMT, this tends to render every disciplinary development occurring before it as either of limited relevance or a preparatory act. And secondly, this historiographical gesture allows Nuremberg to assume a symbolic role that far exceeds its immediate doctrinal and institutional importance.[4]

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[1] When I refer to the 'Nuremberg Trial', 'Nuremberg', or the 'Nuremberg IMT', I am referring to the International Military Tribunal, which was the first of the thirteen trials held at Nuremberg between 1945 and 1946. The first trial saw twenty-four high ranking Nazi leaders indicted under charges of: common plan or conspiracy, crimes against peace, war crimes, and crimes against humanity. The judicial panel was composed of judges appointed by the Allied powers, which eventually published a judgment resulting in convictions for eighteen defendants on at least one count (twelve of whom were sentenced to death and three of whom received life sentences) and three acquittals. See: *International Military Tribunal (Nuremberg), Judgment and Sentences* (1947) 41(1) AJIL 172. The Nuremberg IMT was established under the terms of the *Charter of the International Military Tribunal* ('Nuremberg Charter'), which was contained in an annex to the *Agreement for the Persecution and Punishment of the Major War Criminals of the European Axis* ('London Agreement'). See: *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")* (8 August 1945) 82 UNTC 279.

[2] Sergey Vasiliev, 'The Making of International Criminal Law' in Catherine Brolmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Law Making* (Edward Elgar 2016) 354.

[3] For O'Byrne and Sands, it thus marks a "landmark" in the history of public international law. See: Katherine O'Byrne and Philippe Sands, 'Trial Before the International Military Tribunal at Nuremberg (1945-46)' in Eirik Bjorge and Cameron Miles (eds), *Landmark Cases in Public International Law* (Hart Publishing 2017).

[4] Goldstone and Smith, for example, have argued that the IMT represented not just a doctrinal evolution, but a revolution in the way the "world community sought to address humanity's worst violators." See: Richard Goldstone and Adam M. Smith, *International Judicial Institutions: The Architecture of International Justice at Home and Abroad* (2nd edn, Routledge 2015) 48.

As evidence of this, the memory of Nuremberg is continually retrieved to legitimise a variety of actions under international law. And this is equally true of actions undertaken in the name of some vague notion of *international justice* which bear little resemblance to the IMT, as it is of those acts which most closely resemble its legal and institutional form.[5] In this regard, Nuremberg assumes the role not only of an *event* in the historical sense but as a *symbol* that is readily deployable within our writings on ICL.[6] Writing on the force of *events* within international legal histories, Pahuja has argued that the reduction of a historical process into *events* with this kind of exalted significance smooths over much of the detail—and thus potential points of rupture—that might otherwise be captured.[7] Whilst Chapter 5 that follows will focus on exploring one of these possible points of rupture, the present chapter is concerned with establishing how Nuremberg, as both an *event* and *symbol*, is historicised within ICL scholarship.

As Bernadetto Croce famously remarked: *where there is no narrative, there is no history*.[8] With this insight in mind, the present chapter constitutes an exploration of the disciplinary narratives that flow from Nuremberg as a historical *event*. In much the same way that international law scholars find themselves in the shadow of *Grotius* and *Westphalia*,[9] ICL scholars similarly labour under the shadow of *Nuremberg*. And if, as Kennedy has argued, an argument about international law is almost always an argument about history, my focus in the present chapter is thus on the historical sensibilities present within ICL scholarship.[10]

The present chapter will explore how this doctrinal point of origin has been transformed into a *symbol* for the field, particularly within ICL scholarship. To do so, I will first set out why Nuremberg tends to be placed as a central point of focus for our disciplinary histories. Following this, I will then provide a brief overview of some of the early scholarly responses

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[5] It has been asserted, for example, that humanitarian intervention as a legally justifiable act grew out of the Nuremberg principles as affirmed by the United Nations. See: Tove Rosen, 'The Influence of the Nuremberg Trial on International Criminal law' (*The Robert H. Jackson Center,*) <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> accessed 11 January 2022.
[6] Donald Bloxham, 'From the International Military Tribunal to the Subsequent Nuremberg Proceedings: The American Confrontation with Nazi Criminality Revisited' (2013) 98(4) history 567, 568-569.
[7] Sundhya Pahuja, 'Decolonisation and the Eventness of International Law' in Richard Joyce, and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge 2011).
[8] Bernadetto Croce quoted in Hayden White, 'The Question of Narrative in Contemporary Historical Theory' (1984) 23(1) History and Theory 1, 3.
[9] On the "Grotian tradition" see, for example: Hersch Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 British Yearbook of International Law 1; and John T. Parry, 'What is the Groatian Tradition in International Law?' (2013) 35(2) University of Pennsylvania Journal of International Law 299. On the spirit of Westphalia and its accompanying myths, see Stephane Beaulac, 'The Westphalian Model in Defining International Law: Challenging the Myth' (2004) 8 Australian Journal of Legal History 181. See also more generally references to the 'founding fathers' of international law: Martine Julia van Ittersum, 'Hugo Grotius: The Making of a Founding Father of International Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of Theory of International Law* (OUP 2016).
[10] David Kennedy, 'The Disciplines of International Law and Policy' (1999) 12(1) LJIL 9.

to the trial and judgment, after which I will set out how this moment has been historicised in contemporary ICL scholarship. This will be helpful for Chapter 5 that follows, where I set out an episode that is overlooked within these disciplinary histories but which I argue can be used to engage critically with the legacy of Nuremberg.

4.2 The Birth of a Discipline

As noted above, within ICL scholarship the IMT is considered an inaugural moment in the field's history as it was in this context for the first time that individual criminal responsibility for international crimes was imposed directly under international law.[11] This is the form of *international criminality* that is also often termed *stricto sensu* ICL, which is often contrasted with other more generic possible meanings of *international criminal law*, such as transnational criminal law.[12] *Stricto sensu* ICL is the form of international criminality the field of ICL is primarily associated with today and covers a 'core' of international crimes including war crimes, crimes against humanity, genocide, and aggression.[13] Criminalisation directly under international law is most often rationalised on the basis that these offences represent a threshold of moral repugnance that justifies the imposition of individual criminal accountability by the international community directly, rather than through other processes of criminalisation under conventional or domestic international law alone.[14]

When we trace the origins of this body of law and form of international criminality, we are inevitably drawn back to Nuremberg as it was under the terms of the Charter of the IMT that *individuals* were held to account for crimes under international law for the first time.[15]

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[11] On *international criminal law* as constituting that body of offences directly criminalised under international law, see: Kevin Jon Heller, 'What is an International Crime? (A Revisionist History)' (2017) 58(2) Harvard International Law Journal 353.

[12] Kreß identified four possible permutations which might be described as 'international criminal law', which includes: the law governing the prescriptive criminal jurisdiction of states, the law of international co-operation in criminal matters, transnational criminal law, and *stricto sensu* ICL. See: Claus Kreß, 'International Criminal Law' in R. Wolfrum (ed), *Max Planck Encylopedia of Public International Law* (OUP 2009) para 10.

[13] Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (OUP 2014) 32; Kai Ambos, *Treatise on International Criminal Law - Volume I: Foundations and General Part* (OUP 2013) 223; and Yoram Dinstein, 'International Criminal Law' (1975) 5 Israel Yearbook of Human Rights 55, 67.

[14] Quincy Wright, 'The Scope of International Criminal Law: A Conceptual Framework' (1974-75) 15 Virginia Journal of International Law 561, 567; Kreß ibid; Ambos ibid 227; Paola Gaeta, 'International Criminalization of Prohibited Conduct' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 70; and Leslie Green, 'Is There an International Criminal Law?' (1983) 21(2) Atlanta Law Review 251, 253.

[15] As per Nuremberg Charter, art 6: "The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility…"

Justifying this doctrinal innovation, the judgment of the IMT stated that: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.[16] This affirmed the principle contained in Article 6 of the IMT Charter. The newly formed United Nations General Assembly (UNGA) affirmed this principle of individual criminal responsibility when it passed General Assembly Resolution 95(1), which also directed the formulation of an international criminal code containing the principles recognised in the Charter and judgment IMT.[17] This was followed by General Assembly Resolution 177(II), which directed the newly formed International Law Commission (ILC) to formulate these principles and prepare a Draft Code of Offences Against the Peace and Security of Mankind.[18]

The ILC eventually produced the *Principles of International Law Recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* in 1950, although they were never formally adopted by the UNGA.[19] Principle I affirmed that “[a]ny person who commits an act which constitutes a crime under international law is responsible and therefore liable to punishment”, which has subsequently been restated in the statutes of various ICL tribunals,[20] as well as gaining recognition as forming part of customary international law.[21] Indeed, there were echoes of the Nuremberg holding that crimes were *committed by men, not abstract entities* in the landmark *Tadić* decision, which noted: "[a] State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach."[22]

Other norms and principles emerging and evolving from the judgment include the recognition of crimes against humanity as distinct from war crimes, basic principles of liability for these crimes,[23] and the beginnings of the procedural and evidential rules of

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[16] *International Military Tribunal (Nuremberg), Judgment and Sentences* (n 1) 221.
[17] Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, UNGA Res 95(I) (11 Dec 1946) UN Doc A/RES/95. This directed the *Committee on the Progressive Development of International Law and its Codification* to put in motions plans for the “formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.”
[18] Formulation of the Principles Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, UNGA Res 177(II) (21 Nov 1947) UN Doc A/RES/177.
[19] ‘The Principles of International Law Recognized in the Charter and the Judgment of the Nürnberg Tribunal; Texts and Comments’ (1950) II Yearbook of the International Law Commission 191.
[20] See for example: Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 25.
[21] See for example: *Attorney-General of the Government of Israel v Adolf Eichmann* (1968) 36 ILR 5, 277
[22] *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) [97]
[23] Guénaël Mettraux, 'Judicial Inheritance: The Value and Significance of Nuremberg to Contemporary War Crimes Trials' in Mettraux (ed), *Perspectives on the Nuremberg Trial* (OUP 2008) 608; and Michael P. Scharf,

international criminal tribunals.[24] Although other innovations were contained in the judgment, holding individuals criminally responsible directly under international law and affording individuals fair trials rights in respect of any such prosecution of this nature are considered the key principles of contemporary ICL to have emerged from it.[25] The ILC, for example, has described the principle of individual responsibility and punishment under international law as the "cornerstone of international criminal law" and the "enduring legacy of the Charter and Judgment".[26] In this regard, although ICL has undergone much substantive evolution since the trial and judgment of the IMT,[27] it has proved to be the foundational principle upon which all others hinge.

An often neglected part of this origin story is the contribution of the International Military Tribunal for the Far East ('Tokyo Trial' or 'IMTFE') which was convened in April 1946 to hold the leaders of the Empire of Japan accountable for crimes against peace and war crimes committed in the Pacific Theatre. And although separated from Nuremberg by just a few months, it has generally been under-scrutinised by ICL scholars.[28] There are a number of possible reasons for this. Firstly, the IMTFE did not rest on the same institutional foundations as the IMT. It was established by virtue of a special proclamation issued by General MacArthur as the Supreme Commanding Officer in Japan, with the Charter of the IMTFE approved shortly after that. This contrasts with the Charter of the Nuremberg IMT, which was established by the 1945 *London Agreement*, the signatories of which included the Allied Powers and twenty other countries. The IMTFE thus was not grounded in *international agreement* to the same extent as the IMT. The IMTFE has also suffered from

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'Joint Criminal Enterprise, The Nuremberg Precedent, and the Concept of "Groatian Moment"' in Tracy Isaacs and Richard Vernon (ed), *Accountability for Collective Wrongdoing* (CUP 2011) 138.

[24] Although both Heller and Douglas have asserted that the subsequent trials held under Control Council Law No.10 made significant contributions to the procedural and evidential rules of ICL. See Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP 2011); and Lawrence Douglas, 'From IMT to NMT: The Emergence of a Jurisprudence of Atrocity' in Kim C. Priemel and Alexa Stiller (eds), *Reassessing the Nuremberg Military Trials: Transitional Justice, Trial Narratives, and Historiography* (Bergahn Books 2012) 276.

[25] Judge Philippe Kirsch, 'Applying the Principles of Nuremberg in the ICC: Keynote Address at the Conference "Judgment at Nuremberg" Held on the 60th Anniversary of the Nuremberg Judgment' (Delivered 30 September 2006) <https://www.icc-cpi.int/NR/rdonlyres/ED2F5177-9F9B-4D66-9386-5C5BF45D052C/146323/PK_20060930_English.pdf> accessed 11 January 2021.

[26] ILC 'Report of the International Law Commission on the Work of its 48th Session' (6 May – 26 July 1996) UN Doc A/5/1/10 19.

[27] Notably, ICL has moved on from requiring an underlying aggressive act to establish international criminal responsibility for crimes against humanity, a move reflected in: *Prosecutor v Tadic* (n 22) [140]-[141]. Some of the other key areas that have similarly moved on include the procedural and evidential rules, the inclusion of genocide in the core crimes, modes of liability, the role of victims in proceedings, and the defences available to defendants. For an overview of some of these developments see: Mettraux (n 23); Scharf (n 23); Heller (n 24); Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4(4) Journal of International Criminal Justice 830; Henry T. King Jr., 'The Legacy of Nuremberg' (2002) 34(3) Case Western Reserve Journal of International Law 335, 351.

[28] On this tendency generally, see: Kim C. Priemel, 'Consigning Justice to History: Transitional Trials After the Second World War' (2013) 56(2) The Historical Journal 553, 569-571.

a perception of victor's justice more acutely than the IMT, which was heightened by the lack of unanimity rendered by the judicial panel at Tokyo.[29] Furthermore, the spectre of the atomic bomb and the conditions in which war in the Pacific had been brought to a close cast a shadow over the IMTFE, which heightened this perception.

These factors, in part, help to explain the tendency to overlook Tokyo as an origin moment for the field.[30] Interestingly, Koller notes that this tendency was present even as the *Nuremberg Principles* were being formulated, with the IMTFE receiving little consideration.[31] Recent work by historians and legal scholars has thus sought to reclaim the contribution of the Tokyo Tribunal in our disciplinary histories.[32] Despite this, Tokyo generally receives less scholarly consideration. And even when contribution of the trial and judgment of the IMTFE is considered, it tends to be placed within the "parameters" of Nuremberg.[33] This is despite the fact that the IMTFE was more 'international' in terms of its composition than the IMT, with its notably more diverse judicial panel.[34]

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[29] Judge Pal famously questioned the moral and doctrinal legitimacy of the Tribunal's judgment by raising the spectre of imperialism and challenging the existence of crimes against peace in a scathing dissent. For contrasting views on Judge Pal's dissent, see: Sumedha Choudhury, 'Contextualising Radhabinod Pal's Dissenting Opinion in Contemporary International Criminal Law' (2021) 11(2) Asian Journal of International Law 223; Ushimura Kei, 'Pal's "Dissentient Judgment" Reconsidered: Some Notes on Postwar Japan's Responses to the Opinion' (2007) 19 Japan Review 215; and Rohini Sen and Rashmi Raman, 'Retelling Radha Binod Pal: The Outsider and the Native' in Frédéric Mégret and Immi Tallgren (eds), *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents* (CUP 2020).

[30] Although it should be noted that other factors have also been identified as contributing to this tendency, including: the wide array of counts and charges contained in the indictments, interpersonal issues amongst the judicial panel and prosecution teams, issues regarding the conspiracy charge, as well as a lack of clarity regarding the account of Japanese aggression relied on. See: Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008) 82; and Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard University Press 2008) 32-42, 82-3, & 88-97.

[31] David Koller, 'The Nuremberg Legacy in the Historical Development of International Criminal Law' in Cheah Wui Ling, and Yi Ping (eds), *Historical Origins of International Criminal Law: Volume 1* (Torkel Opsahl 2014) 579-580.

[32] Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (Routledge 2008); Boister and Cryer (n 30); Totani (n 30); Yuki Tanaka, Tim McCormack, and Gerry Simpson (eds), *Beyond Victor's Justice?: The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff 2011); Morten Bergmo, Cheah Wui Ling, and Yi Ping (eds), *Historical Origins of International Criminal Law: Volume 2* (Torkel Opsahl 2014); Liu Daqun and Zhang Binxin (eds), *Historical War Crimes Trials in Asia* (Torkel Opsahl 2016); Kerstin von Lingen (ed), *Transcultural Justice at Tokyo: The Allied Struggle for Justice, 1946-1948* (Brill 2018); Yuma Totani and David Cohen, *The Tokyo War Crimes Tribunal: Law, History, and Jurisprudence* (CUP 2018); and Viviane E. Dittrich, Kerstin von Lingen, Philipp Osten and Jolana Makraiová (eds), *The Tokyo Tribunal: Perspectives on Law, History and Memory* (TOAEP 2020).

[33] James Sedgwick, 'Brother, Black Sheep, or Bastard? Situating the Tokyo War Crimes Trial in the Nuremberg Legacy, 1946-1948' in Beth A. Griech-Polelle (ed), *The Nuremberg War Crimes Trial and Its Policy Consequences Today* (Nomos 2009) 63.

[34] The IMTFE had a judicial panel representing eleven nations, as compared to the four nations represented in the Nuremberg judicial panel (American, British, French, and Soviet).

4.3 The Symbolic Significance of the Nuremberg Trial

If the trial and judgment of the Nuremberg IMT has gone on to achieve a significance that extends beyond its doctrinal contribution, this possibility was foreseen by those negotiating the framework for the Tribunal. Indeed, the choice of site alone tells us much about the intentions of those pushing for its establishment. Whilst Leipzig and Luxembourg had been identified as potential locations, Nuremberg was ultimately chosen as a compromise with the Soviets who had pushed for Berlin—although the permanent seat of the Tribunal was to be located in Berlin.[35]

Nuremberg won out for practical and symbolic reasons. Pragmatically, it was a natural choice as although it had suffered heavy damage during the allied bombing campaigns, the *Palace of Justice* where the trials would be held was relatively intact and also benefitted from having prison facilities adjacent to the Courtroom. Symbolically, Nuremberg had obvious associations with the Nazi regime in light of the infamous *Nuremberg rallies* and the *Nuremberg race laws*. For Robert Jackson, it thus represented a birthplace of the Nazi movement.[36] The urban geography of the city of Nuremberg itself had been reconfigured to reflect the power of the German State, with Sinclair noting in 1938 that it had been constructed to give expression to the very idea of Nazi dictatorship.[37] It was also a cultural and spiritual site for Germans.[38]

Symbolism was clearly of concern for those organising the trial, as is evident in the decision to use documentary film footage during the trial despite its limited probative value.[39] Indeed, although it represented a "wholly new method of documenting criminality",[40] its inclusion was somewhat superfluous given the vast amount of traditional documentary evidence the prosecution could rely on, as well as the fact it did not feature any of the defendants—many of whom had never set foot in the locations it featured.[41] Nevertheless, this footage featured heavily in the trial and helped to represent atrocities

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[35] Francine Hirsch, *Soviet Judgment at Nuremberg: A New History of the International Military Tribunal After World War II* (OUP 2020) 73.
[36] ibid 62.
[37] Thornton Sinclair, 'The Nazi Party Rally at Nuremberg' (1938) 2(4) The Public Opinion Quarterly 570.
[38] Stephen Brockmann, *Nuremberg: The Imaginary Capital* (Camden House 2006).
[39] Ulrike Weckel, 'The Power of Images: Real and Fictional Roles of Atrocity Footage at Nuremberg' in Kim C. Priemel and Alexa Stiller (eds), *Reassessing the Nuremberg Military Tribunals, Transitional Justice, Trial Narratives, and Historiography* (Berghahn Books 2012).
[40] Lawrence Douglas, 'Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal' (1995) 105(2) The Yale Law Journal 449, 451.
[41] Weckel, (n 39) 224. See also Susan Twist, 'Evidence of Atrocities or Atrocious Use of Evidence: The Controversial Use of Atrocity Film at Nuremberg' (2005) 26 Liverpool Law Review 267.

that were in many respects beyond comprehension.[42] In this regard, these images have shaped how the Holocaust is remembered,[43] particularly given the trial itself was less focused on genocide as a category of crime.[44]

The IMT courtroom thus became a central location in which the memory of the Second World War (WW2) and its associated atrocities were filtered. It has thus been described by the Assistant to the U.S. Chief Counsel as the "greatest history seminar ever held."[45] Furthermore, it is understood as possessing symbolic significance for humanity at large, with Henry T. King Jr—a former prosecutor at Nuremberg—describing it as having "pervade[d] our understanding of the world today."[46] This is similarly true for the field of ICL, with the trial and judgment representing more than a doctrinal innovation and institutional precedent; it also came to embody the values of a new kind of international law and society.[47]

4.4 Early Responses to the Trial and Judgment of the Nuremberg IMT

Perhaps somewhat surprisingly, the immediate public reaction to the IMT was mixed. And whilst Jackson's opening speech had received extensive coverage, attention to the trial waned over time.[48] The need to publicise the trial was something the organisers were keenly aware of, with Telford Taylor of the U.S. prosecution team giving a sense of the lengths they went to accommodate members of the "Fourth Estate" both in the city of Nuremberg and in the courtroom itself.[49] Indeed, Courtroom 600 of the Palace of Justice had been intentionally designed to maximise media attendance.[50] Over time, however, media attention waned as the Palace of Justice turned into a "citadel of boredom" where

[42] Douglas (n 40) 453. On the struggle to represent the Holocaust in discourses, see, for example, Zygmunt Bauman, *Modernity and the Holocaust* (Cornell University Press 1989).
[43] See generally, John J Michalczyk, *Filming the End of the Holocaust: Allied Documentaries, Nuremberg, and the Liberation of the Concentration Camps* (Bloomsbury, 2014).
[44] Weckel (n 39) 242-3.
[45] Robert Kempner quoted in Lawrence Douglas, 'History, Memory and Crimes Against Humanity: A Response to Todorov' (2000-2001) No.128/129 Salmagundi 320, 320.
[46] Henry T. King Jr, 'Review Essay: Robert Jackson's Vision for Justice and Other Reflections of a Nuremberg Prosecutor' (1999-2000) 88(8) Georgetown Law Journal 2421.
[47] Richard Overy, 'The Nuremberg Trials: International Law in the Making' in Philippe sands (ed), *From Nuremberg to the Hague: The Future of International Criminal Justice* (CUP 2006) 2.
[48] William J. Bosch, *Judgment on Nuremberg: American Attitudes Toward the Major German War-Crime Trials* (University of North Carolina Press 1970) 95.
[49] Telford Taylor, *The Anatomy of the Nuremberg Trials* (Black Bay Books 1993) 219-21.
[50] Mark Somos and Morgan Gostwyck-Lewis, 'A New Architecture of Justice: Dan Kiley's Design for the Nuremberg Trials' Courtroom' (2019) 21(1) Journal of the History of International Law 104.

attendees were “in the grip of extreme tedium”.[51] In Britain, media attention dropped off following the opening of the trial,[52] with the realities of post-war life, which included rationing and limits on the circulation of newspapers, proving a diversion.[53] Within the Jewish community, the reaction was also mixed. And whilst some viewed it as a necessary retributive act, others were more critical.[54] A lack of Jewish participation, in particular, proved a point of critique, as did the lack of Yiddish translation during the trial.[55] Bloxham thus describes the IMT as a “tale of Jewish absence”.[56] Although we should note that the IMT was not simply about the Holocaust,[57] given the primary focus was on establishing responsibility for launching an aggressive war, with the other atrocities taking secondary importance.[58]

Amongst prominent jurists, the response was critical whilst also identifying the paradigm-shifting potential it held. This occurred even before the tribunal was established, with Finch, for example, viewing it as making good on the project started by Grotius.[59] Robert Jackson had already begun formulating the principles on which the IMT would be based before the U.S. had entered the war and considered them reflective of ideas long since in gestation.[60] Reporting on the progress of the drafting of the Charter, Jackson described it as: "something of a landmark, both as a substantive code defining crimes against the international community and also as an instrument establishing a procedure for prosecution and trial of such crimes before an international court."[61] To this end, the Charter

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[51] Rebecca West, 'Extraordinary Exile' *The New Yorker* (New York, 7 September 1946) <https://www.newyorker.com/magazine/1946/09/07/extraordinary-exile> accessed 11 January 2022.
[52] Caroline Staples, 'Holocaust on Trial: Mass Observation and British Media Responses to the Nuremberg Tribunal, 1945-1946' in Caroline Sharples and Olaf Jensen (eds), *Britain and the Holocaust: Remembering and Representing War and Genocide* (Palgrave MacMillan 2013).
[53] ibid 37-8.
[54] Laura Jockusch, 'Justice at Nuremberg? Jewish Responses to the Nazi War-Crime Trials in Allied Occupied Germany' (2012) 19(1) Jewish Social Studies 107.
[55] ibid 108.
[56] Donald Bloxham, 'Jewish Witnesses in War Crimes Trials of the Postwar Era’in David Bankier and Dan Michman (eds), *Holocaust Historiography in Context: Emergence, Challenges, Polemics and Achievements* (Bergahn Books 2008) 540. Although the lack of Jewish participation was ameliorated to some extent in the subsequent Nuremberg trials. See: Jockusch (n 55).
[57] Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press 2001) 6.
[58] Indeed, this is reflected in Article 6 of the Nuremberg Charter, with responsibility for war crimes and crimes against humanity requiring the establishment of responsibility for crimes against peace as a preliminary matter. See: Nuremberg Charter, art 6(a-c).
[59] George Finch, 'Retribution for War Crimes' (1943) 37(1) AJIL 81.
[60] Robert H. Jackson, ‘The Challenge of International Lawlessness’ (1941) 27 American Bar Association Journal 690.
[61] Report of Robert H Jackson to the International Conference on Military Trials (London 1945) viii-x.

and trial presented an opportunity to "bring international law out of the closet".[62] Other leading jurists were similarly supportive of the development.[63]

Not all commentary was positive, however, with certain responses exhibiting a degree of unease at the kind of precedent the trial would set. To this end, the issue of meting out punishment was considered one of the most challenging problems facing the allies.[64] A potential obstacle to this was the need to appear to render judgment collectively rather than as a sole victorious power.[65] Manner thus suggested the trial be grounded in the municipal law of the Axis or under military law to ameliorate this.[66] Wyzanski was similarly tentative regarding the precedent it would set, worrying that if the political dimensions became too prominent, it might stall the "coming of the day of world law."[67] More specific critiques emerged following the judgment, with the principle of legality, the tension between *lex lata* and *lege ferenda*, and the perception of *victor's justice* of particular concern.[68] Kelsen thus argued its legacy would be in its *legislative* rather than *jurisprudential* contributions.[69] Schwarzenberger's unease was grounded in a belief that the judgment implied the existence of an international legal order that had yet to emerge.[70] Another source of unease—which has persisted within the field of international criminal justice—was whether any category of *international* crime could properly represent atrocities of such scale.[71]

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[62] Robert Jackson in a meeting of the American Society of international Law on April 13, 1945, quoted in Philip Marshall Brown, 'The Vitality of International Law' (1945) 39(3) AJIL 533, 534.
[63] See: Hersch Lauterpacht, 'The Law of Nations and the Punishment of War Crimes' (1944) 21 Brit. Y.B. Int'l L. 58; and Sheldon Glueck, 'The Nuernberg Trial and Aggressive War' (1946) 59(3) Harvard Law Review 396.
[64] Finch (n 59) 81.
[65] Clyde Eagleton, 'Punishment of War Criminals by the United Nations' (1943) 37(3) AJIL 495.
[66] George Manner, 'The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War' (1943) 37(3) AJIL 407. Wright made similar suggestions: Quincy Wright, 'War Criminals' (1945) 39(2) AJIL 257.
[67] Charles Wyzanski, 'Nuremberg: A Fair Trial? A Dangerous Precedent' *The Atlantic* (Washington D.C., April 1946) <https://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492/> accessed 11 January 2022.
[68] George Finch, 'The Nuremberg Trial and International Law' (1947) 41(1) AJIL 20, 24; and F.B. Schick, 'The Nuremberg Trial and the International Law of the Future' (1947) 41(4) AJIL 770. On the critique of victor's justice, see Hans Ehard, 'The Nuremberg Trials Against the Major War Criminals and International Law' (1949) 43(2) AJIL 223, 243; and Bernard Meltzer, 'A Note on Some Aspects of the Nuremberg Debate' (1946) 14 University of Chicago Law Review 455.
[69] Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' (1947) 1(2) The International Law Quarterly 153, 171.
[70] George Schwarzenberger, 'Judgment of Nuremberg' (1947) 21(3) Tulane Law Review 329, 359.
[71] As per Schmitt: the "…monstrous activities of the SS and Gestapo explode the categories of all hitherto existing international law." See: Carl Schmitt, 'The International Crime of Aggression' in Timoth Nunan (ed), *Carl Schmitt: Writings on War* (Polity 2011) 18. Also see Arendt: "For these crimes, no punishment is severe enough…We are simply not equipped to deal, on a human level, with a guilt that is beyond crime." See: Lotte Kohler (ed), *Hannah Arendt and Karl Jaspers: Correspondence, 1926-1969* (Harcourt Brace 1993) 54. And finally, writing in 1947, Jaspers considered the IMT as having only dealt with the narrower question of *criminal* guilt, with other forms going unexamined in the trial. See: Karl Jaspers, *The Question of German Guilt* (E.B. Ashton trs, Fordham University Press 2001).

Although the initial responses by German jurists were initially muted,[72] this shifted over time as their contribution to aiding the transition to a post-War social and political order was recognised.[73] Amongst the public, the perception also shifted, with differences noted between the IMT and the subsequent Nuremberg trials, between East and West Germans, and as the Cold War progressed.[74] Reunification prompted new responses, with the IMT once again featuring as part of an "evolving legal debate, but also a correlation of historical, political, and moral developments."[75]

As time passed after judgment had been rendered, there was a growing perception that the significance of the IMT was its impact on history itself. This had been hinted at in the opening speeches of various participants in the trial, with members of the judicial panel also later opining that its significance was to be found in how it continued to shape the international legal order.[76] The final appraisal of the trial was thus to be rendered by history itself,[77] with the procedural and other doctrinal contributions of the problem and judgment likely to recede over time.[78] In this regard, although perceptions shifted over time, it was early on recognised that Nuremberg possessed a significance that extended far beyond any doctrinal impact it would have.

4.5 Nuremberg, Periodisation, and the 'Pre-History' of International Criminal Law

In terms of how this sense of *symbolism* manifests in contemporary ICL scholarship, when the legacy of the trial and judgment of the Nuremberg IMT is recounted, there is a continued emphasis on its paradigm-shifting qualities. Additionally, however, there is also an increased emphasis on its disciplinary contributions in inaugurating the field of ICL itself, which gives accounts of Nuremberg a transcendent quality. With this in mind, in the

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[72] Thomas Weigend, '"In general a principle of justice": The Debate on the "Crime against Peace" in the Wake of the Nuremberg Judgment' (2012) 10(1) Journal of International Criminal Justice 41.
[73] See, for example, the comments of Pannenbecker and Kranzbuhler, both of whom had acted as defence counsel during the Nuremberg trials: Otto Pannenbecker, 'The Nuremberg War Crimes Trial' (1965) 14(2) DePaul Law Review 348; and Otto Kranzbuhler, 'Nuremberg Eighteen Years Afterwards' (1965) 14(2) DePaul Law Review 333.
[74] Christoph Burchard, 'The Nuremberg Trial and its Impact on Germany' (2006) 4(4) Journal of International Criminal Justice 800.
[75] ibid.
[76] See: Francis Biddle, 'The Nurnberg Trial' (1947) 33(6) Virginia Law Review 679; John J. Parker, 'The Nuremberg Trial' (1946-7) 30(4) Journal of American Judicature Society 109, 115; Norman Birkett, 'International Legal Theories Evolved at Nuremberg' (1947) 23(3) International Affairs 317, 325. On this point, see also the retrospective of Taylor: Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Quadrangle Books 1970) 80.
[77] Birkett ibid 317; and also John P. Kenny, M*oral Aspects of Nuremberg* (Thomist Press 1949) 46.
[78] Thomas J. Dodd, 'The Nurnberg Trials' (1947) 37(5) Journal of Criminal Law and Criminology 357, 367.

remainder of the present chapter, I will explore this sensibility within contemporary ICL scholarship. In particular, I will focus on the historiographical gestures that make this account possible, as well as their consequences for how we account for the development of the field. Following this, I will then explore the legacy of the trial and judgment of the Nuremberg IMT within ICL scholarship, focusing particularly on how it grounds a normative sensibility for the field and helps to embed a particular paradigm of institutionalised retributive justice.

4.5.1 Nuremberg, Periodisation, and the 'Pre-History' of International Criminal Law

As identified above, within ICL scholarship the agreed-upon disciplinary origin moment is the trial and judgment of the Nuremberg IMT as it was here, for the first time, that individual criminal responsibility for international crimes arose directly under international law.[79] This innovation does not just inaugurate the field in a legal or institutional capacity, however, it also anchors a sense of disciplinary time in a much broader sense. Nuremberg can thus be positioned as *year zero* in the history of ICL with little difficulty.[80] This has both temporal and historiographical consequences. And by associating the beginning of the field with a particular doctrinal and institutional development, it shapes how the chronological lines of ICL's history are drawn. It also has genealogical implications for how the development of ICL is understood, which we can identify in how ICL scholars draw connections between ICL as it emerged at Nuremberg with the doctrinal, institutional, or conceptual antecedents to the IMT that we might be able to identify.

One factor shaping this is how *international criminal law* is understood, which influences what is captured in a particular account of the *longue durée* of ICL's history. So, for example, if a narrow meaning of *international criminal law* and *international crime* is adopted as a starting point, this will inevitably impact what historical antecedents to Nuremberg are identified and how seriously they are taken in bringing about this origin moment. Bassiouni, for example, notes that taken at is broadest, *international criminal law* might cover a total of twenty different acts caught by the "criminal aspects of international law", which consisted of a body of "international proscriptions which criminalise certain types of conduct irrespective of particular enforcement modalities and mechanisms."[81] As noted earlier, however, within contemporary ICL scholarship, *international criminal law* is

[79] See O'Byrne and Sands (n 3).
[80] Vasiliev (n 2) 354.
[81] M. Cherif Bassiouni, 'The Penal Characteristics of Conventional International Criminal Law' (1983) 15(1) Case Western Reserve Journal of International Law 27, 27-8.

generally taken to cover those offences entailing individual criminal responsibility directly under international law. Also distinguished as *stricto sensu* ICL,[82] this covers the 'core' international crimes of genocide, war crimes, crimes against humanity, and aggression.[83] This has an immediate impact on the view of the field's development that is produced insofar as it narrows it to certain kinds of international crimes and the institutional settings where they have been addressed. Further, as Bassiouni has noted, the extent to which any events identified constitute antecedents will vary based on our "desire to give historical substance to this discipline."[84]

To this end, whilst some work does not engage to any great extent with the precursors we can identify,[85] others deal with them to the extent they constitute preparatory acts for Nuremberg. Werle, for example, adopts a narrow understanding of *international criminal law* and so discounts the relevance of much of this 'pre-history' as *international crimes* as a legal concept had not yet coalesced.[86] Cassese takes a similar *conceptual* approach to how his historical lines are drawn, basing his account on how closely these antecedents came to the kind of criminality Nuremberg was concerned with.[87] Cassese characterises ICL as concerned with "protecting society against the most harmful transgressions of legal standards of behaviour perpetrated by individuals", thereby distinguishing it from *ordinary* criminality, thus excluding piracy and other so-called 'transnational' crimes from his analysis.[88]

Similarly, by defining ICL as concerned with and consisting of those crimes over which "international courts and tribunals have been given jurisdiction under general international law", this also constrains the relevance any *pre-historical* episodes might have—particularly where the institutional form identified does not directly match the Nuremberg IMT.[89] This enforcement-focused approach highlights the various attempts at enforcing nascent *international* criminal norms, with Peter von Hagenbach in 1473, the Lieber Code of 1863,

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[82]Kreß identifies four categories that might be caught by a generic reading of *international criminal law*. This includes: the law governing the prescriptive criminal jurisdiction of states, the law of international cooperation in criminal matters, transnational criminal law, and supranational criminal law or international criminal law *stricto sensu.* See: Kreß (n 12).

[83] Rome Statute, art 5. On the 'core' of ICL, see: Christine Schwöbel-Patel, 'The Core Crimes of International Criminal Law' in Kevin Heller, Frédéric Mégret, Sarah Nouwen, Jens Ohlin, & Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (OUP 2020).

[84] M. Cherif Bassiouni, *Introduction to International Criminal Law: 2nd Revised and Expanded Edition* (Martinus Nijhoff 2013) 29.

[85] See for example: Antonio Cassese, *Cassese's International Criminal Law* (3rd edn 2013) 18-21.

[86] Werle and Jessberger (n 13) 1-30.

[87] Baars characterises Cassese's account here as rooted in the "humanitarian" school of thought. See: Grietje Baars, 'Making ICL History: On the Need to Move Beyond Pre-Fab Critiques of ICL' in Christine Schwöbel (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2014) 199-200.

[88] Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press, 2008) 12-20.

[89] Rober Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmshurst (eds), *Introduction to International Criminal Law and Procedure* (2nd edn, CUP 2010) 4.

and the attempted prosecution of Kaiser Wilhelm II following the First World War (WW1) proving popular.[90] Olásolo views them as "distant ICL precedents" that attempted, albeit unsuccessfully, to bring about the kind of enforcement the IMT achieved.[91] This was because, as in Ambos' analysis, these were the only attempts that constituted a "systematic approach to create a duty to prosecute international crime".[92] In contrast, work that takes a broader understanding of ICL tends to take these possible antecedents more seriously.[93]

Bohrer provides the most systematic and comprehensive engagement with these antecedents and thus identifies a persistent historiographical tendency to marginalise their contribution within ICL scholarship, which itself reproduces a kind of *Westphalian myth* for ICL.[94] For this reason, Bohrer has more recently taken issue with Schabas' work on the attempted trial of Kaiser Wilhelm II, which he views as further marginalising this *forgotten history*.[95]

The above approaches capture the "accepted history" of ICL in which the Nuremberg trial "planted the seeds of a new sub-discipline of international law".[96] And although differing in what kinds of historical antecedents are recognised, they tend to display a distinctly proleptic and progressive sensibility insofar as they events are considered to the extent they bring us closer to Nuremberg. Consequently, we often see these events presented as *prologues* to Nuremberg.[97] In this way, they are positioned and appraised to the extent they brought us closer towards it.[98] These accounts also tend to reflect a sense of

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[90] On the von Hagenbach trial see: Cryer et al, ibid 91; and William Schabas, *An Introduction to the International Criminal Court* (6th Edn, CUP 2020) 1-5. For an overview of the historiography of the von Hagenbach trial more generally, see: Gregory S. Gordon, 'The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law' in Kevin J. Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (OUP 2013). On the attempted trial of Kaiser Wilhelm II, see: William Schabas, *The Trial of the Kaiser* (OUP 2018). Ratner et al similarly note the attempted trial of the Kaiser as changing the scope, form, and prospects of *individual criminal responsibility* for international crimes: S. Ratner, J. Abrams, and J. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (3rd Edn, OUP 2009) 5-6.

[91] Héctor Olásolo, *International Criminal Law, Transnational Criminal Organizations and Transitional Justice* (Brill Nijhoff 2018) 12-14.

[92] Ambos (n 13) 1-4. For a similarly sparse, enforcement focused account, see: Robert Bellelli, 'The Establishment of the System of International Criminal Justice' in Bellelli (ed), *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Ashgate 2010) 11.

[93] See for example: Roger O'Keefe, *International Criminal Law* (OUP 2015) 60-1, 67-8, & 71; and Bassiouni (n 84) 1047 and ch 5 & 6.

[94] Ziv Bohrer, 'International Criminal Law's Forgotten Millennium of History' (2016) 34(2) Law and History Review 393.

[95] Ziv Bohrer, 'The (Failed) Attempt to Try the Kaiser and the Long (Forgotten) History of International Criminal Law: Thoughts Following the Trial of the Kaiser by William A Schabas' (2020) 53(1) Israel Law Review 159.

[96] Sarah M. Nouwen, 'Justifying Justice' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 328.

[97] Werle and Jessberger (n 13).

[98] Indeed, Schabas' work on the attempted trial of the Kaiser opens with reference to the Nuremberg IMT, and in doing so the author situates both events within the same progressive chronology. See: William Schabas, *The Trial of the Kaiser* (OUP 2018) ch 1.

disciplinary expectation, as in Sikkink's account which presents Nuremberg as the source of a "stream" of disciplinary progress that would create the conditions in which the Rome Statute would eventually emerge.[99]

Without necessarily wanting to reject or affirm the validity of any such account, my intention has nevertheless been to identify how and why the chronological lines of ICL's history are drawn as such. And with reference to the overarching periodisation identified in Chapter 2, I have conveyed an understanding of how these distinct *periods* of ICL's history are constructed. In particular, locating Nuremberg as *year zero* marks the beginning of the first substantive phase of ICL's development, with everything going before part of the *pre-history* phase.[100] This periodisation also contributes to a progressive view of the field, with Altwicker and Diggelman having identified this as a technique deployed within international law scholarship for precisely this purpose.[101] Periodisation achieves this by ordering the various historical events and episodes that make up the *past* and putting them in sequence, as well as by designating turning points between phases.[102] Given that periodisation assumes change is not random and that specific factors converge at particular points to bring about historical change,[103] by focusing on specific legal and institutional developments, we can give shape to the temporal contours of ICL's history. With this in mind, the next section will focus on one of the consequences of this way of presenting ICL's inaugural moment.

4.5.2 Transcendent Birth of International Criminal Law

With the temporal demarcation between the first two *periods* of ICL's history in mind, the present section will focus more closely on one of the narrative implications of this chronological gesture. More specifically, I will argue that it finds expression in a historical sensibility that emphasises the transcendent, paradigm-shifting dimensions of the trial and judgment of the Nuremberg IMT. In this kind of account, the Nuremberg IMT opens up a new legal terrain and in doing so brings about a much broader civilisational shift.[104]

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[99] Sikkink views the current system of accountability for international crimes as a "justice cascade" that was the result of various converging streams. The first of these "streams" is identified as the Nuremberg trials, with the Rome Statute viewed as the "outgrowth of processes that started in Nuremberg. See: Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing the World* (W.W. Norton 2012) 121-3.
[100] As discussed in Chapter 2.
[101] Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?' (2014) 25(2) EJIL 425, 433-437.
[102] Lauren McArthur Harris, 'Conceptual Devices in the Work of World Historians' (2012) 30(4) Cognition and Instruction 312, 322.
[103] Peter Stearns, *World History: The Basics* (Taylor & Francis 2010) 74-5.
[104] See Tomuschat (n 27).

The disciplinary narrative this captures typically proceeds as follows: although previous attempts had been made, it was not until the Nazi atrocities provoked a response so strong in the international community that the sovereign state could finally be submitted to the rule of *international* law.[105] At this moment, the allies "flushed with victory and stung with injury, resolved to stay the hand of vengeance" and enact a civilised world order.[106] This triggered a transition from an international legal system in which states were the primary focus of international law, to one where individuals took centre stage.[107] ICL thus provided the technology that would allow the international legal order to move beyond the anarchic *status quo ante* to one where *humanity's law* could be realised.[108] The ICL trial thus acted as a "visible symbol" of the transcendence from the *Westphalian* system of unbridled state sovereignty towards a new world order.[109]

King similarly uses the idea of *Westphalia* to capture the essence of the *pre-Nuremberg* world, thus viewing the trial and judgment as triggering a sequence of interlinked events which *humanised* international law. This includes the European Convention on Human Rights, the Genocide Convention, and the Universal Declaration of Human Rights, all of which were "outgrowths" of Nuremberg.[110] The Nuremberg trial thus stands in our disciplinary memory as proof of international law's "progress in attempting to meet the needs of society",[111] through this new "cosmopolitan" law.[112] On this view, Nuremberg is elevated from the narrower concerns of retribution to the more exalted aims of establishing the "international human rights movement."[113] The trial and judgement of Nuremberg thus

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[105] See, for example, Rancillo's comment that the atrocities committed by the Nazis during the holocaust provided the catalyst for establishing both ICL as a discrete field and the human rights movement more broadly: Peggy Rancillo, 'From Nuremberg to Rome: Establishing an International Criminal Court and the Need for U.S. Participation' (2001) 78(2) University of Detroit Mercy Law Review 299, 300-302. Werle and Jeßberger similarly assert that it was the "horror of Nazi tyranny that first brought about the acceptance of international criminal responsibility: Werle and Jeßberger (n 13) 1.

[106] Robert H. Jackson, 'Opening Statement Before the International Military Tribunal (November 21, 1945)' in *Trial of the Major War Criminals Before the International Military Tribunal: Vol 2* (Secretariat of the Tribunal, 1947) 98-99.

[107] On the Nuremberg judgment as recognising individuals as subjects of international law bearing rights and responsibilities, see: Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2013) ch 4.

[108] On the idea of *humanity's law*, see: Ruti Teitel, *Humanity's Law* (OUP 2011).

[109] Fred L. Morrison, 'The Significance of Nuremberg for Modern International Law' (1995) 149 Military Law Review 207, 207-8.

[110] Henry T King Jr, 'The Meaning of Nuremberg' (1998) 30(1) Case Western Reserve Journal of International Law 143, 143-4.

[111] A. Frederick Mignone, 'After Nuremberg, Tokyo' (1947) 25(5) Texas Law Review 475, 490.

[112] Robert Fine, 'Crimes Against Humanity: Hannah Arendt and the Nuremberg Debates' (2000) 3(3) European Journal of Social Theory 293.

[113] Henry T King Jr, 'The Judgments and the legacy of Nuremberg' (1997) 22(1) Yale Journal of International Law 213: "Nuremberg marked the real beginning of the international human rights movement because it was the first international adjudication of human rights." See also: King, 'Without Nuremberg – What?' (2007) 6 Washington University Global Stud L Rev 653, 656.

transcends its significance as a doctrinal or institutional precedent and is positioned as a moment when a "new political mode of thinking" was realised.[114]

ICL trials thus appeared as a mechanism that could "catalyse evolution in the normative structure of the international system",[115] with the push towards anti-impunity a manifestation of a new moral order for the post-Nuremberg world.[116] These kinds of far reaching anti-impunity claims regarding ICL have been questioned from a variety of critical perspectives.[117] To this end Nesiah, for example, has called for greater attention to what is overlooked by this "anti-impunity" narrative.[118] Despite the existence of these hidden histories, "anti-impunity" narrative is potent, with the juxtaposition of a *pre* and *post-Nuremberg* world order important to it.[119]

This historical narrativisation of Nuremberg is also conveyed through references to the trial and judgment as having provided a "blueprint" for a "better world for all mankind", with Robert Jackson thus fulfilling the role of "architect".[120] Nuremberg is thus once again imbued with a paradigm-shifting power given that it went beyond retribution and provided a moralising force for a new world order.[121] For King, it represented a "blueprint for a better world in which men and women can live in peace and security, and with dignity."[122] This kind of account also reflects a tendency within international law scholarship where international law itself is presented as the means by which humanity progressed from barbarism to civilisation.[123] On this reading, international law provides an ordering force,

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[114] Vladimir Nikolaevich Kudriavtsev, 'Introduction' in George Ginsburgs and V.N. Kudriavtsev (eds), *The Nuremberg Trial and International Law* (Martinus Nijhoff 1990) 7.
[115] Pierre Hazan, *Judging War, Judging history: Behind Truth and Reconciliation* (Sarah Meyer de Stadelhofen trs, Stanford University Press 2010) 15.
[116] Christian Tomuschat, 'International Criminal Prosecution: The Precedent of Nuremberg Confirmed' (1994) 5 Criminal Law Forum 237, 238. See also Richard Goldstone, 'Historical Evolution - From Nuremberg to the International Criminal Court' (2007) 25 Penn State International Law Rev 763, 764.
[117] On this point, see for example: Grietje Baars, 'Capitalism's Victor's Justice? The Hidden Story of the Prosecution of Industrialist Post-WWII' in Kevin Jon Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (OUP 2013). On the contingency of notions of impunity in contemporary ICL more generally, see: Kamari Maxine Clarke, 'Refiguring the Perpetrator: Culpability, History, and International Criminal Law's Impunity Gap' (2015) 19(5) The International Journal of Human Rights 592, 609-611; and Dawn L Rothe and Victoria E. Collins, 'The International Criminal Court: A Pipe Dream to End Impunity' (2013) 13(1) International Criminal Law Review 191.
[118] Vasuki Nesiah, 'Doing History with Impunity' in Karen Engle, Zinaida Miller, D. M. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (CUP 2016).
[119] Sikkink (n 99).
[120] See for example: King (n 27); and Benjamin Ferencz, 'A Prosecutor's personal Account: From Nuremberg to Rome' (1999) 52(2) Journal of International Affairs 455, 457.
[121] Thane Rosembaum, 'Essay: The Romance of Nuremberg and the Tease of Moral Justice' (2006) 27(4) Cardozo Law Review 1731, 1732. See also Lippman describing Nuremberg as representing a "moral imperative": Matthew Lippman, 'Nuremberg: Forty Five Years Later' (1991) 7(1) Connecticut Journal of International Law 1, 63-4.
[122] Henry T King, Jr, 'Commentary: The Modern Relevance of the Nuremberg Principles' (1997) 17(2) Boston College Third World Law Journal 279, 283.
[123] John D. Haskell, 'Divine Immanence: The Evangelical Foundations of Modern Anglo-American Approaches to International Law' (2012) 11(3) Chinese Journal International Law 429, 442–53.

with the various treaties, institutions, and other disciplinary landmarks along the way presented as evidence. We can identify this tendency in Shapiro and Hathaway's account, which provides a distinctly whiggish history of the field where a colourful cast of characters bring order to the brutish world of sovereign states by resolving to outlaw war.[124]

These grander claims are also present in the accounts which claim ICL and ICL institutions can deliver a kind of *global* or *international* justice.[125] Roht-Arriaza, for example, refers to ICL courts and tribunals as *institutions of international justice*.[126] This is, of course, despite the fact that what ICL and ICL institutions deliver is international *criminal* justice.[127] To this end, ICL has been critiqued as "monopolising" the discourses on global justice,[128] with these *global justice* claims critiqued for the universalistic pretensions they often contain.[129] Schwöbel-Patel has offered the most comprehensive critique of the rise of ICL as the dominant institutional expression of "global justice", highlighting, in particular, the marketing and branding culture which has enabled this.[130] Recent work on the *local* impact of ICL institutions such as the ICC has also questioned these global justice claims.[131]

In these accounts, Nuremberg, as a historical event, takes on paradigm-shifting qualities as it was able to bring about a new era for humanity based on human rights norms, ideas of international justice, and the centrality of the individual.[132] This image is affirmed

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[124] Oona Hathaway and Scott Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon and Schuster 2017). Barkawi provides a critical review of Hathaway and Shapiro: Tarak Barkawi, 'From Law to History: The Politics of War and Empire' (2018) 7(3) Global Constitutionalism 315.
[125] See for example: Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Penguin 1999); Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Brill Nijhoff 2002) ch 3; Bruce Broomhall, *International Justice at the International Criminal Court: Between Sovereignty and the Rule of Law* (OUP 2004); Luis Moreno-Ocampo, 'The International Criminal Court: Seeking Global Justice' (2008) 40 Case Western Reserve Journal of International Law 215; and James Meernik and Kimi King, 'The Fairness of International Justice' (2021) 21(6) International Criminal Law Review 1167.
[126] Naomi Roht-Arriaza, 'Institutions of International Justice' (1999) 52(2) Journal of International Affairs 473.
[127] For a discussion of this linguistic distinction, see: Frédéric Mégret, 'What Sort of Global Justice is "International Criminal Justice"?' (2015) 13(1) Journal of International Criminal Justice 77. One might also take these arguments slightly further and say this *stretching* of international criminal justice is being renewed once again as we debate the proposed international crime of 'ecocide'. See: 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (June 2021) *Stop Genocide Foundation* <https://www.stopecocide.earth/expert-drafting-panel> accessed 13 October 2021.
[128] Sarah M.H. Nouwen and Wouter G. Werner, 'Monopolizing Global Justice' (2015) 13(1) Journal of International Criminal Justice 157.
[129] Immi Tallgren, 'The Voice of the International: Who Is Speaking?' (2015) 13(1) Journal of International Criminal Justice 135; and Luigi D.A. Corrias and Geoffrey M. Gordon, 'Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public' (2015) 13(1) Journal of International Criminal Justice 97.
[130] Christine Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (CUP 2021).
[131] Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (CUP 2018).
[132] See, for example: Norbert Ehrenfreund, *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Court of History* (Palgrave McMillan, 2007) 215-6; and Jonathan Hafetz, *Punishing Atrocities Through a Fair Trial: International Criminal From Nuremberg to the Age of Global Terrorism* (CUP 2018) 6.

by the image of the *pre* and *post*-Nuremberg world posited within ICL scholarship.[133] This image is upheld despite any critiques we might make of the legal precedent Nuremberg represented,[134] which do little to detract from this perception.[135]

4.5.3 The Origins of International Criminal Law and the Normative Sensibilities of a Discipline

This narrative of ICL's origins crystalises into a normative sensibility for the field—what Bassiouni characterises as a "moral-ethical" sensibility that extends beyond the strict doctrinal and institutional legacies of the IMT.[136] This is a kind of "intellectual ferment" that has permeated social values since 1945 and shaped the "social consciousness" of subsequent generations.[137] For some, this *intellectual ferment* manifests in the "civilising" effect Nuremberg is said to have had, which has pushed the international community to reach a "higher level in our development as a species."[138] Indeed, one of the consequences of Nuremberg is that it is said to have helped an *international community* to emerge.[139]

As stated in the Tribunal's judgment, this was possible because the international community had decided to "stay the hand of vengeance" and submit their enemies to the judgment of law in "one of the most significant tributes that Power has ever paid to Reason."[140] This signalled the transition to a "new world order" based on legal rationality that could tame the power of the sovereign state.[141] Adherence to the rule of (international) law thus provided the means by which the tribunal could establish its moral credentials.[142] This shift brought about profound changes in the international order,[143] with the international

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[133] Often, this focuses on how the finding of individual criminal responsibility pierced the traditional barrier of state sovereignty. See for example: Payam Akhavan, 'The Rise, and Fall, and Rise, of International Justice' (2013) 11(3) Journal of International Criminal Justice 527.
[134] For an overview of some of the more contemporary scholarship on this topic see: Kirsten Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2010) 21(4) EJIL 1085. For examples of some of the scholarly critiques of the Nuremberg trial expressed at the time see: Bernard D. Meltzer, 'Comment: A Note on the Nuremberg Debate' (1947) 14 University of Chicago Law Review 455.
[135] Overy (n 47) 2.
[136] M. Cheriff Bassiouni, 'The "Nuremberg Legacy' in Guénaël Mettraux (ed), *Perspectives on the Nuremberg Trial* (OUP 2008).
[137] ibid 595-6.
[138] Graham T Blewitt, 'The importance of a Retributive Approach to Justice' in David Blumenthal and Timothy McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (Martinus Nijhoff 2008) 46.
[139] Tomuschat (n 27).
[140] Jackson (n 106).
[141] Robert Jackson, 'Nuremberg in Retrospect: Legal Answer to International Lawlessness' (1949) 35(10) American Bar Association Journal 881. For references to Nuremberg as marking the transition to a "new world order", see: Leila Sadat, 'The Nuremberg Trial, Seventy Years Later' (2016) 15(4) Washing University Global Studies Law Review 575, 580-1; and Mark Lewis, *The birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950* (OUP 2014). Also see: Mettraux (n 23) 613.
[142] Joan Wallach Scott, *On the Judgment of History* (Columbia University Press 2020) 3.
[143] Douglas (n 24) 276-7; Ratner et al (n 90); and Mettraux (n 23) 605.

human rights movement identified as one of these outgrowths.[144] And beyond any retributive achievement, this commitment and these combined achievements are considered the true triumph of Nuremberg.[145] The trial and judgment thus stands as the "most impressive moral advance emanating from World War II."[146] In these kinds of appraisals, we see how Nuremberg takes on a symbolic function and embodies a set of moral and ethical principles for a new international legal order.

This normative legacy continues to shape the evolution of ICL and the operation of ICL institutions, particularly where history is involved as a disciplinary call to action. Here, past successes are isolated, decontextualised, and deployed in a distinctly rhetorical—and often sentimental—manner. ICL scholars have thus pointed to America's involvement in Nuremberg to convey how far off the path of global leadership they have strayed. This has occurred in the context of foreign policy failings in Vietnam,[147] Iraq,[148] and more recently, those actions taken by the Trump Administration.[149]

Often these calls are made with somewhat ahistorical implications. As in the case of ICL scholar Mettraux's *New York Times* editorial, which invoked the Nuremberg legacy to persuade US policymakers to shut down Guantanamo Bay because a tribunal styled after the IMT was the most appropriate way of dealing with the detainees.[150] They might also be directed towards the international community more generally or towards some international

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[144] Daniel Levy & Natan Sznaider, 'The Institutionalisation of Cosmopolitan Morality: The Holocaust and Human Rights' (2004) 3(2) Journal of Human Rights 143; and David Luban, 'The Legacies of Nuremberg' in Guénaël Mettraux (ed), *Perspectives on the Nuremberg Trial* (OUP 2008).
[145] Herbert Wechsler, 'The Issues of the Nuremberg Trial' (1947) 62(1) Political Science Quarterly 11, 26; and Glueck (n 63).
[146] King (n 110) 146.
[147] This theme will be explored in more detail in chapter eight. See: Taylor (n 76); and Richard Wasserstrom, 'The Relevance of Nuremberg' (1971) 1(1) Philosophy & Public Affairs 22.
[148] Benjamin Ferencz, 'The Nuremberg Principles and the Gulf War' (1992-3) 66(3) St. John's Law Review 711; Leslie Scheuermann, 'Victor's Justice? The Lessons of Nuremberg Applied to the Trial of Saddam Hussein' (2006) 15(1) Tulane Journal of International and Comparative Law 291; and Douglas J. Sylvester, 'The Lessons of Nuremberg and the Trial of Saddam Hussein' in John T. Parry (eds), *Evil, Law and the State: Perspectives on State Power and Violence* (Rodopi 2006).
[149] See for example: Benjamin Ferencz, 'Nuremberg Prosecutor's Warning About Trumps War on the Rule of Law' (*Daily Beast*, 19 July 2020) <https://www.thedailybeast.com/nuremberg-prosecutors-warning-about-trumps-war-on-the-rule-of-law?ref=author> accessed 1 November 2021; Akila Radhakrishnan and Elena Sarver, 'Trump's Chilling Blow to the ICC: With International Criminal Court Sanctions, the U.S. President's Hypocrisy Hits a New Low' (*Foreign Policy*, 17 June 2020) <https://foreignpolicy.com/2020/06/17/trumps-chilling-blow-to-the-icc/> accessed 1 November 2021; Rebecca Gordon, 'Why Are We Above International Law? The Trump Administrations Rejection of the International Criminal Court is the Latest Example of America's Toxic Exceptionalism' (*The Nation*, 26 March 2019) <https://www.thenation.com/article/archive/rebecca-gordon-international-criminal-court-john-bolton/> accessed 1 November 2021; and Diane Marie Amann, Margaret deGuzman, Gabor Rona, Milena Sterio, 'Why Are We Suing President Trump' (*Just Security,* 8 October 2020) <https://www.justsecurity.org/72733/why-we-are-suing-president-trump/> accessed 1 November 2021.
[150] Guénael Mettraux, 'A Nuremberg for Guantanamo' (*The New York Times*, 19 August 2009) <https://www.nytimes.com/2009/08/20/opinion/20mettraux.html> accessed 12 January 2022.

source of institutional authority.[151] In much the same way, the refrain 'never again' permeates international criminal justice discourses and is deployed as a call to action,[152] as we have seen recently in the context of human rights abuses committed against Uyghur populations in China.[153] In these examples, we get a sense of how the memory of Nuremberg lives on as part of a disciplinary consciousness.

The retrieval of Nuremberg memory in this way tells us much about the historical sensibility guiding the field's development. And in much the same way that *history* is invoked to guide action, it can also be drawn on to make sense of some current development. For example, in response to the *Tadić* trial, references to Nuremberg proliferated within ICL scholarship. And as the first *internationally* constituted ICL tribunal since the IMT and IMFTE, there was arguably good reason for this. To this end, the ICTY was viewed as the heir apparent of the Nuremberg legacy.[154] Alvarez thus remarked that: "[i]t is appropriate that the 50th anniversary of the Nuremberg Trials has produced a new international juridical body that is attempting to reinvigorate their legacy."[155] The establishment of the ICC elicited similar responses and was considered Nuremberg's direct

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[151] International lawyer Amal Clooney urged the UN Security Council to adopt a resolution on the basis that: "This is your Nuremberg moment. Your chance to stand on the right side of history." See: ''This is your Nuremberg moment': Amal Clooney urges UN to adopt sexual violence resolution – video' (*The Guardian*, 24 April 2019) <https://www.theguardian.com/global/video/2019/apr/24/this-is-your-nuremberg-moment-amal-clooney-urges-un-to-adopt-sexual-violence-resolution-video> accessed 12 January 2022.
The UNSC resolution in question related to conflict-related sexual violence committed by ISIS members. Although, somewhat ironically, the legacy of Nuremberg was being invoked in relation to a form of criminality that the Nuremberg trials and the Charter itself had been notably silent on. On the limits of Nuremberg in relation to sexual violence, see: Heidi Matthews, 'Redeeming Rape: Berlin 1945 and the Making of Modern International Criminal Law' in Tallgren and Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (OUP, 2019); and Hilly Moodrick-Even Khen and Alona Hagay-Frey, 'Silence at the Nuremberg Trials: The International Military Tribunal at Nuremberg and Sexual Crimes Against Women in the Holocaust' (2013-2014) 35 Women's Rights Law Reporter 43.
[152] Sven Alkalaj, 'Never Again' (1999) 23(2) Fordham International Law Journal 357; Kelly D. Askin, 'Omarska Camp, Bosnia: Broken Promises of "Never Again"' (2003) 30(1) Human Rights 12; and Kelly D. Askin, 'Never Again Promise Broken Again - Again - and Again' (2006) 27(4) Cardozo Law Review 1723. The phrase was also famously used in the report produced on the human rights abuses committed during the Argentine military rule from 1976 to 1983. See: National Commission on the Disappearance of Persons, *Nunca Más: The Report of the Argentine National Commission on the Disappeared* (Farrar Straus & Giroux 1986).
[153] Anne Applebaum, 'Never Again? It's Already Happening' (*The Washington Post,* 15 February 2019) <https://www.washingtonpost.com/opinions/global-opinions/the-west-ignored-crimes-against-humanity-in-the-1930s-its-happening-again-now/2019/02/15/d17d4998-3130-11e9-813a-0ab2f17e305b_story.html> accessed 1 November 2021; Jonah Kaye, 'Uyghur Camps and the Meaning of "Never Again"' (*The Jewish News,* 23 July 2020) <https://thejewishnews.com/2020/07/23/uyghur-camps-and-the-meaning-of-never-again/> accessed 1 November 2021; and Dolkun Isa, 'Europe Said "Never Again". Whys Is It Silent on Uighur Genocide?' (*Politico*, 14 September 2020) <https://www.politico.eu/article/uighur-genocide-china-why-is-europe-silent/> accessed 1 November 2021. The phrase has also been adopted in a parliamentary report on atrocities in Xinjiang: House of Commons Foreign Affairs Committee, Never Again: The UK's Responsibility to Act on Atrocities in Xinjiang and Beyond (HC 198—2021) <https://committees.parliament.uk/publications/6624/documents/71430/default/> accessed 1 November 2021.
[154] Jeremy Colwill, 'From Nuremberg to Bosnia and Beyond: War Crimes Trials in the Modern Era' (1995) 22(3) Racial & Political Injustice 111; and Theodor Meron, 'From Nuremberg to the Hague' (1995) 149 Military Law Review 107.
[155] Jose E. Alvarez, 'Nuremberg Revisited: The Tadic Case' (1996) 7(2) EJIL 245, 260.

descendent.[156] In these examples, we can see how ICL scholars retrieve history to make sense of contemporary developments and, in particular, by placing it within a chronology of historical development.

4.5.4 History, the 'Nuremberg Paradigm', and the Institutional Landscape of International Criminal Justice

As Bassiouni notes, beyond its legal and moral-ethical dimensions, the legacy of Nuremberg also finds expression in a particular institutional vision of ICL that dominates the field of *international criminal justice*.[157] In this regard, the Nuremberg IMT continues to exert an influence insofar as it has provided a model for a particular kind of justice that should be meted out in respect of human rights violations and other atrocities.[158] Over time, the Nuremberg precedent has crystalised into a "judicial tradition" that shapes what accountability in respect of the core international crimes—as representative of the crimes of *most concern* to the international community—looks like.[159] ICL norms have thus *monopolised* the pursuit of accountability in respect of human rights atrocities.[160]

Adherence to the judicial *tradition* of Nuremberg, however, has increasingly been characterised as *over-reliance*,[161] with the "monopolisation" identified by Nouwen and Werner now a persistent point of critique.[162] This manifests in a narrow focus on legalistic and judicialised forms of justice.[163] In the context of transitional justice, Zunino argues that

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[156] Dieter Kastrup, 'From Nuremberg to Rome and Beyond: The Fight Against Genocide, War Crimes, and Crimes Against humanity' (1999) 23(2) Fordham International Law Journal 404; Rancillo (n 106); Philippe Sands (ed), *From Nuremberg to the Hague: The Future of International Criminal Justice* (CUP 2003).
[157] Bassiouni (n 136) 584.
[158] On the impact of Nuremberg on the institutional landscape of ICL see: Benjamin B. Ferencz, 'International Criminal Courts: The Legacy of Nuremberg' (1998) 10(1) Pace University Law Review 203; Darryl Robinson and Gillian MacNeil, 'The Tribunals and the Renaissance of International Criminal Law: Three Themes' (2016) 110(2) AJIL 191; Philippe Kirsch, 'Applying the Principles of Nuremberg in the International Criminal Court' (2007) 6(3) Washington University Global Studies Law Review 501; Antonio Cassese, 'From Nuremberg to Rome: International Military Tribunals to the International Criminal Court' in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary, Vol 1* (OUP 2002).
[159] Mettraux (n 23) 612.
[160] Nouwen and Werner (n 129). Schwöbel-Patel has recently provided a particularly compelling account of the underlying dynamics behind this *monopolisation* by revealing the operation of the "political economy" of international criminal justice: Schwöbel-Patel (n 132)..
[161] Kerstin Bree Carlson, 'Model(ing) Law: The ICTY, the international Criminal Justice Template, and Reconciliation in the Former Yugoslavia' (Phd thesis, University of Copenhagen 2013); and later Carlson, *Model(ing) Law: Perfecting the Promise of International Criminal Law* (CUP 2018).
[162] Mamdami makes this point about the Nuremberg Paradigm in relation to the Truth and Reconciliation Commission (TRC) used in post-Apartheid South Africa: Mahmood Mamdani, 'Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa' (2015) 43(1) Politics & Society 61. On the TRC, see also: Christopher Zambakari, 'Two Paradigms of Justice: Criminal vs Survivor Justice in Africa' (2019) 22(2) Issues in Criminal, Social, and Restorative Justice 122; and Ronald Suresh Roberts, 'How "Transitional Justice" Colonised South Africa's TRC' (2020) 1 Modern Languages Open 34.
[163] Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34(4) Journal of Law and Society 411.

the adherence to this particular legal form is because it aligns with what are believed to be the historical origins of the field.[164] An awareness of the rigidity of this paradigm has prompted scholars working from a variety of critical perspectives to call for the localisation of the institutional forms of *international criminal justice*.[165]

Here, we are seeing the emergence and ossification of what Pureza has described as the "Nuremberg paradigm", where the legacy of the IMT has canonised a particular model of retributive justice. This *paradigm* sets the conceptual and normative boundaries within which various forms of harm and injustice are understood.[166] Other references to a *Nuremberg paradigm* have similarly sought to characterise the formation of this model of retributive justice,[167] which encompasses the doctrinal, conceptual, and normative dimensions of international criminal justice.[168] This paradigm is premised on the understanding that the "responsibility for mass violence must be ascribed to individual agents…and…that criminal justice is the only politically viable and morally acceptable response to mass violence."[169] And as was argued earlier, this inevitably draws us back towards a particular historical location and point in time. These historical locations form a "metaphorical cartography" where the narrative of ICL's history is told through a progressive recounting of key sites, locations, and timestamps.[170]

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[164] Marcos Zunino, *Justice Framed: A Genealogy of Transitional Justice* (CUP 2019) 132 & 138. On Nuremberg as the origin moment for the field of transitional justice studies, see: Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 Harvard Human Rights Journal 69, 70.

[165] On this point in the specific context of Uganda and the ICC, see: Kamari Maxime Clarke, 'Global Justice, Local Controversies: The International Criminal Court and the Sovereignty of Victims' in Marie-Bénédicte Dembour and Tobias Kelly (eds), *Paths to International Justice: Social and Legal Perspectives* (CUP 2007). On the legacy of Gacaca in Rwanda and Mato Oput in Uganda: Mark Drumbl, 'Justice outside of Criminal Courtrooms and Jailhouses' in Margaret deGuzman and Diane Marie Amann (eds), *Arcs of Global Justice* (OUP 2018); Linda Keller, 'Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms' (2008) 23 Connecticut Journal of International Law 209; Ariel Meyerstein, 'Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality' (2007) 32(2) *Law and Social Inquiry* 467; and Terry Beitzel and Tammy Castle, 'Achieving Justice Through the International Criminal Court in Northern Uganda: Is Indigenous/Restorative Justice a Better Approach' (2013) 23(1) International Criminal Justice Review 41.

[166] Jose Pureza, 'Defensive and Oppositional Counter-Hegemonic Uses of International Law: From the International Criminal Court to the Common Heritage of Humanity' in Boaventura Sosa Santos and CA Rodriguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (CUP 2009) 274.

[167] Danilo Zolo, 'The Iraqi Special Tribunal: Back to the Nuremberg Paradigm?' (2004) 2(2) Journal of International Criminal Justice' 313; Luc Reydams, 'The ICTR Ten Years On: Back to the Nuremberg Paradigm?' (2005) 3(4) Journal of International Criminal Justice 977; and Ruti Teitel, 'Transitional Justice: Post-war Legacies' (2006) 27 Cardozo L Rev 1615.

[168] Zambakari (n 162); and Daniel H. Derby, 'An International Criminal Court for the Future' (1995) 5(2) Transnational Law & Contemporary Problems 307, 308.

[169] Mamdami (n 164) 80.

[170] David Koller, '... and New York and The Hague and Tokyo and Geneva and Nuremberg and...: the geographies of international law' (2012) 23(1) EJIL 97.

4.6 Conclusion

In light of the above, we begin to get a sense of how the memory of Nuremberg has lived on in the contemporary consciousness of the field. We are given a tangible sense of this legacy in the institutional landscape of ICL, with international criminal justice institutions essentially replicating the *Nuremberg paradigm* and applying a body of legal norms that closely follow this legal and moral-ethical legacy.[171] However, writing these disciplinary histories of the field's development has proved a largely self-fulfilling exercise,[172] with the search for the origins of ICL entailing a search for those conceptual, institutional, and legal forms commensurate with contemporary understandings. Despite believing ourselves to be engaged in a form of genealogy, then, this search for *origins* sees us finding "in the past only what one is looking for today".[173] In this regard, we see merit in Croce's famous remark that the "practical requirements" of historical judgment "give to all history the character of *contemporary history*".[174]

Simpson has characterised this manner of writing the history of ICL as the search for "precedents for the unprecedented". This has led to a seemingly contradictory engagement with the past in our collective search for the origins of ICL. On the one hand, we are drawn into a search for the antecedents of contemporary ICL that might give historical substance and doctrinal legitimacy to the field. This allows us to view the type of international criminal justice that emerged at Nuremberg as progressively building on previous doctrinal or institutional antecedents.[175] At the same time, however, within this narrative, there is also a desire to preserve it as unprecedented, with this historiographical gesture giving substance to Nuremberg as a doctrinal and institutional innovation.[176] ICL scholarship thus engages in a "bootstrapping move" where the "atrocity that has never been experienced before must,

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[171] Carlson (n 161).
[172] Frédéric Mégret, 'International Criminal Justice Writing As Anachronism: The Past that Did Not Lead to the Present' in Immi Tallgren and Thomas Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (OUP 2019) 73.
[173] As Tallgren eloquently notes: "…a search for origins is the safest way to find in the past only what one is looking for today…". See: Immi Tallgren, 'Searching for the Historical Origins of International Criminal Law' in Morten Bergsmo, Cheah Wui Ling, and Yi Ping (eds), *Historical Origins of International Criminal Law: Volume I* (Torkel Opsahl Academic EPublisher 2014) xiii.
[174] Bendetto Croce, *History as the Story of Liberty* (Sylvia Sprigge trs, Allen and Unwin 1941) 19.
[175] For a critical engagement with this tendency in the context of the abolition of the slave trade as an antecedent, see: Vasuki Nesiah, 'The Law of Humanity Has a Canon: Translating Racialized World Order into "Colorblind" Law' (*Polar Journal*, 15 November 2020) <https://polarjournal.org/2020/11/15/the-law-of-humanity-has-a-canon-translating-racialized-world-order-into-colorblind-law> accessed 12 January 2022.
[176] Gerry Simpson, 'Unprecedents' in Thomas Skouteris and Immi Tallgren (eds), *The New Histories of International Criminal Law: Retrials* (OUP 2019) 17.

at the same time, be situated in a trajectory of juridical activity in relation to analogous historical acts."[177]

The search for *origins* thus proves not only *self-fulfilling* but also *self-indulgent*. Here, the past is engaged with as a celebration of what the present has become. This genealogical tracing also takes on a progressive edge, given that the search for historical antecedents typically involves a search for contemporary concepts and ideas in a more primitive and often idealised form.[178] These tendencies make projects seeking out historical exclusions and discontinuities important,[179] given that they might help us to disrupt these narrative constraints and to move beyond the familiar historiographical terrain we typically stick to within ICL scholarship. In this sense, it helps us to avoid what d'Aspremont has labelled *turntablism*,[180] which is a kind of historiographical circularity that represses the critical potential of even ostensibly *critical* engagements with the past.[181] With this in mind, the next chapter will explore an event that has been excluded from mainstream accounts of ICL and which might provide such a source of historiographical *discontinuity*.

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[177] ibid 13-4.
[178] Tallgren (n 173) xiii.
[179] Emily Haslam, 'Writing More Inclusive Histories of International Criminal Law: Lessons from the Slave Trade and Slavery' and Mégret (n 172) in Thomas Skouteris and Immi Tallgren (eds), *The New Histories of International Criminal Law: Retrials* (OUP 2019) 74.
[180] Jean d'Aspremont, 'Turntablism in the History of International Law' (2020) 22(2-3) Journal of the History of International Law 476.
[181] Jean d'Aspremont, 'Critical Histories of International Law and the Repression of Disciplinary Imagination' (2019) 7(1) London Review of International Law 89.

Chapter 5: We Charge Genocide: Rereading the Nuremberg Legacy

5.1 Introduction: 'Silence' and the History of International Criminal Law

As we have seen, in recent years ICL scholars have returned to Nuremberg, with various gaps identified in the accounts of this pivotal moment. Heller, for example, has moved beyond the IMT towards the subsequent Nuremberg trials held under Control Council Law No. 10.[1] Other work has engaged with Nuremberg as part of some broader critical project. This has included, for example, feminist critiques which have pointed to the silencing of gendered violence during the Nuremberg and Tokyo trials,[2] as well as the failure to adequately address the complicity of industrialists in the Nazi criminal enterprise.[3] The often overlooked Soviet contributions to the IMT have also recently been reclaimed.[4] These efforts at probing the limits of Nuremberg as a disciplinary origin moment have also included attempts to rebalance our attention from an excessive focus on Nuremberg towards placing renewed attention on Tokyo.[5]

Identifying these gaps and silences in our accounts of this foundational moment shifts our perspective of the disciplinary precedent the trial and judgment of Nuremberg represented. In this regard, these critical works contrast sharply with the conventional accounts of Nuremberg where it is held to have had a *civilising* effect which helped humanity to reach a "higher level in our development as a species",[6] and thus marked the transition

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[1] Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP 2011).

[2] See for example: Hilly Moodrick-Even Khen and Alona Hagay-Frey, 'Silence at the Nuremberg Trials: The International Military Tribunal at Nuremberg and Sexual Crimes against Women in the Holocaust' (2013-14) 35 Women's Rights Law Report 43. On the gendered invisibilities of Nuremberg, also see: Immi Tallgren, 'Absent or Invisible? "Women" Intellectuals and Professionals at the Dawn of the Discipline' in Frédéric Mégret and Immi Tallgren (eds), *The Dawn of a Discipline: International Criminal Law and Its Early Exponents* (Cambridge University Press, 2020).

[3] Grietje Baars, *The Corporation, Law and Capitalism* (Brill 2019) ch 3; and Doreen Lustig, 'The Nature of the Nazi State and the Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Revisiting Franz Neumann's Concept of Behemoth at the Industrialist Trials' (2011) 43(4) International Law and Politics 965.

[4] Francine Hirsch, *Soviet Judgment at Nuremberg: A New History of the International Military Tribunal After World War II* (OUP 2020).

[5] See, for example: Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal - A Reappraisal* (Oxford university Press, 2008); Yuki Tanaka, Timothy L.H. Cormack, and Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Brill 2011); and Viviane E. Dittrich, Kerstin von Lingen, Philipp Osten and Jolana Makraiová (eds), *The Tokyo Tribunal: Perspectives on Law, History and Memory* (TOAEP 2020).

[6] Graham T Blewitt AM, 'The importance of a Retributive Approach to Justice' in David Blumenthal and Timothy L H McCormack (Eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised*

into a *new world order* based on the rule of international law.[7] This phase of ICL's history encompasses the trial and judgment of the IMT and a sequence of closely related developments, which taken together are held to signal the emergence of a new *cosmopolitan morality*.[8] This account broadly reflects the contemporary appraisals of Nuremberg, where many of the immediate responses viewed it as a doctrinal and institutional landmark that made good on the project started by Grotius.[9]

With this in mind, the present chapter will explore the limits of this origin story and the disciplinary sensibilities it anchors. To do so, I will focus on the human rights petitions brought by African American activists in the years after judgment was rendered by the Nuremberg IMT, which sought to engage the nascent institutional architecture of the United Nations to advance the racial equality movement in America. Although I will briefly outline two earlier petitions brought by the *National Negro Congress* (NNC) and the *National Association for the Advancement of Colored People* (NAACP), my primary focus will be on a later petition submitted by the *Civil Rights Congress* (CRC). Although all of these attempts drew on the moral precedent of the Nuremberg IMT, the CRC petition was unique in using it as a legal precedent, in addition to the recently entered into force *Convention on the Prevention and Punishment of the Crime of Genocide*.[10]

The CRC petition has an added significance, I will argue, in how it drew on the language of ICL and, in particular, genocide. By calling for the application of the Genocide Convention to the racial violence and systemic racism the petition documented it represented an attempt to extend the body of ICL norms emerging from Nuremberg to forms of violence the field has historically failed to grapple with. Paying attention to this episode—which is largely overlooked within mainstream accounts of the field—thus gives a sense not only of the *possibilities* the Nuremberg precedent represented, but also its *limits*.[11] In this regard,

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Vengeance? (Brill 2007) 46. Also see: Richard Overy, 'The Nuremberg Trials: International Law in the Making' in Philippe Sands (ed), *From Nuremberg to the Hague: The Future of International Criminal Justice* (CUP 2003) 2; and Henry T. King Jr, 'Review Essay: Robert Jackson's Vision for Justice and Other Reflections of a Nuremberg Prosecutor' (1999-2000) 88(8) Georgetown Law Journal 2421.

[7] See, for example: Norbert Ehrenfreund, *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Court of History* (Palgrave McMillan 2007) 215-6; Jonathan Hafetz, *Punishing Atrocities Through a Fair Trial: International Criminal From Nuremberg to the Age of Global Terrorism* (CUP 2018) 6; David Luban, 'The Legacies of Nuremberg' in Guénaël Mettraux (ed), *Perspectives on the Nuremberg Trial* (OUP 2008); Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4(4) Journal of International Criminal Justice 830; and Daniel Levy & Natan Sznaider, 'The Institutionalisation of Cosmopolitan Morality: The Holocaust and Human Rights' (2004) 3(2) Journal of Human Rights 143, 144.

[8] Levy & Sznaider, ibid.

[9] See for example: George Finch, 'Retribution for War Crimes' (1943) 37(1) AJIL 81; and Robert Jackson quoted in Philip Marshall Brown, 'The Vitality of International Law' (1945) 39(3) AJIL 533, 534.

[10] Convention on the Prevention and Punishment of the Crime of Genocide (Adopted 9 Dec 1948, entered into force 12 January 1951) 78 UNTS 277 ('Genocide Convention').

[11] Although overlooked within mainstream accounts, this episode has recently gained a degree of scholarly attention: Robert Knox and Ntina Tzouvala, 'Looking Eastwards: The Bolshevik Theory of Imperialism and International Law' in Kathryn Greenman, Anne Orford, Anna Saunders, & Ntina Tzouvala (eds), *Revolutions in*

the present chapter constitutes a 'contrapuntal' reading of this dominant narrative of the field's origins and development.[12] To guide this, I will draw on work from critical ICL scholars and, in particular, those working from a TWAIL perspective.

5.2 Fascism, Empire, and Genocide: Radical Black Activism in the Post-War World

Whilst the most common critiques of Nuremberg as a moral and legal precedent tended to focus on the idea of 'victor's justice' and the principle of legality,[13] other voices critiqued it from a distinctly anti-colonial posture. From this perspective, the limits of Nuremberg were found in how imperialism emerged relatively unscathed. Similarities in the violence perpetrated within imperial and fascist regimes had been identified early on. This anti-imperial sentiment had been popularised in the interwar years, which often aligned with awareness of the dual portent represented by fascist and imperial politics[14]—both of which limited the possibility for 'world revolution'.[15] Whilst Arendt engaged in one of the more high profile invocations of this comparison,[16] others such as Lemkin had similarly identified similarities in the underlying dynamics of both.[17]

Some of the most forceful comparisons came from scholars working within anti-imperial and radical black scholarly and literary traditions, which pre-date these later works. George Padmore, for example, had written of "colonial fascism", with this critique becoming particularly pointed in light of a perceived failure of the British public to reflect on the realities of the imperial project in light of Nazi atrocities.[18] For Du Bois, the treatment of Jews in pre-War Germany sharpened his understanding of the racist systems against which he fought

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International Law: The Legacies of 1917 (CUP 2021); and John Reynolds, 'We Charge Apartheid? Palestine and the International Criminal Court' (*TWAIL Review,* 20 April 2021) <https://twailr.com/we-charge-apartheid-palestine-and-the-international-criminal-court/> accessed 1 January 2022. Most recently, Heller has given it consideration in response to an article by Alex Hinton: Kevin Jon Heller, 'Is "Structural Genocide" Legally Genocide? A Response to Hinton' (*Opinio Juris*, 30 December 2021) <http://opiniojuris.org/2021/12/30/is-structural-genocide-legally-genocide-a-response-to-hinton/> accessed 1 January 2022.

[12] As set out in Chapter 3, s 3.7.

[13] See Chapter 4, s 4.4 (n 69).

[14] Tom Buchanan, '"The Dark Millions In the Colonies are Unavenged": Anti-Fascism and Anti-Imperialism in the 1930s' (2016) 25(4) Contemporary History 645.

[15] C.L.R. James, *World Revolution, 1917-1936: The Rise and Fall of the Communist International* (Secker & Warburg 1937) 13: "All the world must now fight against Hitler and Japan. The African enslaved by the Kenyan settler and the French colonist, the starving millions of India…these are also summoned to fight for the peace-loving democracies against war-making fascism."

[16] Hannah Arendt, *The Origins of Totalitarianism* (Schocken Books 2004) 267-268 & 286.

[17] Moses notes this understanding in the work of Raphael Lemkin: Dirk Moses, *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History* (Berghann Books 2008) 9.

[18] George Padmore, 'Fascism in the Colonies' (1938) 2(17) Controversy; Padmore, 'Hands off the Colonies!' (*New Leader*, 25 February 1938); and Padmore, 'British Imperialists Treat the Negro Massess Like Nazis Treat the Jews' (1941) 5(42) Labour Action 4.

both at home and abroad.[19] Anti-colonial work drew similar comparisons, with Fanon characterising Nazism as a distinctly European colonial institution,[20] and Memmi also identifying points of convergence between anti-Semitism, fascism, and colonialism.[21] Fascism thus appeared to bring into sharp relief the racist modalities of colonial power.

In terms of the moral impulses emerging from Nuremberg, Césaire noted that the responses to it had failed to use it to reflect on the histories of colonial violence. For Césaire, the hypocrisy of Nuremberg was that Europe could only recognise the criminality of Nazism when the colonialist strategies previously "reserved exclusively for the Arabs of Algeria, the coolies of India, and the blacks of Africa" were turned towards themselves.[22] Discussing France's colonial crimes, Césaire argued that Hitler's crimes embodied the return of the West's genocidal past unleashed within Europe rather than on its periphery. What made the Nazi crimes so repugnant was that they were the "crime against the white man" rather than the "humiliation of man as such."[23] In this, we can note echoes of Judge Pal's dissenting judgment at the Tokyo Tribunal, which considered the Japanese atrocities as sharing a "common grammar of militarist imperial aggression" with those of the Allied forces.[24]

These works were prescient in using imperialism and colonialism as analytics to understand the Nazi atrocities, which is a comparison that has generated significant scholarship since—as we see in characterisations of the Nazi atrocities as expressions of imperialistic desires, for example.[25] Other work has used the concept of genocide to understand certain colonial practices, particularly in the context of settler-colonial societies.[26] Whilst this latter comparison has proved controversial and prompted debates about the *uniqueness* of each context,[27] it has proved useful in helping us to understand

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[19] W. E. B. Dubois, 'The Negro and the Warsaw Ghetto' in Eric J. Sundquist (ed), *The Oxford W.E.B. Reader* (OUP 1996) 470.
[20] Frantz Fanon, 'Racism and Culture' in Fanon, *Toward the African Revolution: Political Essays* (Haakon Chevalier tr, Grove Press 1967) 33; and Fanon, *The Wretched of the Earth* (Constance Farrington tr, Grove Press 1963) 101.
[21] Albert Memmi, *The Colonizer and the Colonized* (Howard Greenfeld tr, Profile Books 2021).
[22] Aimé Césaire, Discourse on Colonialism (Joan Pinkham tr, Monthly Review Press, 2000) 36-7.
[23] ibid.
[24] Ushimura Kei, 'Pal's "Dissentient Judgement" Reconsidered: Some Notes on Postwar Japan's Response to the Opinion' (2017) 19 Japan Review 215, 215; and Mark A. Drumbl, 'Memorializing Dissent: Justice Pal in Tokyo' (2020) 114 AJIL: Unbound 111, 112.
[25] For overviews of this body of work, see: Thomas Kuhne, 'Colonialism and Holocaust: Continuities, Causations, and Complexities' (2013) 15(3) Journal of Genocide Research 339; and Michelle Gordon, 'Colonial Violence and Holocaust Studies' (2015) 21(4) Holocaust Studies 272.
[26] See for example: Dirk Moses, *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian Histor*y (Berghann Books 2004); Dirk Moses and Dan Stone (eds), *Colonialism and Genocide* (Routledge 2007); and Moses (n 17)
[27] On this tendency: Jie-Hyun Lim, 'Triple Victimhood: On the Mnemonic Confluence of the Holocaust, Stalinist Crime, and Colonial Genocide' (2020) 23(1) Journal of Genocide Research 105; and Philip Spencer, 'Imperialism, Anti-Imperialism and the Problem of Genocide, Past and Present' (2013) 98(4) History 606.

the kinds of violence that characterised both.[28] In this way, the Holocaust has become a "memory template" for historical traumas in the cosmopolitan memory of global history.[29] The Holocaust, as a historical episode, thus acts as a paradigm we use to think through a range of historical atrocities.

In much the same way the Nazi atrocities provided a way for anti-imperialists to talk through the violence of empire and colonialism, radical black activists similarly looked to this context to make sense of their own experiences of racialised violence. This comparison occurred inadvertently during the Nuremberg trial when the defence lawyer for Karl Brandt made comparisons between Nazi Germany and *Jim Crow* America. During the *Doctor's Trial,*[30] Brandt's lawyers attempted to enter *The Passing of the Great Race* into evidence to illustrate that the racial policies of the Nazis were in no way unique.[31] Written in 1916 by American eugenicist Madison Grant, it argued that Nordic descended races were superior.[32] Grant's text was one of the earliest American eugenics texts translated into German and had seemingly been a personal favourite of Hitler—Hitler had reportedly sent a note to Grant praising it.[33] More recently, work by Whitman has also shown that the legal techniques developed in the American context to address immigration, interracial marriage, citizenship, and segregation had influenced Nazi jurists.[34]

The introduction of Grant's text was a source of deep embarrassment for the US legal team. And in this sense, it was a prescient indication of how the Nazi crimes would be used to draw attention to the hypocrisies and racial injustices that lay at the heart of American life. This was especially true of their presence on the international stage, where the race issue continued to be a thorn in the side of their foreign policy. And as we will see, the fact that while the Nazis were being prosecuted at Nuremberg, racial violence was pervasive at home constituted one of the great hypocrisies underlying America's global leadership.

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[28] This idea is explored in: Michael Rothberg, *Multidirectional Memory: Remembering the Holocaust in the Age of Decolonization* (Stanford University Press 2009).
[29] Daniel Levy and Natan Sznaider, 'Memory Unbound: The Holocaust and the Formation of Cosmopolitan Memory' (2002) 5(1) European Journal of Social Theory 99; and Levy and Sznaider, *Human Rights and Memory* (Penn State University Press 2010).
[30] The 'Doctors' Trial' were the first of the twelve subsequent Nuremberg trials held before US military courts, which followed the IMT. For an overview see: George J. Annas and Michael A. Grodin, 'Reflections on the 70th Anniversary of the Nuremberg Doctors' Trial' (2018) 108(1) American Journal of Public Health 10.
[31] Eve Darian-Smith, 'Re-Reading W.E.B. Du Bois: The Global Dimensions of the Human Rights Struggle' (2012) 7(3) Journal of Global History 483, 488.
[32] Madison Grant, *The Passing of the Great Race: Or, the Racial Basis of European History* (1st edn, Charles Scribener's Sons, 1916).
[33] Stefan Kühl, *The Nazi Connection: Eugenics, American Racism, and German National Socialism* (OUP 1994) 85.
[34] James Q. Whitman, *Hitler's American Model: The United States and the Making of Nazi Race Law* (Princeton University Press 2017).

For W.E.B Du Bois, an awareness of the Nazi atrocities had prompted a reformulation of his idea of the 'colour line', which referred to the *line* in society that defined relations between white and non-white in reconstruction era America.[35] This came from his extensive travels in pre and post-War Europe, where he witnessed first-hand the scale and perniciousness of anti-Jewish persecution. Reflecting on his visit to the Warsaw Ghetto, Du Bois commented:

> "The race problem in which I was interested cut across lines of color and physique and belief and status and was a matter of cultural patterns, perverted teaching and human hate and prejudice, which reached all sorts of people and caused evil to all men."[36]

This experience sharpened his understanding of the forces and structures of oppression against which he fought and triggered his emergence from "emerge from a certain social provincialism into a broader conception of what the fight against race segregation, religious discrimination and the oppression by wealth had to become if civilisation was going to triumph and broaden into the world."[37]

Speaking on his travels to the Warsaw Ghetto in 1949, Du Bois commented:

> "I have seen something of human upheaval in this world: the scream and shots of a race riot in Atlanta; the marching of the Ku Klux Klan; the threat of courts and police; the neglect and destruction of human habitation; but nothing in my wildest imagination was equal to what I saw in Warsaw in 1949."[38]

And similarly, following a 1936 visit to Germany shortly after the Nuremberg Laws had been passed, Du Bois remarked that these eugenicist policies constituted "an attack on civilisation, comparable only to such horrors as the Spanish Inquisition and the African slave trade."[39]

Du Bois' use of comparative atrocity was echoed in a later comment that there was no Nazi atrocity which "Christian civilisation or Europe had not long been practicing against colored folks in all parts of the world..."[40] We thus get a sense of how the Nazi atrocities

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[35] W.E.B. Du Bois, *The Souls of Black Folk* (A. C. McClurg & Co, 1903).
[36] W.E.B. Du Bois, 'The Negro and the Warsaw Ghetto' (1952) 6(7) Jewish Life 14,
[37] ibid 14.
[38] ibid 15.
[39] W.E.B. Du Bois quoted in Harold Brackman, '"A Calamity Almost Beyond Comprehension": Nazi Anti-Semitism and the Holocaust in the Thought of W.E.B. Du Bois' (2000) 88(1) American Jewish History 53, 65.
[40] The full quote reads: "Christian civilisation or Europe had **not** long been practicing against colored folks in all parts of the world in the name of and for the defence of a superior race born to rule the world." See: W.E.B. Du Bois, *The World and Africa* (International Publishers 1947) 23.

were used to reframe his anti-colonial politics,[41] which allowed him to unpack a common grammar of violence in both contexts. At the heart of this *common grammar* was a political economy of racism.

By reframing African American oppression in this way, Du Bois and other radical activists sought to make it resonate with a white American audience.[42] This was amplified by the "laissez-faire" approach to ameliorating racial injustice in America at that time, particularly when contrasted with the "vigorous prosecution" of Nazi war criminals.[43] Walter White of the NAACP captured the hypocrisy of this post-War moment in a telegram to Eleanor Roosevelt in which he noted: "Negro-veterans…have been done to death or mutilated with savagery equalled only at Buchenwald."[44] This concern was particularly acute given the lack of convictions or arrests for recent incidents of lynching. An awareness of these hypocrisies intensified and radicalised the domestic struggle for racial justice in the post-War years.[45] This was compounded by an increase in lynching and other violence committed against African Americans—particularly those instances involving returning veterans.[46] Growing anxieties regarding the switch to a post-War economy and the need to employ returning veterans heightened these tensions, which had the potential to destabilise black communities.[47]

Nevertheless, the post-War years held much promise for black activists. And by 1944, the NAACP had amassed close to 500,000 members and considerable financial resources.[48] The outlook amongst certain black activists was also increasingly internationalist in focus, with the civil and political rights provisions of the United Nations Charter ('The Charter') and the Universal Declaration on Human Rights ('UDHR') holding great promise. Additionally, there was a growing strain of peace activism in certain quarters, which drew attention to the connections between the cessation of global conflict, disarmament, racial equality, international cooperation, economic progress, the eradication of capitalist exploitation, and the end of imperialism and colonialism.[49] For Du Bois, the post-War years possessed, on the one hand, the promise of transnational solidarity, and

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[41] Darian-Smith (n 31) 486.
[42] ibid 504.
[43] Carol Anderson, *Eyes off the Prize: The United Nations and the African American Struggle for Human Rights 1944-1955* (CUP 2003) 62-3.
[44] Quoted from ibid 63.
[45] Eric Porter, *The Problem of the Future World: W.E.B. Du Bois and the Race Concept at Midcentury* (Duke University Press 2010) 81-2.
[46] Anderson (n 43) 58-60.
[47] ibid 65-6.
[48] ibid 2.
[49] Charisse Burden-Stelly, 'In Battle for Peace During "Scoundrel Time": W.E.B. Du Bois and United States Repression of Radical Black Peace Activism' (2019) 16(2) Du Bois Review 555,

on the other, the potential for war being a continuing state of affairs where change was not possible.[50]

A hopeful, internationalist outlook was also drawn from transnational communist, labour, and Pan-Africanist movements, which formed the basis of a perspective where African Americans were viewed not only as *black Americans* but as people of colour in a white-dominated world.[51] Securing an equitable future thus entailed dismantling the imperialist structures creating these global conditions. African American activists, therefore, increasingly looked to international fora. To this end, Du Bois and other NAACP officials were present in the US delegation to the San Francisco Conference in 1945—which was a portent of his future engagements with the UN institutional architecture I will now set out.

5.3 National Negro Congress: A Petition to the United Nations on Behalf of the 13 Million Oppressed Negro Citizens of the United States of America

One such type of engagement came in the form of a petition by the *National Negro Congress* (NNC), who had, at their tenth-anniversary convention the summer of 1946, voted to draft a petition to the Economic and Social Council of the UN (ECOSOC).[52] It was to be prepared primarily by Marxist historian Herbert Aptheker and would include a detailed factsheet on the "oppression of the American Negro". A final draft was presented to the NCC Convention on the first of June, with a formal presentation to follow five days later at Hunter College in New York City. It would then be forwarded to the ECOSOC.

Titled *A Petition to the United Nations on Behalf of the 13 Million Oppressed Negro Citizens of the United States of America*, it was grounded in the equal rights protections of the Charter and the responsibilities of the ECOSOC.[53] It also contained a report by Aptheker, which set out the conditions of inequality, oppression, racial injustice, and racial violence African Americans experienced—including in occupational life and employment, family income, housing, health, education, public services, civil liberties, peonage, and violence. The conclusion stated the:

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[50] Porter (n 45) 88.
[51] Carol Anderson, 'From Hope to Disillusion: African Americans, the United Nations and the Struggle for Human Rights, 1944-1947' (1996) 20(4) Diplomatic History 531, 531-2.
[52] Charles P. Henry and Tunua Thrash, 'U.S. Human Rights Petitions Before the UN' (1996) 26(3/4) The Black Scholar 60, 63.
[53] National Negro Congress, *A Petition to the United Nations on Behalf of the 13 Million Oppressed Negro Citizens of the United States of America* (National Nego Congress 1946) <https://archive.org/details/NNC-Petition-UN-1946/mode/2up> accessed 27 January 2022.

> "[C]ancer of racism has spread its poison throughout the life of America. Its throttling and killing effect upon the people of the entire nation—North and South, Negro and white—grows more fearful and more anachronistic with the passing of each hour."[54]

Based on the facts contained in the report and the equal rights protections contained in the Charter, it called on the ECOSOC, through the Commission on Human Rights or otherwise, to:

> "(1) Make such studies as it may deem necessary of the conditions herein described as they exist in the United States of America, pertaining to political, economic and social discrimination against Negroes because of their race and color.
>
> (2) Make such recommendations and take such other actions as it may deem proper with respect to the facts herein stated, to the end that "higher standards" in the field of human rights may be achieved in the United States of America and "discrimination and other abuses" on the grounds of race and color, may be "checked and eliminated."
>
> (3) Take such other and further steps as may seem just and proper to the end that the oppression of the American Negro be brought to an end."[55]

Despite the petitioner's hopes that the Soviet Union and other aligned powers would help advance it, it saw little substantive success—particularly given US opposition. And although the General Assembly had acted on other human rights matters laid before it, no further action was taken.[56]

5.4 National Association for the Advancement of Colored People: *An Appeal to the World*

Although generating little substantive action within the UN, the NNC petition did create a degree of international attention and would inspire later action by the *National Association for the Advancement of Colored People* (NAACP) and the *Civil Rights Congress* (CRC).[57] Du Bois and Walter White of the NAACP, in particular, looked to build on the NCC petition

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[54] ibid 14.
[55] ibid 7.
[56] Henry and Thrash (n 52) 63.
[57] Gerald Horne, *Black and Red: W.E.B. Du Bois and the Afro-American Response to the Cold War, 1944-1963* (SUNY Press 1986) 76.

and take it beyond a publicity stunt.[58] For the CRC, the influence of the NNC was as much institutional, with the NNC later merging with the *International Labor Defense* (ILD) and the *National Federation for Constitutional Liberties* (NFCL) to form the CRC.[59] The possibility of submitting a petition to the UN held great promise, particularly insofar as the cause of racial justice in America could be elevated to the level of international concern through the language of human rights.

Du Bois had early on recognised the public relations potential of an appropriately drafted—and strategically delivered—petition and, to this end, put considerable effort into coordinating support from those close to the UN,[60] including various UN delegations and Secretary-General Trygve Lie.[61] However, official support was difficult to mobilise, which was partially connected to uncertainty regarding the competencies of the newly established UN Commission on Human Rights. Du Bois thus focused on organising the media release of the petition. This forced the hand of the then Director of the UN Human Rights Division within the Secretariat—John Humphrey—to receive the petition in October 1947.[62] Du Bois formally presented it to representatives of the Human Rights Commission on 23rd October 1947, describing it as a: "frank and earnest appeal to all the world for elemental justice against the treatment which the United States has visited upon us for three centuries".[63] The aim was to have it placed on the agenda of the UN General Assembly.

The NAACP petition was more substantive than the NNC petition and, under the short title *An Appeal to the World*, consisted of six chapters.[64] Du Bois was the lead editor and provided the introductory chapter. Chapters two, three, and four set out the legal status of African Americans from the late eighteenth century to the date of publication. The fifth was authored by Leslie S. Perry and set out the areas of social life where African Americans experienced marginalisation and discrimination, using the concept of *fundamental human rights*. Rayford W. Logan authored the final section and set out the provisions of the UN Charter they sought to rely on and previous actions under them. With reference to earlier

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[58] Anderson (n 43) 93.
[59] For an overview see: Gerald Horne, *Communist Front? The Civil Rights Congress, 1946-1956* (Fairleigh Dickinson University Press 1988) 29-51.
[60] Anderson (n 43) 93-4.
[61] ibid 102.
[62] ibid 103.
[63] W.E.B. Du Bois, 'Speech to the United Nations: To the Representatives of the Human Rights Commission and its Parent Bodies the Economic and Social Council and the General Assembly' (23 October 1947)' (W.E.B. Du Bois Papers 1803-1999, Special Collections and University Archives, University of Massachusetts Amherst Libraries) <https://credo.library.umass.edu/view/full/mums312-b116-i053> accessed 27 January 2022.
[64] W.E.B. Du Bois (ed), *An Appeal to the World: A Statement on the Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and an Appeal to the United Nations for Redress* (NAACP 1947).

decisions by ECOSOC, Logan argued: "[t]hese resolutions demonstrate that there has been no relaxation in the desire to carry out the evident intent of the drafters of the Charter."[65]

The basis of this *Appeal to the World* was Article 1(3) of the Charter, which established the following as one of the primary purposes and principles of the UN:

> "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[66]

Logan argued this manifested the determination of the drafters of the Charter to "universalise the protection of human rights and of minorities which had previously rested upon agreements with individual nations".[67] In particular, Logan argued that the determination of the drafters to ensure respect for human rights *without distinction as to race, sex, language, or religion* was clear given its repetition throughout the Charter. Logan identified this determination as not just an abstract statement of principle but rather something that could be delivered by mechanisms contained within the Charter itself. To this end, the General Assembly was identified as the "agency by which this protection is to be implemented",[68] with Article 13 the appropriate mechanism to do so.

That the General Assembly was identified as the guarantor of the human rights protections contained in the Charter illustrates the 'appeal to the world' the petitioners sought to make. In this regard, the NAACP and NNC shared a distinctly internationalist focus. Du Bois thus stated that the question of racial equality, which was primarily an internal and national question, becomes "inevitably an international question and will in the future become more and more international as the nations draw together."[69]

A failure to address this question, Du Bois argued, made the functioning of the UN impossible. Of course, making an *appeal* to the international community in this manner also

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[65] Rayford W. Logan, 'Chapter VI: The Charter of the United Nations and its Provisions for Human Rights and the Rights of Minorities and Decisions Already Taken Under this Charter' in W.E.B. Du Bois (ed), *An Appeal to the World: A Statement on the Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and an Appeal to the United Nations for Redress* (NAACP 1947) 90.
[66] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 1(3).
[67] Logan (n 65) 86.
[68] ibid.
[69] W.E.B. Du Bois, 'Chapter I: Introduction' in W.E.B. Du Bois (ed), *An Appeal to the World: A Statement on the Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and an Appeal to the United Nations for Redress* (NAACP 1947) 13.

helped to dispose of what Logan identified as the major obstacle to their efforts: that the principle of sovereignty would ordinarily render this matter an *internal* one to be solved domestically.[70] However, the Charter itself provided a degree of hope where the Chapter VII threshold contained in Article 2(7) could be met. Interestingly, Logan specifically identified the treatment of Jews in Germany before the War as illustrative of a circumstance that might otherwise be "rigidly" classified as falling within the domestic affairs of a state, but that would now be rendered of *international* concern due to the principles and purposes contained in Article 1(1) and the Chapter VII powers of the UN.[71]

How one measures the success of the petition will depend on how one views the NAACP's objectives. If these are taken to be actually compelling institutional action within the UN, the petition enjoyed limited success. And despite any commitments of support that were forthcoming,[72] the US delegation and State Department ultimately stymied their prospects.[73] The Commission on Human Rights voted 11-1 to remit it to the Sub Commission on the Prevention of Discrimination and the Protection of Minorities, where it could influence the shape of the UDHR.[74] Although the Soviet delegation did introduce the petition, it was ultimately put in a politically untenable position and lost momentum.[75]

On the other hand, if their objectives are taken to be stirring up international attention on the core issues the petition pertained to, it was markedly more successful. Somewhat ironically, the geopolitical conditions that made it institutionally unviable were partially responsible for this. The mere association with the Soviet Union provoked the US State Department into action. Similarly, Soviet interest in the petition was, at least in part, linked to the reputational damage it might cause to the US. However, this association ultimately pushed Eleanor Roosevelt to reject it and distance herself from the NAACP. It also heightened tensions within the NAACP between the more radical approach of Du Bois versus the more moderate tact of Walter White. These tensions eventually saw White distancing himself from the petition and putting his efforts towards backing the report of a special committee on civil rights convened by President Truman in 1946, released a week after *Appeal to the World*.[76]

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[70] Logan (n 65) 90-3.
[71] ibid 91.
[72] This included commitments from: the Indian delegation, Pakistan, Poland, Egypt, Ethiopia, Belgium, Haiti, Mexico, Norway, China, the Soviet Union, and the Dominican Republic. See: Horne (n 57) 78.
[73] Henry and Thrash (n 52) 64-5.
[74] Brenda Gayle Plummer, *Rising Wind: Black Americans and U.S. Foreign Affairs, 1935-1960* (University of Carolina Press 1996) 181-2.
[75] Porter (n 45) 90
[76] ibid 93-4; and Plummer (n 74) 183.

This shift signalled the broader retreat of the NAACP under White during the Cold War from a more radical vision of human rights towards the more moderate pursuit of *civil rights*.[77] White thus adopted a liberal anti-communist stance that aligned with the Truman administration and hoped to ensure the movement's survival within an increasingly pervasive climate of McCarthyism.[78] This was indicative of the onset of what Burden-Stelley describes as the "longest, most expansive, and most comprehensive period of political repression since the founding of the country". This involved the mobilisation of US State agencies to constrain the activities of internationalists, peace activists, black activists, communists, and anyone else deemed a subversive force.[79]

Nevertheless, the petition was important in "bringing home to an American audience the significance of the first Nuremberg trial", which used Holocaust memory to think through the racial violence and injustice present in the US.[80] In doing so, Du Bois helped localise the "racial politics of the Second World War and the UN Declaration of Human Rights" through engagement with the UN.[81] We thus get a sense of the promise particular international legal norms held for these activists, particularly in light of the possibility of action in international forums. What is also notable is how the moral precedent of Nuremberg was drawn on in both the NAACP and NNC petitions, which is a theme I will return to when looking at the CRC petition.

5.5 Civil Rights Congress: *We Charge Genocide*

Although not resulting in much institutional success, the NAACP petition nevertheless proved influential to later efforts by Du Bois and other civil rights activists. For example, in the months following the NAACP petition, Du Bois lent his support to another petition submitted to the Human Rights Commission of ECOSOC regarding the Rosa Lee Ingram case. This related to a death sentence imposed on the widowed sharecropper and mother of twelve, Rosa Lee Ingram, and two of her sons in circumstances where they had used fatal force against a neighbour who had attempted to violently rape Ingram. The subsequent prosecutions were hastily undertaken and involved repeated constitutional rights violations. African American activists—particularly feminist groups—led the public outcry against the

[77] Porter (n 45)) 94.
[78] Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton University Press 2011) 13.
[79] Burden-Stelly (n 49).
[80] Darian-Smith (n 31) 504-5.
[81] ibid 505.

conviction. An interest group was formed to take the case before ECOSOC and the General Assembly.[82] And in a supporting petition, Du Bois charged the Human Rights Commission under Eleanor Roosevelt and John Humphrey—as Chairman and Secretary respectively—of "consistently and deliberately ignoring scientific procedure and just treatment to the hurt and wounded of the world."[83]

The legacy of *Appeal to the World* is also evident in the groundwork it lay for a latter petition by the CRC. And if Du Bois sought to *appeal* to the world, this later petition took a more forthright approach. Titled *We Charge Genocide: The Crime of Government Against the Negro People*, the CRC petition used the language of ICL to frame racial violence and injustice in the US.[84] Although it drew on ICL rather than human rights norms, the CRC petition was structurally similar to the NAACP petition and bore the institutional legacy of the NNC. Its production was overseen by Executive Secretary William Patterson,[85] who had a more expansive petition in mind that could provide a systematic account of the violence and oppression African Americans were subjected to.[86] Patterson thus sought political activists and scholars who could assist in its production. With a first draft finished by August 1951, Patterson thus began planning its release.[87] This was evidently of great concern to Patterson, as was reflected in his lack of concern for the UN's institutional and agenda setting practices.[88]

Patterson had originally intended for Paul Robeson and Du Bois to deliver the petition. However, this strategy had to be reformulated when Robeson's political affiliations limited his ability to travel and Du Bois' health declined.[89] Patterson faced similar travel restrictions as a communist party member, which meant a ticket to Paris had to be procured on his behalf. Copies of the petition were sent to Paris in advance of his arrival to ensure they

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[82] Charles Martin, 'Race, Gender, and Southern Justice: The Rosa Lee Ingram Case' (1985) 29(3) The American Journal of Legal History 251, 263.
[83] W.E.B. Du Bois, 'A Petition to the Human Rights Commission of the Social and Economic Council of the United Nations; and to the Several Delegations of the Member States of the United Nations (1949)' (W.E.B. Du Bois Papers 1803-1999, Special Collections and University Archives, University of Massachusetts Amherst Libraries) <https://credo.library.umass.edu/view/full/mums312-b229-i024> accessed 27 January 2022.
[84] The CRC was reprinted on a number of occasions, having been originally published in 1951. The edition I will be quoting from is a later edition published in 1970 which reproduces the original 1951 edition, in addition to containing a new preface by the actor and activist Ossie Davis. For the original, see: William L. Patterson (ed), *We Charge Genocide: The Crime of Government Against the Negro People* (1st edn, Civil Rights Congress 1951). For the later edition reference in this chapter, see: William L. Patterson (ed), *We Charge Genocide: The Crime of Government Against the Negro People* (International Publishers 1970).
[85] Patterson was a radical activist, member of the Communist Party, and lawyer. For an autobiographical overview of his life, see: William Patterson, *The Man Who Cried Genocide: An Autobiography* (International Publishers 1971).
[86] Charles H. Martin, 'Internationalizing "The American Dilemma": The Civil Rights Congress and the 1951 Genocide Petition to the United Nations' (1997) 16(4) Journal of American Ethnic History 35, 44.
[87] ibid 45.
[88] Anderson (n 43) 182.
[89] ibid 193.

arrived unencumbered.[90] Patterson had also liaised with French Communist party members who had helped coordinate the public relations campaign that would accompany the petition's release.[91] Arriving in Paris on 16 December 1951 with twenty copies of the petition, they were subsequently delivered to UN officials, including President of the General Assembly Luis Padilla Nervo and Secretary-General Trygve Lie. Robeson led a CRC delegation to the UN offices in New York, where a copy was presented to the Secretary General's office, after which he set about lobbying other delegates.[92] At the same time, Patterson embarked on a European speaking tour promoting both the petition and the cause more generally.[93]

Running to over 200 pages, the CRC petition was more substantive than the NNC and NAACP efforts before it. It drew on data from various sources, including NAACP publications, Census Bureau reports, and other government departments. It consisted of five parts including: the "Opening Statement", "The Law and the Indictment", "The Evidence", "Summary and Prayer", and an "Appendix".[94] The first part included a high-level overview, basic proofs, and historical and thematic background. The second part set out the legal basis for the petition, whilst the third part included a 137-page record of acts committed against African Americans between January 1945 and June 1951.

5.5.1 What did the CRC Petition Contain?

The central claim of the petition was that the US government were committing violations of the UN Charter and the Convention on the Prevention and Punishment of Genocide. This was surmised in the opening paragraph, which captured the violence spoken of:

> "Out of the inhuman black ghettos of American cities, out of the cotton plantations of the South, comes this record of mass slayings on the basis of race, of lives deliberately warped and distorted by the wilful creation of conditions making for premature death, poverty and disease. It is a record that calls aloud for condemnation, for an end to these terrible injustices that constitute a daily and ever-increasing violation of the United Nations Convention on the Prevention and

[90] Gerald Horne, *Black Revolutionary: William Patterson and the Globalization of the African American Freedom Struggle* (University of Illinois Press 2013) 130.
[91] ibid.
[92] Martin (n 86).
[93] ibid.
[94] Patterson (n 84).

Punishment of the Crime of Genocide."[95]

The petition was brought because "oppressed Negro citizens of the United States" were "segregated, discriminated against and long the target of violence, suffer from genocide as a result of the consistent, conscious, unified policies of every branch of government".[96] The petitioners were also compelled to act because "discrimination at home must inevitably create racist commodities for export abroad—must inevitably tend toward war."[97] The petitioners thus claimed the "racist theory of government of the USA was not the private affair of Americans, but the concern of mankind everywhere."[98] This encompassed both the "persistent slaughter" and "institutionalised oppression" of African Americans.[99]

Although focusing on events between January 1945 to June 1951, the petition grew from a long history of oppression and racism within the US. It thus stated this:

> "In one form or another it has been practiced for more than three hundred years although never with such sinister implications for the welfare and peace of the world at present. Its very familiarity disguises its horror. It is a crime so embedded in law, so explained away by specious rationale, so hidden by the talk of liberty, that even the conscience of the tender mind is sometimes dulled."[100]

The petitioners used *genocide* to refer to two distinct forms of violence. There was firstly the genocidal killings and violence of those: "beaten to death on chain gangs and in the back rooms of sheriff's offices, in the cells of county jails, in precinct police stations and on city streets, who have been framed and murdered by sham legal forms and a legal bureaucracy."[101] And secondly, it referred to "economic genocide" which covered *deliberately inflicting on the group conditions of life calculated to bring about its destruction in whole or in part*, as per the Genocide Convention.[102] This covered forms of violence such as lower health outcomes and mortality rates, employment-based discrimination, ghettoization, discriminatory housing policies, decreased access to medical care and education, and various other forms of discrimination and segregation.[103]

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[95] William Patterson, 'Introduction' in William L. Patterson (ed), *We Charge Genocide: The Crime of Government Against the Negro People* (International Publishers 1970) xiv.
[96] ibid xiv.
[97] ibid xv.
[98] ibid xv.
[99] Patterson (n 84) 3.
[100] ibid 4.
[101] ibid 4.
[102] ibid 5.
[103] ibid 5.

On this basis, the petition charged the US Government with: "violating its pledges, its solemn international undertakings under the Charter [of the UN] and the Genocide Convention, and allege that by reason of such violations the Negro people of the United States have suffered from acts of genocide."[104] This included charges under Article II(a), Article II(b), Article II(c), and Article III. The charge under Article II(a) related to killings of African Americans "intended and aimed at the destruction of the group in whole or in part".[105] The petition also charged that assaults, beatings, maiming, and other patterns of extra-legal violence—and the fear of such attacks—constituted *serious bodily and mental harm to members of the group* under Article II(b). This also encompassed:

> "…the segregation which imprisons United States Negroes from birth to death, marking their status as inferior as a matter of law on the basis of race, cutting them off from adequate education, hospital facilities, medical treatment, adequate housing, forcing them to live in ghettos and depriving them of rights and privileges that other Americans are accorded as a matter of course."[106]

Taken together, this constituted "political, social, cultural, biological, economic, and moral oppression".[107]

The petition also charged the US Government with deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part—as per Article II(c). Which included:

> "…segregation, of living in ghettos and disease-breeding housing, of being barred from the great majority of hospitals, as a result of discrimination in employment which makes for a tragically low income, of violence which often prevents trade union organisation, of the semi-peonage of share-cropping, of a terror which prevents members of the group from using political action to better their condition, as a result of these and other factors, United States Negroes are deprived on average of nearly eight years of life as compared with the life expectancy of White Americans. Disease rates and mortality rates are higher among the Negro people than in any comparable segment of the United States Population."[108]

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[104] ibid 50.
[105] ibid 45.
[106] ibid 46.
[107] ibid 46.
[108] ibid 46.

These conditions resulted from deliberate governmental policy intended for the purpose of: "depressing wages, increasing profit, and retaining reactionary political and economic control through the divisions they effect in American life."[109]

A fourth count charged public officials with direct and public incitement to genocide and the US Government of conspiracy to commit and complicity in genocide arising from a failure to enforce due process and equality provisions of the US Constitution—under Article III.[110] Evidence in support of the Article II and III charges were set out in Part Three of the petition, which included details of hundreds of extrajudicial and judicial killings of African Americans, as well as statistical data setting out health, education, and morality disparities.

Having set out these charges, the petition called for action under the UN Charter and the Genocide Convention:

> "…we solemnly ask the General Assembly to condemn this genocide on the score that it is not only an international crime in violation of the United Nations Charter and the Genocide Convention but that it is a threat to the peace of the world."[111]

Specifically, it requested the General Assembly adopt a resolution declaring these acts by the US Government as genocidal and to take action to prevent any more such acts and fulfil their obligations under the Charter and Convention.[112] Member State action was also requested under Article VIII, which provides for contracting parties to request competent organs of the UN to take action under the Charter they consider appropriate for preventing or suppressing genocide.[113] Notably, they called on the governments of France, Poland, Czechoslovakia, the USSR, the Ukrainian SSR, and the Byelorussian SSR to call on the UN to take action given the suffering they had also endured "under this odious scourge."[114] India was also explicitly mentioned as their "nationals know something of oppression on the basis of race."[115] A final plea sought to establish an international tribunal under Article VI of the Genocide Convention and for the General Assembly to: "follow the precedents of international law in dealing with violators of international conventions. As did the nations at the Nuremberg trial".[116]

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[109] ibid 47.
[110] ibid 47-48.
[111] ibid 28.
[112] ibid 196.
[113] ibid 196.
[114] ibid 51.
[115] ibid.
[116] ibid.

5.5.2 The Reaction to *We Charge Genocide*

Although garnering little attention from the American media,[117] it provoked reactions that were at once varied and predictable. More conservative newspapers tended to dismiss it, whilst more liberal papers appeared at least somewhat sympathetic to the cause—although not necessarily the choice of framing.[118] This muted response was partially a consequence of early intervention by the State Department and the NAACP, who actively opposed it. The State Department had early on approached the NAACP with a view towards disrupting its impact.[119] And now stripped of its more radical elements, the NAACP obliged and issued a press release characterising it as subversive and conspiratorial.[120] The publication of the petition had also been pre-empted by a television broadcast that described it as communist propaganda and indicated that White of the NAACP was due to deliver a response.[121] This proved a challenge for White, given the CRC's use of data collected by the NAACP in the petition. White eventually responded in his weekly newspaper column and refuted the specific charge of genocide whilst also advocating his reform program.[122] White had also unsuccessfully tried to raise funds for a trip to Paris to respond to it publicly.[123]

Staunch resistance also came from the US representative to and chair of the UN Commission on Human Rights, Eleanor Roosevelt. For Kies, Roosevelt's response must be understood as part of her gradualist approach to civil rights issues, her staunch anti-communism, and her work on the UNDHR.[124] These pre-dispositions made her receptive to the State Department's attempts to undermine the petition, which included launching a speaking tour of Europe by prominent civil rights activists to counter it.[125] These efforts also included emphasising the communist affiliations of the CRC and deploying a counter-narrative focusing on the rapid societal progress of African Americans.[126] A final prong of

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[117] A prominent African American paper noted the story about the petition as having "been buried by the daily press of the United States" and that the "daily press of this nation, generally, carried not a single line to indicate that this petition had been filed or, for that matter, that there was such a petition in existence." See: "UN Asked to Act Against Genocide in the United States" *The Afro-American* (Baltimore, 29 December 1951) 21 <https://news.google.com/newspapers?id=mdQmAAAAIBAJ&sjid=kgIGAAAAIBAJ&dq=we-charge-genocide&pg=2113%2C3191483> accessed 19 October 2021.
[118] Martin (n 86) 52.
[119] On this collusion see: Anton Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention* (Wisconsin University Press 2017) 239-40.
[120] Martin (n 86) 46.
[121] ibid 47.
[122] ibid.
[123] Martin (n 86) 49.
[124] Tim Kies, 'Liberalism Meets Radicalism: Eleanor Roosevelt and the Internationalization of the Black Liberation Struggle' in Fazzi D., Luscombe A. (eds) *Eleanor Roosevelt's Views on Diplomacy and Democracy: The Global Citizen* (Palgrave Macmillan 2020) 118.
[125] Martin (n 86) 49-50.
[126] Kies (n 124) 118; and Martin (n 86) 50.

the counter-attack involved summoning Patterson to the US embassy in Paris to confiscate his passport, with the intention to fly him back to America. Although anticipating this, Patterson embarked on a European speaking tour.

Resistance also came from Raphael Lemkin,[127] who characterised the petition as an attempt to: "divert attention from the crimes of genocide committed against Estonians, Latvians, Lithuanians, Poles and other Soviet-subjugated peoples."[128] Similarly, in a draft statement on the petition, Lemkin characterised it as "wantonly misinterpreted and maliciously confused".[129] Responding to the claim that the oppression spoken of constituted *serious mental harm*,[130] Lemkin remarked:

> "…fear alone cannot be considered as serious mental harm as meant by the authors of the convention; the act is not directed against the Negro population of the country and by no stretch of imagination can one discover in the United States an intent or plan to exterminate the Negro population, which is increasing in conditions of evident prosperity and progress."[131]

Lemkin distinguished the *discrimination* spoken of with genocide proper, noting the latter was a "rare crime of great magnitude"[132], and that by confusing the two: "injustice is done not only to existing international law but also to the good name of some democratic societies which might be unjustly slandered for genocide."[133]

Lemkin thus appeared to depart from his earlier writing on genocide,[134] which argued:

> "…every action infringing upon the life, liberty, health, corporal integrity, economic existence, and the honor of the inhabitants when committed because they belong to a national, religious, or racial group; and in the second, every policy aiming at the destruction or the aggrandizement of one such group to the prejudice or detriment of another."[135]

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[127] With Lemkin himself having coined the term 'genocide' just a few years earlier. As referenced in: Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944).
[128] 'U.S. Accused in U.N. of Negro Genocide' *The New York Times* (New York, 18 December 1951) 13. <https://nyti.ms/33TWezH> accessed 19 October 2021.
[129] Lemkin draft statement, quoted in Weiss-Wendt (n 119) 243.
[130] Patterson (n 84) 46.
[131] Raphaël Lemkin, 'The Nature of Genocide: Confusion With Discrimination Against Individuals Seen' *The New York Times* (New York, 14 June 1953) 149 <https://nyti.ms/2RhRz89> accessed 19 October 2021.
[132] ibid.
[133] ibid.
[134] Dirk Moses, *The Problems of Genocide: Permanent Security and the Language of Transgression* (Cambridge University Press 2021) 403.
[135] Lemkin (n 127) 93.

In response, Oakley Johnson—a prominent activist involved in preparing the petition—contested Lemkin's claim that this discrimination and *serious mental harm* did not constitute harm under the Genocide Convention. Johnson argued it was not isolated incidents of *fright* or *harm* that were at issue, but the subjection of an entire race of people to terror and fear of harm—which were the stated goals of groups like the Ku Klux Klan. Patterson later recalled letter exchanges with Lemkin in which they clashed over each other's respective understanding of genocide and its applicability to this context.[136] However, Jacobs is sceptical of this claim due to a lack of archival evidence.[137]

Lemkin had corresponded about the potential application of the Genocide Convention to this form of violence as early as 1949 and made strong private and public statements against this possibility.[138] There is a degree of inconsistency in these views, however. Whilst Lemkin in one context argued that the killing of as few as fifty persons could constitute genocide, at the same time, he rebutted suggestions of its application to violence against African Americans.[139] This view persisted. And during a televised roundtable in 1953, Lemkin responded "by no means!" when asked whether he thought lynching might be captured by it.[140] As an attempted refutation of these claims, Lemkin often pointed to African Americans' growing "prosperity and progress".[141] Lemkin's intransigence on this point seems curious given his willingness to view settler-colonial history through the lens of genocide.[142] As Docker notes, this represents a narrowing of his own understanding.[143] Interestingly, Irvin-Erickson also notes that Lemkin's writing reveals a similarity with the CRC petition insofar as he often pointed to the racial and socio-economic dynamics shaping historical genocides.[144]

Material precariousness and political allegiances conditioned Lemkin's response. In particular, it was partially a product of his "enduring Zionism and partisan attachment to the new state of Israel",[145] as well as his relationships with the various Eastern European émigrés he sought support from in the US. Further, Lemkin's response was also shaped by

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[136] Patterson (n 85) 179 & 191.
[137] Steven Leonard Jacobs, 'We Charge Genocide: A Historical Petition All But Forgotten and Unknown' in Scott Murray (ed), *Understanding Atrocities* (University of Calgary Press 2017) 127.
[138] Weiss-Wendt (n 119) 226-227.
[139] ibid.
[140] Quoted in ibid 187.
[141] Lemkin (n 131).
[142] Michael McDonnell and A. Dirk Moses, 'Raphael Lemkin as a Historian of Genocide in the Americas' (2005) 7(4) Journal of Genocide Research 501.
[143] John Docker, 'Raphael Lemkin, Creator of the Concept of Genocide: A World History Perspective' (2010) 16(2) Humanities Research 49.
[144] Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide* (University of Pennsylvania Press 2017) 209-10.
[145] Moses (n 134) 404.

his efforts to have Soviet activities labelled as genocidal, which saw him circumscribe his sympathies for African American causes.[146] In this regard, this episode reveals the tensions created by Lemkin's need for material support from Eastern European émigrés and his desire to secure broader support for the Genocide Convention.[147] Understood as such, Lemkin appears a *hostage of politics* and an increasingly desperate pragmatist struggling to balance the demands of the lobbying he considered essential to gaining full support for the Genocide Convention and the various political affiliations this created.[148] Drawing out this tension, Irvin-Erickson identifies differences in the views contained in his manuscripts—where the institutions and practices of American chattel slavery were placed within the history of genocide—and those espoused in his public responses to the CRC petition, which downplayed contemporary forms of institutional racism. This resulted in a betrayal of his universalist values when he tried to convince the white establishment in the US to ratify the Genocide Convention by arguing, essentially, that the victims of communism in the Soviet Union suffered genocide whilst African Americans suffered only civil rights violations.[149] As a *hostage of politics*,[150] Lemkin thus adopted a narrow view of genocide to make it palatable for a white, anti-communist political establishment.[151]

5.5.3 Contextualising the Reaction to *We Charge Genocide*

Evidently, responses to the petition were conditioned by the prevailing Cold War politics of the day. These conditions had worked to marginalise the more radical elements of the black freedom movement,[152] which over time brought about a more moderate turn within the civil rights movement.[153] In this sense, the responses to the petition thus reflected changes underway in the broader politics of the American struggle for racial equality.[154] Mounting pressure created by activist groups like the CRC on the international stage thus pushed the

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[146] Docker (n 143) 59.
[147] Anton Weiss-Wendt, 'Hostage of Politics: Raphael Lemkin on "Soviet Genocide"' (2005) 7(4) Journal of Genocide Research 551.
[148] Tanya Elder, 'What You See Before Your Eyes: Documenting Raphael Lemkin's Life by Exploring His Archival Papers, 1900-1959' (2005) 7(4) Journal of Genocide Research 469.
[149] Irvin-Erickson (n 144) 14.
[150] Weiss-Wendt (n 147) 556-7.
[151] Irvin-Erickson (n 144) 208-210.
[152] Kies (n 124) 119.
[153] Kenneth Janken, 'From Colonial Liberation to Cold War Liberalism: Walter White, the NAACP, and Foreign Affairs, 1941-1955' (1998) 21(6) Ethnic and Racial studies 1074, 1089-90. See also: Anderson (n 43) 167 &173-4.
[154] Janken, ibid 1087.

US Government to pursue a narrower vision of racial progress at home.[155] This is the essence of the "Cold War civil rights compromise" Melamed identifies.[156]

5.5.4 Measuring the Success of *We Charge Genocide*

As noted earlier, the CRC petition called for action by either the General Assembly or a competent organ of the UN under the Genocide Convention. This included either passing a General Assembly resolution declaring the guilt of the US Government in committing genocide and demanding they stop and prevent any further such acts, as well as any other action any competent organs saw fit.[157] It also requested a tribunal be established under Article VI.[158] Unsurprisingly, none of these requests received a positive institutional response by or within the UN. However, Patterson nevertheless considered it successful as it exposed the "moral bankruptcy" of the US and the UN.[159]

On the other hand, public responses were warmer, with the initial print run of five thousand selling out within a week. This was aided by the distribution and publication methods deployed by the CRC, which included the use of discounts and sales targets for CRC chapters,[160] as well as a variety of cultural events. For example, actress and poet-playwright Beah Richards composed and performed theatrical interpretations of the petition.[161] It also received widespread overseas publication, with French, Spanish, Chinese, Hungarian, and Slovak editions, amongst others, being published.[162] The overseas media response was also warmer than at home, with the petition receiving strong coverage in the French newspapers.[163]

5.5.5 Between Idealism and Rhetoric: What Chances did the Petition Have?

As we have seen, the prevailing Cold War politics of the day limited the possibility of institutional support for the petition. And despite private assurances to the contrary, little

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[155] Carmen G. Gonzalez, 'Environmental Racism, American Exceptionalism, and Cold War Human Rights' (2017) 26(2) Transnational Law & Contemporary Problems 281, 291.
[156] Jodi Melamed, *Represent and Destroy: Rationalizing Violence in the New Racial Capitalism* (University of Minnesota Press 2011) 25. See also: Dudziak (n 78) 75-114.
[157] Patterson (n 84) 51 & 196-7.
[158] ibid 51.
[159] Patterson (n 84) 197, 199, 207, & 212.
[160] Horne (n 90) 169.
[161] Doyo F. Gore, 'A Black Woman Speaks: Beah Richard's Life of Protest and Poetry' in Howard Brick, Robbie Lieberman, Paula Rabinowitz (eds), *Lineages of the Literary Left: Essays in Honor of Alan N. Wald* (Michigan Publishing 2015).
[162] Horne (n 90) 170.
[163] Martin (n 86) 53.

support was forthcoming from UN delegates—notably in circumstances where that state was receiving economic and development aid from the US.[164] Support from the USSR and Soviet-aligned states was also circumscribed by the US Government's pursuit of human rights cases against them—notably against Hungary, Romania, and Bulgaria.[165] These tensions emerged during debates on the drafts of what would become the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social, and Cultural Rights*, with the petition providing a launchpad for heated exchanges between US and Soviet delegates.

Geopolitics aside, however, a question remains as to whether the petition had any genuine prospects of success to begin with. In considering this, we should first note that by grounding the petition in the Genocide Convention, the CRC petition stood on firmer ground than the NNC and NAACP petitions.[166] As such, they received little more than noncommittal assurances that they would help inform the drafting of an International Bill of Rights.[167] In contrast, the CRC petition called on the members of the General Assembly to fulfil their obligations under the Charter and the Genocide Convention.[168]

However, as action was sought under the Convention, an immediate obstacle they faced was America's delayed ratification of the Convention itself. In response, the petitioners argued the Charter and Convention must be viewed as two parts of a whole, with the latter needing to be operative to give effect to the former, regardless of America's ratification.[169] Viewed as such, the obligation to implement the convention was "in no way dependent upon ratification" and had become binding on all signatories.[170] In particular, the petitioners focused on the signing of the Convention, rather than ratification, as giving rise to the moral and legal obligations contained in both the Convention and Charter.[171] A failure to enforce the Convention would thus not only reduce it to "idle verbiage but would similarly transform the Charter."[172] By failing to abide by these moral and legal obligations, the petitioners argued the US Government violated both international and national law,[173] which

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[164] Anderson (n 43) 194-5.
[165] ibid 195.
[166] As noted above, when the NNC and NAACP petitions were delivered there was a lack of certainty as regards whether the allegations they contained could be acted on under the Charter and given the uncertainty regarding the capacities of the ECOSOC to act on them at that time.
[167] Anderson (n 43) 105.
[168] Patterson (n 84) 51.
[169] The petition stated that: "[t]he two are so closely connected that they must be considered as a whole." See: ibid 9.
[170] ibid 36.
[171] ibid 43 & 49.
[172] ibid 34.
[173] ibid 50.

also perpetuated a "long-standing failure to enforce the Fourteenth and Fifteenth Amendments of the Constitution of the United States".[174]

Curiously, the petitioners did not argue that regardless of ratification, the obligations contained in the Convention nevertheless arose under customary international law. This was certainly a possibility given that the customary status of genocide had already been recognised, with Article I of the Convention itself suggesting this possibility.[175] This was later confirmed in a May 1951 Advisory Opinion,[176] with its *jus cogens* and *erga omnes* character also later confirmed.[177]

Nevertheless, the petitioners did not forward this argument. In the absence of any material that can indicate why this line of argument was not pursued, there are two possible factors we might consider. Firstly, and bearing in mind the intended audience was as much domestic as it was international, we should note that there was some uncertainty at the time regarding the direct applicability of customary international law as a matter of US federal law absent legislative implementation.[178] Although this uncertainty was not present in the nineteenth and early twentieth centuries,[179] a 1938 Supreme Court judgment changed this.[180] In this regard, when the CRC was putting together the petition there was a degree of reticence regarding the status of customary international law as a matter of federal law.[181]

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[174] ibid 37.

[175] Genocide Convention, art 1: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." On this, see: Christian J. Tams, 'Article I' in Christian J. Tams, Lars Berster, and Björn Schiffbauer (eds), *Convention on the Prevention and Punishment of Genocide: A Commentary* (Bloomsbury Publishing 2014) para 14.

[176] *Reservations to the Convention on the Prevention of the Crime of Genocide* (Advisory Opinion) (1951) ICJ Rep 15, 23.

[177] See for example: *Barcelona Traction Heat, Light and Power Company (Second Phase) (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3, 32*; Armed Activities on the Territory of the Congo (New Application, 2002) (Democratic Republic of Congo v Rwanda) (Jurisdiction and Admissibility)* [2006] ICJ Rep 6, 32. On this, see more generally: Antonio Cassese, 'Genocide' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, 2009) 332-3; and Jan Wouters and Sten Verhoeven, 'The Prohibition of Genocide as a Norm of *Ius Cogens* and Its Implications for the Enforcement of the Law of Genocide' (2005) 5(3) International Criminal Law Review 401.

[178] This was despite the U.S. Constitution, Article I, Section 8, Clause 10 referring to Congress as possessing the power: "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations".

[179] With customary international having been applied as part of the *general common law* which was neither federal nor state law and reflected the traditional common law position. See: Curtis Bradley, *International Law in the U.S. Legal System* (2nd edn, OUP 2015) ch 5.

[180] In this case, the Supreme Court had determined there was no *federal general common law* except in matters governed by the Federal Constitution or Acts of Congress. As per: *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). On customary international law and *Erie*, see: F. Giba-Matthews, 'Customary International Law Acts as Federal Common Law in U.S. Courts' (1996) 20(5) Fordham International Law Journal 1839, 1866-1874.

[181] Curtis A. Bradley and Jack L. Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110(4) Harvard Law Review 815; and Gary Born, 'Customary International Law in United States Courts' (2017) 92(4) Washington Law Review 1641.

This is perhaps reflected in the fact that the petition references an older Supreme Court that upheld the precedence of international treaties over state law.[182]

A second factor possible shaping the CRC's argument in this regard might reflect an emerging trend in constitutional litigation at the time. This saw litigants challenging discriminatory legislation by referring to the UN Charter and other international human rights law. This finds some support in the petition itself, which references the *Fujii v California* case.[183] In this controversial judgment, the California Court of Appeal had declared legislation invalid on the basis that it contravened the UN Charter and the UDHR.[184] Although later reversed on appeal,[185] the *Fuji* case was one of a number of cases at the time where litigants attempted to rely on the UN Charter and other international human rights instruments in constitutional challenges. In some of these cases such international instruments were raised in the pleadings,[186] others saw Courts referencing them directly.[187] It is thus possible that this trend which Sloss describes as having *transformed* the Constitution, influenced the petition overlooking the customary status of genocide.[188]

In any event, the enforceability of the Genocide Convention against the US would have been procedurally and politically unlikely given the composition of the Security Council. It is perhaps for this reason they called for General Assembly action as the violence and oppression they spoke of created a risk to international peace and security.[189] The petitioners argued that genocide had become a crime precisely because it represented an "international danger" and thus how a government treats its citizens "must be of a world concern when that treatment includes a war-breeding genocide that may engulf the world."[190] For this reason, as it was conduct that "must inevitably tend toward war",[191] it was

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[182] Patterson (n 84) 36, referencing *Ware v. Hylton,* 3 U.S. 199 (1796).
[183] ibid.
[184] *Sei Fujii v. State of California,* 97 A.C.A 154, 217 Pac.2d 481 (1950). The legislation in question had barred certain classes of individuals from owning agricultural property on the basis of their ineligibility for citizenship.
[185] *Sei Fujii v. State of California,* 38 Cal.2d 718, 242 P.2d 617 (1952). On this case generally, see: Sidney K. Kanazawa, 'SEI FUJII: An Alien-American Patriot' (2018) 13 California Legal History 387.
[186] *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Takahashi v. California Fish and Game Commission* 334 U.S. 410 (1948); and *Bolling v. Sharpe*, 347 U.S. 497 (1954). See: David L. Sloss, 'How International Human Rights Transformed the US Constitution' (2016) 38(2) Human Rights Quarterly 426, 437 & 440.
[187] In *Oyama*—which was the first Supreme Court decision to refer to the UN Charter—the concurring judgments of Mr Justice Black and Mr Justice Murphy referred to the Charter specifically in finding the impugned law inconsistent with the constitution. See: *Oyama v. California*, 332 U.S. 633 (1948). On this, see: Judith Resnick, 'Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry' (2006) 115(7) Yale Law Journal 1564, 1600-04; and Rose Cuison Villazor, 'Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship' (2010) 87(5) Washington University Law Review 979, 1000-1001.
[188] Sloss (n 186) 430-435.
[189] As the petition stated: "…it is a threat to the peace of the world." See: Patterson (n 84) 28.
[190] ibid 32.
[191] Patterson (n 95) ixv.

a "concern of mankind everywhere".[192] Action from a *competent organ* of the UN was thus requested under Article VIII of the Convention. In terms of who qualified as a *competent organ*, whilst a narrower formulation had been considered under Article VIII, ultimately, a broader wording was adopted.[193] However, apparently aware of this potential ambiguity, the petition stated that action by either the General Assembly or the Security Council was appropriate and referenced previous actions by both organs in respect of human rights issues.[194] Regardless of the possibility of action by either organ, however, it was politically unlikely given the conditions on which Council voting rests.[195] In the event of an American veto preventing Security Council action, the *Uniting for Peace* resolution presented a new possibility.[196] Although this was perhaps similarly remote given the tepid response the petition received in official channels.

Another issue was whether the Genocide Convention *could* apply to the racial violence and oppression the petition spoke of. While we have seen how public commentators such as Lemkin and White both privately and publicly rejected this, this possibility was a continued source of anxiety for US lawmakers. This was reflected in the Senate's persistent refusal to ratify the Convention despite strong support by various Presidential administrations and in contrast to the leadership shown by US delegates during the drafting and signing period.[197] The application of the Convention to this context was considered during the drafting period.[198] However, internal documents produced by American delegates indicate that although anxious about this possibility, they nevertheless believed that lynching and other forms of racial discrimination would not be caught by it due to a lack of official policy condoning this kind of violence.[199]

This position was reiterated during the Senate hearings on ratification, with ratification recommended on that basis—although this advice was not followed for some three

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[192] ibid xv.
[193] William Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, CUP 2009) 533-540. Note, however, that whilst Schabas suggests it was the US delegations who supported this broader definition, Irvin-Erickson suggests that privately they were against it, preferring 'competence' to be left in the hands of the Security Council alone. See Irvin-Erickson (n 144) 193.
[194] Patterson (n 84) 51-2.
[195] Indeed, given that the US possessed veto power as a permanent member, positive action would have required them to abstain from voting. As per UN Charter, art 27(3).
[196] UNGA Res 377(V) (3 November 1950) UN Doc A/RES/377(V).
[197] William Korey, 'The United States and the Genocide Convention: Leading Advocate and Leading Obstacle' (1997) 11 Ethics & International Affairs 271, 273-4.
[198] Weiss-Wendt (119) 228.
[199] See: '[No. 38] Ernest Gross and Dean Rusk Prepare US Commentary on the Secretary Draft Genocide Convention, September 10, 1947', '[No.56] The US State Department Works out a Position on Genocide Convention prior to the Debates in the ECOSOC's Ad Hoc Committee on Genocide, April 2, 1948', and '[No. 64] The US State Department Cites Lynching as One of the Reasons It May Reconsider Its Position on the "Complicity" Element of the Genocide Convention, April 20, 1948' in and in Anton Weiss-Wendt (ed), *Documents on the Genocide Convention from the American, British, and Russian Archives: The Politics of International Humanitarian Law, 1933-1948, Volume 1* (Bloomsbury 2019) 72-3, 102-3, & 121-2.

decades.[200] Nevertheless, the spectre of its application to the Civil Rights context lingered,[201] as indicated by a *questions and answers* document released by the State Department in 1952, which listed the potential application of the Convention to lynching as one of the most common questions.[202] Regardless of whether the Convention could apply to the American context,[203] resistance nevertheless persisted due to an anxiety about its potential to expose the US to scrutiny from an international tribunal,[204] in addition to various federal and constitutional issues.[205] This was exacerbated by the climate of McCarthyism and a kind of juridical xenophobia brought about by the Korean War.[206]

Focusing too narrowly on the doctrinal or political hurdles the petition faced is in one sense to overlook the broader significance of the petition.[207] And whilst Helps is undoubtedly correct to argue that by relying on international law and the Convention it exposed the petition to a "logistical weakness",[208] this misses both its broader impact and significance. This is supported by Patterson's later reflections on the petition, which suggest

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[200] 'Statement of Philip B. Perlman, Solicitor General of the United States' in *The Genocide Convention: United States Congress Senate Committee on Foreign Relations and United States. Congress. Senate. Committee on Foreign Relations. Subcommittee on the International Convention on the Prevention and Punishment of the Crime of Genocide* (U.S. Government Printing Office 1950) 48.

[201] Although ratification had been recommended by the Senate Committee, an anti-ratification campaign was spearheaded by the American Bar Association, the Southern wing of the Democrat Party, and Midwestern Republicans. Opposition persisted until the 1960s, with the Convention eventually ratified in the late 1980s—albeit subject to reservations and understandings. See: John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (Palgrave 2008) 189. Although the worry that the Convention would apply to racial discrimination was of great concern in this period, the most persistent points of resistance related whether the US Constitution would have supremacy over international law and the role of the ICJ in resolving disputed under the Convention. On the opposition to the Convention. On this, see: Lawrence LeBlanc, *The United States and the Genocide Convention* (Duke University Press 1991) 5-8.

[202] In this instance, the State Department stated that lynching would not be covered as they were sporadic and individualised instances of homicide which were not condoned by Federal or State officials. See: *Questions and Answers on the UN Charter, Genocide Convention, and Proposed Covenant on Human Rights* (Office of Public Affairs, Department of State June 1952) <https://hdl.handle.net/2027/umn.31951d03554945w> accessed 24 December 2021.

[203] For example, responding to the fears of the American Bar Association, McDougal and Arens, argued that although the Genocide Convention could be applied to lynching and racial riots as a specific type of violence, this was unlikely in the American context due to the special intent requirement as well as the absence of "grand design for race extermination". It was this requirement of special intent that elevated domestic crimes such as murder—as would be involved in lynching or racial riots—to genocide as an *international* crime. For the authors, this meant the Genocide Convention would only ever apply to the situations of totalitarian violence seen in Europe and Asia. See: Myres S. McDougal and Richard Arens, 'The Genocide Convention and the Constitution' (1950) 3(4) Vanderbilt Law Review 683, 705-6.

[204] Irvin-Erickson (n 144) 160 & 205; and LeBlanc (n 200) 9–11, 39–42, & 200–233.

[205] George A. Finch, 'The Genocide Convention' (1949) 43(4) AJIL 732. See similarly: A.A. White, 'Tomorrow One May Be Guilty of Genocide' (1949) 12(5) Texas Bar Journal 203, 227-8. This was one of the major objections articulated by the American Bar Association, who proved to be a key opponent in the continued refusal to ratify the Convention. See: Binoy Kampmark, 'Shaping the Holocaust: The Final Solution in US Political Discourses on the Genocide Convention, 1948-1956' (2005) 7(1) Journal of Genocide Research 85, 91.

[206] William Korey, 'The United States and the Genocide Convention: Leading Advocate and Leading Obstacle' (1997) 11 Ethics & International Affairs 271, 276.

[207] Indeed, as Weiss-Wendt notes, it was likely too late into the session for a new item to be added to the General Assembly's agenda as the CRC had hope: Weiss-Wendt (n 119) 260.

[208] David Helps, '"We Charge Genocide": Revisiting Black Radical's Appeals to the World Community (2018) 3(1) Radical Americas 1, 7.

the primary aim was to force a rethinking of racial violence and oppression in America rather than any specific institutional action.[209] In this regard, much of the significance of the petition is to be found in how it used the language of *genocide.*

5.6 The Significance of the "Charge" of Genocide

Although building on the NNC and NAACP precedents, the CRC petition was notably more substantive. And in addition to forwarding a more complex legal argument, it was also more specific in setting out the action it sought. This was helped by the type of international legal norms it relied on, with ICL allowing for a more focused critique and the Genocide Convention providing a clearer means of achieving the action the petitioners sought. The petitioners were keenly aware of the rhetorical possibilities the language of ICL opened up and thus noted:

> "The Genocide Convention differs from other international proclamations such as the Declaration of Human Rights. It is more than a statement of moral principle. It is law, international law, setting out specific crimes and specific punishments. It has all the status of solemn treaty. It takes its place because such international prohibitions as those forbidding and punishing piracy and slavery. As such it focuses attention on the criminal."[210]

As further evidence of the importance of both the language of genocide and ICL to the petition, it included reproductions of Article II and III of the Convention at the beginning of the published version.[211]

Perhaps most importantly, ICL instruments allowed the petitioners to identify a *perpetrator* of the *criminal* conduct they spoke of. To this end, it charged the US Government as the "principal defendant",[212] which imputed responsibility for genocide to the institutions of the state itself. The petitioners thus identified the violence spoken of as:

> "[E]mbedded in law and often perpetrated by such organs of state government as the police and courts, that they could not take place without the positive or negative sanction of the several states and the Government of the United States of America.

[209] Dudziak (n 78) 66
[210] Patterson (n 84) 33.
[211] This is the case in both the 1951 and 1970 editions.
[212] Patterson (n 84) 43.

> White supremacy has been voiced as a state philosophy by government officials, Federal, state and city, and in order to effectuate that policy, city, state and federal government have sanctioned *direct and public incitement to commit genocide* and *conspiracy to commit genocide*".[213]

By designating responsibility in this manner, the underlying acts were elevated from sporadic to systematic acts of violence perpetrated by the political and institutional architecture of the state itself. Allocating *criminal* responsibility also allowed the petitioners to establish governmental intent for the acts. Those identified as bearing responsibility were set out primarily in Part II of the petition, although references were littered throughout. In general, however, it charged the institutions and officials of the US Government with violating their "pledges, its solemn international undertakings under the Charter [of the UN] and the Genocide Convention, and alleges that by reason of such violations the Negro people of the United States have suffered from acts of genocide."[214] This included charges under Article II(a), Article II(b), Article II(c), and Article III of the Convention, which were committed by officials of the judicial, legislative, and executive branches of the US.[215]

With the bearers of responsibility identified, two forms of action were outlined. Firstly, the petition called for the declaration of these acts as genocidal and for appropriate action to be taken to prevent any more such acts.[216] And secondly, it requested an "international penal tribunal" be established under Article VI of the Convention, which would "follow the precedents of international law in dealing with violators of international conventions" established at Nuremberg.[217] Interestingly, although perhaps not unexpectedly, the petition did not wade into the matter of state responsibility to any great extent, despite labelling the acts as a *crime of the United States government*.[218] The focus was instead on persuading states to take action under the Convention and to hold a tribunal that could establish *individual* criminal responsibility.[219]

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[213] ibid.
[214] ibid 50.
[215] The petition listed the following individuals, public officials, and other organisations as bearing responsibility: the President of the US, the US Congress, the US Supreme Court, the Attorney General, the Department of Justice, various US States, the Ku Klux Klan, various governors, senators, and congressmen, as well as corporate entities including Morgan, Rockefeller, Du Pont, and Mellon. See: Patterson (n 84) 44-6, 47, 171-2, 178, 186, 191-2, 195.
[216] For a summary of the actions sought see ibid 196.
[217] ibid 51.
[218] This was perhaps reflective of the broader appetite for matters of *state criminality* at the time. See: Nina H.B. Jørgensen, *The Responsibility of States for International Crimes* (OUP 2011) 18-21. On the appetite for *individual* versus *state* criminal responsibility in the Nuremberg era more generally, see: Paola Gaeta, 'On What Conditions Can a State Be Held Responsible for Genocide?' (2007) 18(4) EJIL 631, 633-37.
[219] Of course, the current trend in international law confirms that both individuals and states can be held responsible for acts of genocide, although in the case of the latter this does not necessarily entail *criminal* responsibility. As confirmed in, for example: *Application on the Prevention and Punishment of the Crime of*

Establishing responsibility also opened up the possibility of punishment, which was to be achieved by "international enforcement"—particularly in circumstances where the state itself had failed to do so.[220] Given that the Convention could be enforced against State Parties, Article IX was viewed as "one of the most important in the Convention" as it created "compulsory jurisdiction of the International Court of Justice in all disputes relating to the Convention".[221] This was heightened because the petitioners did not see a lack of ratification as a limitation.[222] On this basis, under Article IX of the Convention, the petitioners called for the contracting parties to submit a dispute to the International Court of Justice regarding the application and fulfilment of the Convention.[223]

The possibility of individual punishment and international enforcement provides an immediate contrast with the NNC and NAACP petitions. In particular, international criminality opened up the possibility of establishing individual criminal responsibility and enforcing the obligations contained in the Convention and thus provided a much clearer course of action. In this regard, we see how the language of ICL opened up new possibilities for framing certain kinds of human rights violations and new possibilities of action. The CRC petition thus explored new "intellectual boundaries" of how race relations were being discussed.[224]

5.7 Using 'Genocide' to Frame the 'Crimes' of the United States Government

As argued, much of the petition's success lay in how it publicised and provided a new way of framing the acts of violence it spoke of. And by using the language of *genocide*, it formed part of an effort by radical black activists to "situate their experience within larger histories of colonisation, decolonisation and the advent of human rights."[225] The potential of genocide as a legal concept had been recognised early on, with prominent African American newspaper *The Chicago Defender* describing it in 1946 as a "much needed new word" that

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Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43, [168]-[173], & [182]. Bonafe has characterised this as the distinction between 'individual responsibility' for international crimes and "aggravated state responsibility". See: Beatrice I. Bonafe, *The Relationship Between State and Individual Responsibility for International Crimes* (Martinus Nijhoff Publishers 2009) 17-23 & 29-32.

[220] Patterson (n 84) 33.

[221] ibid 52.

[222] ibid 36-39.

[223] ibid 53.

[224] Martin (n 86) 56.

[225] Helps (n 208) 3.

would "give America the much-needed weapon with which to combat the evil of lynching."[226] The potential of the Genocide Convention had similarly been recognised, which meant that:

> "… every country will be permitted to try in its own domestic courts any criminal who might be apprehended on its territory…Now the plot thickens. Will the Ku Klux Klan or any other hate-frenzied mob be guilty of genocide under the United Nations Convention for the Prevention of Genocide?"[227]

Using *genocide* to frame racial violence and injustice in this manner also ensured the legacy of the petition carried on. Patterson was keenly aware of this. And used *genocide* once again in an ill-fated second petition, for which an urgent funding appeal had been issued to members in 1953.[228] This second petition failed to get off the ground, with the CRC eventually dissolving in 1956.[229] Despite this, the legacy of *We Charge Genocide* lived on beyond the CRC, with its influence evident on later actions in the black freedom movement. For example, Malcolm X's famous "The Ballot or the Bullet" speech bears its legacy in his comment that:

> "When you expand the civil-rights struggle to the level of human rights, you can then take the case of the Black man in this country before the nations in the UN. You can take it before the General Assembly. You can take Uncle Sam before a world court. But the only level you can do it on is the level of human rights. Civil rights keep you under his restrictions, under his jurisdiction."[230]

Malcolm X made further references to taking up the African American cause to the United Nations or *World Court*.[231]

This legacy can be noted more directly in a petition Malcolm X had drafted with the Organization of African American Unity and which had been intended to be submitted to

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[226] 'Much Needed New Word' *Chicago Defender* (Chicago, 21 September 1946).
[227] Willard Townsend, 'The Other Side: Genocide: The Word is New But the Music is Old' *Chicago Defender* (Chicago, 25 October 1947). For a similar recognition of the potential of genocide see also: 'UN Law May Be Hard on Dixie' *New York Amsterdam News* (New York, 21 October 1950); and 'Genocide Plan Made Law: U.S. Did Not Sign' *Afro-American* (Baltimore, 20 January 1951).
[228] Patterson stated in the letter: "[The] CRC is now preparing another Petition. It will be presented to the UN this year as a sequel, together with 'We Charge Genocide', if you will help us. We believe it is necessary in the strengthening of the fight against McCarthyism, and for democracy and peace." Quoted from Daniel E Solomon, 'The Black Freedom Movement and the Politics of the Anti-Genocide Norm in the United States, 1951-1967' (2019) 13(1) Genocide Studies and Prevention: An International Journal 130, 132.
[229] Horne (n 90) 170-188.
[230] Malcolm X, 'The Ballot or the Bullet' in George Breitman (ed), *Malcolm X Speaks: Selected Speeches and Statements* (Secker & Warburg 1994) 34-5.
[231] See for example: Malcolm X, 'The Black Revolution' in George Breitman (ed), *Malcolm X Speaks: Selected Speeches and Statements* (Secker & Warburg, 1994) 53-4; and Malcolm X and Alex Haley, *The Autobiography of Malcolm X* (Ballantine Books 1964) 207.

the UN. Titled *Outline for a Petition to the United Nations Charging Genocide Against 22 Million Black Americans,*[232] Malcolm X even sought guidance on how such a case might be brought before the Commission on Human Rights. This came as part of a broader campaign to lobby African countries for support in the UN, which saw Malcolm X delivering a speech to the Organisation of African Unity. Much like the CRC, this petition sought to use genocide to frame African Americans' historical and contemporary oppression, with the UN thus requested to "give a hearing to the plight of 22 million black Americans."[233]

As a place where the "conscience of mankind can be appealed to",[234] Malcolm X and the CRC viewed the UN with a similar sense of opportunism. Similarities can also be noted in their argument that the US Government had continually violated the rights set forth in the UN Charter.[235] Malcolm X's proposal also referenced "widespread evidence of economic genocide which is illustrative of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."[236] This came in addition to mental harm and other forms of physical violence. Although only mentioned in outline form, Malcolm X's draft also proposed to provide an overview of the Nuremberg trials.[237] Taken together, the influence of the CRC petition and the NNC and NAACP petitions before it is clear. In particular, we see how the language of ICL provided a new way of framing historical and contemporary racist violence and the new opportunities for international action presented in the institutional architecture of the UN. In this regard, both Malcolm X and the CRC viewed international law and international institutions with a similarly opportunistic eye insofar as both could help to transform the domestic struggle for racial equality by creating both domestic and international pressure.[238]

This legacy is similarly echoed in other movements within the black freedom movement. For example, the Student Nonviolence Coordinating Committee (SNCC) used *genocide* to frame the racial injustices they fought against in public remarks and campaigns.[239] To this end, they released a pamphlet titled *Genocide in Mississippi* as part of a campaign against

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[232] Malcolm X, 'Outline for Petition to the United Nations Charging Genocide Against 22 Million Black Americans' in John Henrik Clarke (ed), *Malcolm X: The Man and His Times* (Africa World Press 1990) 343.
[233] ibid 344.
[234] ibid 344.
[235] ibid 345.
[236] ibid 344-5.
[237] ibid 349.
[238] Both were also characterised by an distinctly internationalist outlook, with Malcom X employing a Pan-African internationalism to foster relations and solidarity between African Americans and Africans. On Malcolm X's engagements with the United Nations and other international organisations, as well as this specific plan, see: Charles Lewis Nier III, 'Guilty as Charged: Malcolm X and His Vision of Racial Justice for African Americans Through Utilization of the United Nations International Human Rights Provisions and Institutions' (1997) 16(1) Penn State International Law Review 149.
[239] Solomon (n 228) 131.

legislative proposals that used forced sterilisation and imprisonment to discourage single parenthood.[240] Similarly, the Black Panther Party (BPP) often drew on both *We Charge Genocide* and the concept of genocide more generally in their activism.[241] References to the Holocaust and other historical genocides littered BPP speeches and activist literature, particularly in their protests against police violence and the Vietnam War.[242] And drawing on the CRC petition directly, a BPP rally poster was emblazoned with "We Charge Genocide" superimposed on a UN logo.[243] Furthermore, in 1970, an internal committee document referred to a "petition to the United Nations to end genocide".[244] Similarly, "Black Liberation Week" had been initiated by the Black Solidarity Day Committee the previous February with a rally charging the genocide of African Americans.[245]

That genocide was so readily drawn on in these contexts tells us much about the radical and rhetorical potential it appeared to possess. It was not only the legal dimensions of *genocide* that mattered, however. It was also the history with which it was associated. In this regard, the use of *genocide* within these movements should be considered within a broader pattern of African American activists making use of Holocaust memory. Perhaps the most famous of these is the provocatively named *American's Black Holocaust Museum* (ABHM), set up in 1988 by Civil Rights activist James Cameron.[246] Cameron was best known for having survived an attempted lynching in August 1930, when the sixteen-year-old Cameron and two others were suspected of involvement in a murder-robbery. Cameron survived thanks to the intervention of an unidentified woman and a local sports star who pleaded his innocence before the 15,000 strong crowd. Cameron came so close to death his neck literally bore the scars of the noose in the years after.[247] Inspiration for the ABHM came following Cameron's visit to the Dad Vashem Holocaust Memorial in Jerusalem in 1979.

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[240] ibid 135.
[241] Stokely Carmichael served as Honorary Prime Minister of the Black Panther Party following the dissolution of the SNCC.
[242] See for example the 'Ten Point Program' by the Black Panther Party, originally published as: 'What We Want Now! What We Believe' (15 May 1967) 1(2) The Black Panther 1, 3. Also see: : Black Panther Party, *Ten Point Programme*; and Huey Newton, 'Executive Mandate No. 1: Statement by the Minister of Defense' in Huey Newton, *Essays from the Minister of Defence* (Black Panther Party 1968) <https://archive.lib.msu.edu/DMC/AmRad/essaysministerdefense.pdf> accessed 27 January 2022.
[243] Helps (n 208) 13.
[244] 'Committee Exhibit No. 40: Continuations Committee of the Emergency Conference to Defend the Right of the Black Panther Party to Exist' in United States Congress House Committee on Internal Security, *Black Panther Party: Hearings, Ninety-First Congress, Second Session Parts 1-4* (U.S. Government Printing Office 1970) 5110.
[245] 'Black Liberation Week Opens with Rally Charging Genocide' *The New York Times* (New York, 17 February 1970) <https://nyti.ms/3f9P14V> accessed 21 October 2021.
[246] America's Black Holocaust Museum <https://www.abhmuseum.org> accessed 13 January 2022.
[247] Cameron's chilling experience is recorded in his autobiography: James Cameron, *A Time of Terror: A Survivor's Story* (Black Classic Press 1994).

The language of *Genocide* and the memory of the *Holocaust* have continued to be deployed in various contexts in the struggle for racial justice.[248] And as we saw above, Holocaust memory has acted as a powerful rhetorical device that has often been used to convey the hypocrisy of white Americans condemning Nazi atrocities whilst ignoring the violence enacted against black communities.[249] Black Power activists, for example, have used Holocaust memory and the language of genocide to radicalise the racial justice movement and to reject the integrationist aims of Civil Rights movements.[250] The legacy of *We Charge Genocide* has thus been kept alive by African American activists, with a grassroots group recently forming under the 'We Charge Genocide' name in 2016 to highlight police violence against and the economic marginalisation of communities of colour.[251] And much as the CRC did, this group has sought to engage with international human rights bodies.[252] Most recently, in the context of the US Government response to the Covid-19 pandemic, the petition was invoked to highlight the marginalisation of certain communities.[253]

Notable in all of the episodes and movements outlined above is how the idea of genocide was used to animate a variety of political causes, which saw genocide as a *legal* concept stretched beyond its conventionally accepted doctrinal and conceptual limits. Regardless of the semantic propriety of this *stretching*, however, it has proved a useful analytic with which make sense of the ongoing marginalisation of black Americans as it has persisted and evolved through slavery, Jim Crow, the Civil Rights era, and beyond.[254] As it has for other marginalised communities making use of the concept.[255] In the context of the

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[248] The 'genocide' paradigm has also been used to characterise birth control and abortion access within black American communities. See: Robert Weisbord, *Genocide? Birth Control and the Black American* (Greenwood Press 1975). For a contemporary overview of this, see: Shyrissa Dobbins-Harris, 'The Myth of Abortion as Black Genocide: Reclaiming our Reproductive Cycle' (2017) 26(1) National Black Law Journal 85.
[249] Clive Webb, 'The Nazi Persecution of Jews and the African American Freedom Struggle' (2019) 53(4) Patterns of Prejudice 337.
[250] ibid 359.
[251] Asha Rosa, Monica Trinidad, and Page May, 'We Charge Genocide: The Emergence of a Movement' in Alicia Garza, Maya Schenwar, Joe Macaré, and Alana Yu-lan Price (eds), *Who Do You Serve, Who Do You Protect?: Police Violence and Resistance in the United States* (Haymarket Books 2016).
[252] 'We Charge Genocide Sends Delegation to United Nations' (*We Charge Genocide*, December 15, 2014) <http://wechargegenocide.org/summary-of-we-charge-genocide-trip-to-united-nations-committee-againsttorture/> accessed 13 January 2022.
[253] Angel Martinez and Corina Mullin, 'We charge Genocide: Racist State Violence is a Labour Issue' (2020) 23(3) Journal of Labour and Society 415.
[254] As we see in the recent work of American attorney ben Crump who uses the concept of genocide to capture ongoing discrimination against and marginalisation of black communities, particularly as this is connected to the legacies of slavery. Much like the CRC petitioners, Crump draws on a *structural* understanding of what genocidal violence might constitute. Crump in particular focuses on discriminatory practices and violence embedded in the legal and judicial systems across America. See: Ben Crump, *Open Season: Legalized Genocide of Coloured People* (Amistad 2019).
[255] Most notably indigenous communities. See recently: Emily Prey and Azeem Ibrahim, 'The United States Must Reckon with Its Own Genocides' (*Foreign Policy*, 11 October 2021) <https://foreignpolicy.com/2021/10/11/us-genocide-china-indigenous-peoples-day-columbus/> accessed 1

CRC petition, the language genocide was used to critique the US Government's hypocrisy in establishing a purportedly liberal post-War international order based on the Nuremberg precedent, whilst domestic racial violence was pervasive.[256] In doing so, radical activists expanded the conventional semantic boundaries of genocide as a legal concept.

5.8 *We Charge Genocide* and the Internationalisation of a Cause

Common to the NNC, NAACP, and CRC petitions was how each represented an attempt to *internationalise* their respective causes. This was emblematic of an African American internationalist tradition that was heightened in the post-War years,[257] which connected "struggles against white supremacy, US imperialism, European colonialism, the super-exploitation of the Global South, and the oppression of racialised peoples within the US."[258] During the Paris Peace Conference, for example, prominent civil rights activist and National Race Congress member William Monroe Trotter had travelled there to file several petitions[259], as had other prominent activists such as Marcus Garvey and Ida B. Wells.[260] This combined with a "radical black peace activism" that understood the cessation of global conflict, disarmament, non-proliferation, racial equality, international cooperation, economic progress, the end of imperialism, and the eradication of capitalist exploitation as connected.[261]

Pursuing this issue in an international forum such as the UN represents the next iteration of this internationalist trend. And to elevate what might otherwise have been viewed as a matter of *domestic* concern to the level of *international* concern, the CRC petition noted that the "racist theory of government of the USA is not the private affair of Americans, but the concern of mankind everywhere"[262], with this violence presenting a

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April 2022. For an overview of some literature on this question, see: James Fenelon, 'Review: The Haunting Question of Genocide in the Americas' (2015) 35(2) Great Plains Quarterly 203.

[256] Solomon (n 228) 131-133.

[257] The African American liberation movement's internationalist impulses have been recognised as stretching back to at least as far as the Haitian Revolution, with other works stretching this tradition back even further. See: Brand R. Byrd, *The Black Republic: African Americans and the Fate of Haiti* (University of Pennsylvania Press 2019); and Henry Richardson III, *The Origins of African-American Interests in International Law* (Carolina Academic Press 2008).

[258] Burden-Stelly (n 49) 555.

[259] William Harrison, 'Phylon Profile IX: William Monroe Trotter—Fighter' (1946) 7(3) Phylon 236, 244; and Robert C. Hayden, 'William Monroe Trotter: A One-Man Protester for Civil Rights' (1988) 2(1) Trotter Review 4.

[260] Helps (n 208) 4; and Robin D.G. Kelley, '"But a Local Phase of a World Problem": Black History's Global Vision, 1883-1950' (1999) 86(3) The Journal of American History 1045.

[261] Burden-Stelly (n 49) 555.

[262] Patterson (n 84) xv.

"threat to the peace of the world."[263] This contrasts with the view espoused by Robert Jackson in his work as representative to the London Conference—where the Nuremberg Charter was drawn up—which distinguished between forms of violence justifying intervention and retribution—such as the Nazi crimes—and those "regrettable circumstances" at home which did not.[264] On this basis, the petitioners sought relief and intervention as "world citizens".[265] In this sense, *internationalisation* was achieved by inviting the international community's scrutiny in what was traditionally considered an area of domestic concern.[266]

But it was not only their attempted engagements with the institutional architecture of the international legal system that helped to *internationalise* their cause; this was also achieved in how they understood the causes and structures of the violence and oppression against which they fought. The CRC petition drew out a common logic of racial violence their cause could be placed within. To this end, it noted:

> "White supremacy at home makes for coloured massacres abroad. Both reveal contempt for human life in a coloured skin. Jellied gasoline in Korea and the lynchers' faggot at home are connected in more ways than that both result in death by fire. The lyncher and the atom bomber are related. The first cannot murder unpunished and unreduced without so encouraging the latter that the peace of the world and the lives of millions are endangered. Nor is this metaphysics. The tie binding both is economic profit and political control."[267]

The petitioners thus placed their own experiences of oppression within transnational patterns and logics of racial violence, with a particular relationship between economic profit and political control common to all manifestations.[268] This political economy manifested in physical, economic, and political violence perpetrated against African American communities.[269]

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[263] ibid.
[264] As Robert Jackson stated: "[O]rdinarily we do not consider that the acts of a government towards its own citizens warrant our interference. We have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved." Quoted in William Schabas (n 193) 35.
[265] Patterson (n 84) 196.
[266] Horne (n 59) 177; and Horne (n 90) 12-5.
[267] Patterson (n 84) 7.
[268] As the petitioners stated: "We shall prove that the object of this genocide, as of all genocide, is the perpetuation of economic and political power by the few through the destruction of political protest by the many." ibid 5
[269] ibid 5.

By placing this *genocidal* violence within a "superstructure of 'law and order' and extra-legal terror [that] enforces an oppression that guarantees profit"[270], the CRC moved beyond the domestic and spoke to forms of racial violence that were *international* in cause and effect. This is evident in the alliances Patterson sought in the months preceding publication, with the CRC establishing links with international labour unions, civil rights leaders, and other organisations across Europe and Africa.[271] In doing so, the petition rejected a narrow focus on *civil rights* in favour of a "historically, economically, and globally-minded approach that maintained space in its analysis for the experiences of racialized people worldwide."[272] With regard to the history of ICL, this episode is thus significant as an attempt to use international criminal norms to frame this understanding of the logic of racial violence. In this regard, it provides a unique insight into how ICL norms were diffusing in this early phase of the field's development.

5.9 *We Charge Genocide* and the Nuremberg Precedent

As we have seen, Holocaust memory was frequently invoked to frame the racial oppression of and violence against African Americans, with the *We Charge Genocide* petition emblematic of this trend. For Patterson in particular, understanding the Nazi crimes sharpened his understanding of the logic of racism and racial violence in America. With this awareness in mind, Patterson "could not fail to recognise that just as the United States under cover of law, carried out genocidal racist policies…just so had Hitler built and operated his mass death machine under cover of Nazi law."[273] By analogising these historical experiences, Patterson drew attention to the common thread of "fascism with which every capitalist state is infected."[274] Given these similarities, Patterson also looked to the Nuremberg precedent as indicative of the appropriate action to take.[275] The CRC petition is thus littered with references to both the Holocaust and the Nuremberg trial, with Justice Robert Jackson's condemnation of the "monstrous Nazi beast appl[ying] with equal weight, we believe, to those who are guilty of the crimes herein set forth."[276] It thus called on the General Assembly to follow the established "precedents of international law" for

[270] ibid 23.
[271] Helps (n 208) 9.
[272] ibid 14.
[273] Patterson (n 85) 170.
[274] ibid.
[275] In later correspondence, Patterson noted he had "studied the reports of the War Crimes Court at Nuremberg." William Patterson to Doris Brin Walker (Letter dated 15 June 1970) quoted in Horne (n 90) 128.
[276] Patterson (n 84) xii-xiii. Also note the reference to Robert Jackson at ibid 196.

dealing with violations of international conventions and to establish a tribunal under Article VI of the Convention.

Patterson's hopes for the Nuremberg precedent were frequently present in his public speakings, with one speech noting that:

> "As a result of the Nuremberg Trials, the General Assembly of the United Nations on December 11, 1946, formulated the Convention on the Prevention of the Crime of Genocide. That has become a part of the basic law of our country. To save ourselves and mankind we should use that law against our own oppressors."[277]

Taken together, the Nuremberg precedent, the UN Charter, the UDHR, and the Genocide Convention thus not only provided the doctrinal foundation for the petition,[278] but also signalled the possibility for a new kind of justice. It is this *hope* embodied in the new possibilities for *international criminal justice* that I will explore in the following section. And in exploring this, I will argue that despite this *hope*, the petition relied on an understanding of certain ICL norms that diverged—and continue to diverge—with the accepted understandings of them.

5.10 What Might Genocide Have Become? *We Charge Genocide* and the Slow Violence of Colonialism

As we have seen, the CRC petition identified two distinct forms of violence that constituted *genocide* against African Americans. There was, firstly, the physical violence we typically associate with the Jim Crow era where African Americans were:

> "[L]ed to death on chain gangs, in the back rooms of sheriffs' offices, in the cells of county jails, in precinct police stations and on city streets; proof that hundreds have been framed and murdered by sham legal forms, by a legal bureaucracy; hundreds killed for failure to say 'sir' or to tip their hats or move aside quickly enough, or on trumped-up charges of rape when in reality they were trying to vote, or for demanding the rights and privileges constitutionally guaranteed to all Americans."[279]

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[277] William Patterson, *We Demand Freedom: Two Addresses by William L. Patterson* (Civil Rights Congress 1951) 28.
[278] Helps (n 208) 7.
[279] Patterson (n 277) 28.

These forms of physical violence were clearly important to petitioners, as evidenced by the pictures of lynching contained in the printed edition.[280]

Secondly, however, the petition also identified structural and systemic forms of violence. Patterson thus wanted to:

> "[O]ffer proof of the terrors of the city ghettos and their rural equivalent where segregation exists by law and force and violence; where men, women and youth are crowded into filthy, disease-bearing houses; deprived of adequate medical care and education; with Jim-Crow buses, trains, hospitals, schools, churches, restaurants, theaters, hotels and, finally, Jim-Crow cemeteries and those even for dogs owned by Negroes."[281]

This kind of violence grounded the charges under Article II(b) and Article II(c) of the Genocide Convention. The former captured patterns of "extra-legal violence" which entailed constant fear of serious bodily and mental harm,[282] as well as:

> "[S]egregation which imprisons United States Negroes from birth to death, marking their status as inferior as a matter of law on the basis of race, cutting them off from adequate education, hospital facilities, medical treatment, adequate housing, forcing them to live in ghettos and depriving them of rights and privileges that other Americans are accorded as a matter of course."[283]

Under Article II(c),[284] the petitioners pointed to forms of economic, social, and occupational segregation, which included ghettoisation, limits on access to health care, share-cropping, anti-unionisation, and political disenfranchisement.[285]

The petitioners argued these conditions were deliberately inflicted to destroy the group in whole or in part as a way of "depressing wages, increasing profit, and retaining reactionary political and economic control"[286] The causes of genocide were thus framed in the logic of monopoly capitalism.[287] And by recognising a common logic present in the "profits of chattel slavery" and the "plans and profits of Wall Street", contemporary racial

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[280] See (n 84) above.
[281] Patterson (n 277) 28-9.
[282] Patterson (n 84) 46. As per Genocide Convention, art II(b): "…causing serious bodily or mental harm to members of the group".
[283] Patterson (n 84) 46.
[284] Genocide Convention, art II(c): "…deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part".
[285] Patterson (n 84) 46.
[286] ibid 47.
[287] The petitioners characterised it as a "profitable genocide": ibid 196.

violence was placed within longer histories of racism.[288] By drawing attention to the structures and techniques of colonial domination,[289] the petition captured forms of violence not typically identified as *genocidal*. The contemporary reaction to the petition reflects this, with Eleanor Roosevelt, for example, arguing it exaggerated the conditions of racism it spoke of and failed to distinguish between *institutionalised murder* by the Nazis and the *institutionalised oppression* African Americans experienced.[290]

Evidently, this perception persists, as we see in Samantha Power's comment that only a "wildly exaggerated" reading of the Convention would support its application to the treatment of African Americans.[291] Power's appraisal should be placed in the context of her view that having provided a leading role in the creation of genocide as an international legal norm, the US should return to this global leadership position.[292] In response to power, Bachman views the US less like a bystander that failed to muster political will in response to specific incidents of genocide and instead considers the US as having facilitated the conditions in which "genocide has been committed and ignores entirely the possibility that the US could be directly responsible for the commission of genocide."[293] Powers overlooks the political compromises that shaped this nascent international legal norm even in its earliest stages of development and how this influenced the kinds of violence it could capture and respond to. To this end, Churchill characterises US leadership in drafting the Genocide Convention as *subversive*,[294] with the US having proved instrumental in excluding from its ambit the offence of cultural genocide—particularly in light of their potential exposure to such charges.[295] Although the US's defensive posture did not necessarily differ from other delegates.[296]

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[288] ibid 27 & 186.
[289] Benjamin Meiches, 'The Charge of Genocide: Racial Hierarchy, Political Discourse, and the Evolution of Institutions' (2019) 13(1) International Political Sociology 20.
[290] Plummer (n 74) 202.
[291] Samatha Power, *"A Problem From Hell": America and the Age of Genocide* (Basic Books 2013) 67.
[292] For a refutation of Power's approach, see: Jeffrey S. Bachman, *The United States and Genocide: (Re)Defining the Relationship* (Routledge 2018) 8-11.
[293] ibid 11.
[294] Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present* (City Lights 1997) 364.
[295] Bonnie St. Charles, 'You're on Native Land: The Genocide Convention, Cultural Genocide, and the Prevention of Indigenous Land Takings' (2020) 21(1) Chicago Journal of International Law 227, 241; and ibid 364.
[296] The Soviet Union were similarly opportunistic in their contributions. See: Weiss-Wendt (n 119); and Matthew Lippman, 'The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later' (1998) 15(2) Arizona Journal of International and Comparative Law 415. Van Schaack makes a similar point, noting the convention not only had to respond to the tragedy of the Holocaust using new legal technology, but had to do so in a way that would not implicate those Member States drafting it: Beth Van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot' (1997) 106(7) The Yale Law Journal 2259, 2268. In particular, there was a concern not to draw the boundaries of genocide too wide: LeBlanc (n 200) 27-8.

As we have seen, concerns about the potential scope and application of the Genocide Convention were a persistent source of anxiety in the long-running ratification debates from the 1950s until the 1980s.[297] Indeed, at one point during a Senate Hearing on ratification, international law scholar Eberhard Deutsch referenced *We Charge Genocide* specifically as a warning and circulated copies of it to attendants.[298] Power's analysis thus suffers from a halcyon view of US *global leadership* in contributing to the Genocide Convention and a failure to appreciate the definitional ambiguity that inhered in genocide as a legal concept from early on.[299] It is perhaps for this reason that Power appears so confident in dismissing the CRC's attempted framing as *wildly exaggerated*. It was not simply the case that *genocide* could not feasibly be stretched to cover the violence outlined in the petition. Instead, genocide as a legal norm had been intentionally narrowed to cover only specific forms and modalities of violence.

In this regard, the *We Charge Genocide* episode is illuminating precisely because it shows how the accepted understandings of *genocide* kept it at a distance from the "structures of racial hierarchy."[300] In this way, the petition was radical because it attempted to open up the conceptual possibilities of genocide as a legal concept.[301] The result of this was the creation of "racial anxieties" that undermined the use of genocide as a "potent international discourse",[302] with this radical interpretation provoking a conservatism in its potential application. Doing so strengthened the existing semantic and discursive boundaries of *genocide*.

5.10.1 'Slow Violence' and the Selectivity of International Criminal Justice

The forms of violence the petition characterised as genocidal in nature might today be termed 'slow' or 'structural' violence, which contrast with the "kinetic" violence we typically associate with genocide.[303] In the petition, *kinetic* violence covers lynching and other violent

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[297] LeBlanc (n 201) 5-6; and Lawrence LeBlanc, 'The ICJ, the Genocide Convention, and the United States' (1987) 6(1) Wisconsin International Law Journal 43, 45. For an overview of how Congress worked to limit its potential application, see: Jordan J. Paust, 'Congress and Genocide: They're Not Going to Get Away With It' (1989) 11(1) Michigan Journal of International Law 90.
[298] LeBlanc (n 201) 112.
[299] For an overview of these definitional issues, see: Bachman (n 288) 4-7 & 19-55.
[300] Meiches (n 285) 30.
[301] Similarly, Knox and Tzouvala argue the petition is notable for the originality of the distinctly Marxist understanding of genocide it forwarded. See: Knox and Tzouvala (n 11) 51.
[302] Meiches (n 289).
[303] On the idea of "kinetic violence", see: Asad G. Kiyani, 'International Crime and the Politics of Criminal Theory: Voices and Conduct of Exclusion' (2015) 48(1) NYU Journal of International Law 129, 1701-1. This idea has also arisen in the context of scholarship on military conduct and the use of armed force: Christopher Finlay, 'Just War, Cyber War, and the Concept of Violence' (2018) 31(3) Philosophy & Technology 357. See, for example, Leech's re-characterisation of capitalism as enacting a form of "structural genocide": Garry

acts perpetrated by racist mobs or individuals, whilst *slow* violence captures the violence occurring "gradually and out of sight, a violence of delayed construction that is dispersed across time and space, an attritional violence that is not typically viewed as violence at all."[304] Interestingly, "slow genocide" was referenced in a 1960s *New York Amsterdam News* article when Congress of Racial Equality director James Farmer decried the: "slow genocide that invests the lives of black men everywhere in this nation, laws or now laws, President or no President."[305] Slow violence is closely related to *structural violence*, which captures the economic, political, and cultural dynamics that cause harm and suffering through social structures. In this way, it looks as much to the social structures that produce violence as it does individual acts. 'Structural violence' was coined by Galtung, who used it to refer to constraints on human potential caused by economic or political structures and how this prevented individuals from realising their somatic or mental potential.[306]

Farmer extends this to forms of violence that are: "structured and structuring. It tightens a physical noose around their necks, and this parroting determines the way resources—food, medicine, even affection—are allocated and experienced."[307] For Farmer, social inequalities were central to structural violence,[308] which encompasses "avoidable limitations that society places on groups of people that constrain them from meeting their basic needs and achieving the quality of life that would otherwise be possible."[309] It has thus been used to capture the *structural* dimensions of human rights violations and socioeconomic harms. This includes violations of human dignity, including poverty, socio-economic inequity, and related physical harms such as serious diseases.[310] Gready broadens this somewhat and divides it into three pillars: social marginalisation, political exclusion, and economic exploitation.[311]

As *structural* and *slow* violence are embedded in the social structures that give rise to them, this form of violence achieves an omnipresence—what Hughes characterises as the

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Leech, *Capitalism as Structural Genocide* (Zed Books 2012). On the idea of structural violence as applied to genocide, see: Adam Jones, 'Genocide and Structural Violence: Charting the Terrain' in Adam Jones (ed), *New Directions in Genocide Research* (Routledge 2011).

[304] Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press 2010) 2.

[305] James Farmer, 'Sounds of Surrender' *New York Amsterdam News* (New York, 6 November 1965).

[306] Johann Galtung, 'Violence, Peace, and Peace Research' (1969) 6(3) Journal of Peace Research 167.

[307] Paul Farmer, 'An Anthropology of Structural Violence' (2004) 45(3) Current Anthropology 305, 315.

[308] ibid, 317.

[309] Bandy X Lee, *Violence: An Interdisciplinary Approach to Causes, Consequences, and Cures* (Wiley & Sons 2019) 123.

[310] Paul Farmer, *Pathologies of Power: Health, Human Rights, and the New War on the Poor* (University of California Press 2003).

[311] Paul Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (Routledge 2011) 15.

"routinisation of human suffering."[312] It is often overlooked because it does not match our societal—or, indeed, disciplinary—expectations of *violence*. It is often incremental and accretive, delivering harm that corrodes over time. Within genocide studies, Wakeham has pointed to a tendency to overlook the *slow violence of* settler-colonialism.[313] This builds on Wolfe's understanding of the "logic of elimination" that characterises the settler-colonial context, which was understood as an ongoing system of indigenous erasure that relied on physical and epistemic violence.[314] For Wolfe, the violence of colonialism thus had both *positive* and *negative* dimensions—'negative' insofar as it dissolves indigenous societies, 'positive' in erecting a new colonial society—which leads him to view it as a *structure* rather than an *event*.[315]

Generally speaking, the field of ICL has tended to marginalise these forms of violence. And to this end, a strain of critical ICL scholarship has identified a disciplinary tendency to focus on specific forms of violence. This myopia is heightened given the field's stated concern with the *most serious crimes of concern to the international community*.[316] Krever, for example, has critiqued the triumphalism present in ICL scholarship in light of a persistent failure to explore the root causes of the violence the field is concerned with. This leads to the uncritical celebration of the virtues of ICL, which risks "passive acquiescence in the status quo and discouraging more thoroughgoing efforts to address the systemic forces underlying instances of violence."[317] Similarly, the *core* crimes of ICL have been criticised for the narrow conceptualisations of violence they cover—notwithstanding the complexities of the interrelationship between 'core' and non-'core' forms of international criminality.[318] Xavier and Reynolds have thus called for a disciplinary reimagining of the forms of violence criminalised at the design level, particularly insofar as ICL fails to address the Third World and Global South inhabitants impacted by the: "structural violence of economic coercion, resource extraction, global wealth distribution and enforced impoverishment".[319] Kiyani has

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[312] Scheper Hughes, *Death Without Weeping: The Violence of Everyday Life in Brazil* (University of California Press 1993) 16
[313] Pauline Wakeham, 'The Slow Violence of Settler Colonialism: Genocide, Attrition, and the Long Emergency of Invasion' (2021) Journal of Genocide Research 1-21 <https://doi.org/10.1080/14623528.2021.1885571> accessed 13 January 2022.
[314] Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) Journal of Genocide Research 387.
[315] ibid 388.
[316] As per Rome Statute, Preamble & Art 5.
[317] Tor Krever, 'International Criminal Law: An Ideology Critique' (2013) 26 LJIL 701.
[318] On this, see Rafael Braga Da Silva, 'Synergies Between Core and Transnational Crimes: An Analysis from the Perspective of the Rome Statute' (2020) 21(1) Melbourne Journal of International Law 1.
[319] John Reynolds and Sujith Xavier, '"The Dark Corners of the World": TWAIL and International Criminal Justice' (2016) 14(4) Journal of International Criminal Justice 959, 981.

similarly identified design level selectivity which fails to prosecute crimes that fall outside the classical categories of atrocities ICL is typically concerned with.[320]

Calls have thus been made to expand ICL's scope to be more attuned to the *banal* forms of suffering the field tends to overlook, particularly as contrasted with the *radical evil* ICL most often pursues.[321] For Kalpouzos and Mann, it is overlooked because it comprises "normalised occurrences" rooted in "social and economic process rather than politics."[322] These routinised forms of violence lack the same "spectacular" physical atrocities that typically draw the gaze of international criminal justice institutions and ICL scholarship.[323] This is in one sense inevitable given the perception of genocide as the *crime of crimes* and the "very worst thing imaginable".[324] By labelling genocidal violence as the utmost aberration and the ultimate exception to civilised conduct, it blinds itself to these more *banal* forms of suffering.[325]

5.10.2 *We Charge Genocide,* the Slow Violence of Institutionalised Racism, and the Blind Spots of International Criminal Law

In light of the above, we can note similarities in the kind of violence the CRC petition captured and this *slow violence*. In addition to the physical—or *kinetic*—violence it documented under Article II(a) of the Convention, the petition also identified patterns of structural violence under Article II(c), which covered:

> "[D]eliberate national oppression of these 15,000,000 Negro Americans on the basis

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[320] Asad Kiyani, 'Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity' (2016) 14(4) Journal of International Criminal Justice 939, 942.

[321] DeFalco has similarly noted a disciplinary tendency to overlook the *slower*, attritive forms of violence: Randle C. DeFalco, 'Time and the Invisibility of Slow Atrocity Violence' (2021) 21(5) International Criminal Law Review 905.

[322] Ioannis Kalpouzos and Itamar Mann, 'Banal Crimes Against Humanity: The Case of Asylum Seekers in Greece' (2015) 16(1) Melbourne Journal of International Law 1, 1-2.

[323] Schwöbel-Patel has explored the idea of "spectacle" with particular reference to the images of victimhood that spur the operation of ICL institutions: Christine Schwöbel-Patel, 'Spectacle in International Criminal Law: The Fundraising Image of Victimhood' (2016) 4(2) London Review of International Law 247. This idea also forms the basis for her more recent work in: Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (CUP 2021). On the idea of the core crimes of ICL as concerned with particular forms of "spectacular crime", see also: Schwöbel-Patel, 'The Core crimes of International Criminal Law' in Kevin Heller, Frédéric Mégret, Sarah MH Nouwen, Jens David Ohlin, and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press, 2020) 788; and Immi Tallgren, 'Come and See? The Power of Images and International Criminal Justice' (2016) 17(2) International Criminal Law Review 259, 277.

[324] Mark Levene, *Genocide in the Age of the Nation-State, Volume 1: The Meaning of Genocide* (Bloomsbury 2008) 38.

[325] On this point, see: Dylan Rodríguez, 'inhabiting the Impasse: Racial/Racial-Colonial Power, Genocide Poetics, and the Logic of Evisceration' (2015) 33(3) Social Text 19. Similarly, also see: Jaako Heiskanen, 'In the Shadow of Genocide: Ethnocide, Ethnic Cleansing, and International Order' (2021) 1(4) Global Studies Quarterly 1, 3.

> of race to perpetuate these conditions of life. Negroes are the last hired and the first fired. They are forced into city ghettos or their rural equivalents. They are segregated legally or through sanctioned violence into filthy, disease-bearing housing, and deprived by law of adequate medical care and education…They are forced by threat of violence and imprisonment into inferior, segregated accommodations, into Jim Crow buses, Jim Crow trains, Jim Crow hospitals, Jim Crow schools, Jim Crow theatres, Jim Crow restaurants, Jim Crow housing, and finally into Jim Crow cemeteries."[326]

Additionally, they also argued that *structures* of American racism caused "serious bodily or mental harm" under Article II(b), which resulted from "marking their status as inferior as a matter of law on the basis of race".[327] It also identified a socio-economic logic underpinning the structures of this racist system.[328]

In speaking to the social, political, and economic structures which sustained the racism they spoke of, and by using ICL norms to do so, the petitioners thus highlighted a blind spot in the forms of violence ICL is concerned with. This *blind spot* relates not only to the failure of ICL to address *structural* violence, but also race, racism, and the dynamics of racial violence more specifically. This blind spot reflects ICL's primary concern with the violent manifestation of racism rather than the conditions that make it possible.[329] Marks has noted a similar tendency of avoiding *root causes* within the field of international human rights.[330]

The invisibility of race within contemporary ICL practice and discourse has become heightened in recent years, particularly as the ICC's uneasy relationship with global peripheries has been brought into sharp relief. This has certainly proved true of the ICC's relationship with the African continent, which has generated a significant volume of scholarship in recent years.[331] Within this growing body of work, there appears to be a divide between those ICL scholars tending to view this episode and the institutional tensions

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[326] Patterson (n 84) 5.
[327] ibid 46.
[328] As the petition argued: "We shall prove that the object of this genocide, as of all genocide, is the perpetuation of economic and political power by the few through the destruction of political protest by the many. See: ibid 5.
[329] Krever (n 317).
[330] Susan Marks, 'Human Rights and Root Causes' (2011) 74(1) The Modern Law Review 57.
[331] On this topic generally, see: Fred Aja Agwu, *Africa and International Criminal Justice: Radical Evils and the International Criminal Court* (Routledge 2020); Charles Chernor Jalloh and Ilias Bantekas (eds), *The International Court and Africa* (OUP 2017); Evelyn Ankumah (ed), *The International Criminal Court and Africa: One Decade On* (Intersentia 2016); Kamari M. Clarke, Abel S. Knottnerus, & Eefje de Volder (eds), *Africa and the ICC: Perceptions of Injustice* (CUP 2016); and Gerhard Werle, Lovell Fernandez, Moritz Vormbaum (eds), *Africa and the International Criminal Court* (Springer Press 2014).

it revealed as an ad hoc issue with shallower roots and those considering it as symptomatic of the dysfunctions of international criminal justice and the limits of ICL itself.[332]

This latter view is a product of a wave of critical ICL scholarship that has identified the racialised dynamics that animate the institutional architecture of international criminal justice. Whilst some of this work has explored how race is conceptualised within ICL itself,[333] others have traced how notions of race animate disciplinary discourses about international criminal justice. Edelbi, for example, has identified how discourses about the ICC replicated the "racialised logic of colonialism", which in the context of discussions about the ICC and certain African states, has seen scholars stigmatise the latter to affirm the moral authority of the former.[334] Pointing to a failure to adequately grapple with either the structural conditions producing racial violence or to account for race within our disciplinary discourses properly contrasts with the mainstream view of the field, which often views ICL as an antidote to both. However, a dominant concern for *individualising* responsibility and guilt and a narrow view of what constitutes violence results in *race* often being rendered "invisible".[335] This is perhaps inevitable given that ICL as a "legal liberal construct, is simply not designed to address structural and systemic violence in the first place."[336]

Whilst not unique to ICL,[337] this tendency is particularly problematic given ICL institutions are actively involved in the "ongoing social construction of race."[338] Mutua has

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[332] See for example Monageng and Mbizvo emphasising the contributions of Africans to the ICC, as a way of emphasising how present relations have gone off course: S.M. Monageng, 'Africa and the International Criminal Court: Then and Now' in G. Werle, L. Fernandez, & M Vormbaum (eds), *Africa and the International Criminal Court* (TMC Asser Press 2014); and Shamiso Mbizvo, 'The ICC in Africa: The Fight Against Impunity' in Clarke, Knottnerus, and Volder (eds), *Africa and the ICC: Perceptions of Justice* (CUP 2016). See also: Philipp Kastner, 'Africa—A Fertile Soil for the International Criminal Court?' (2010) 85(1/2) Die-Friedens-Warte 131.

[333] Carola Lingaas, *The Concept of Race in International Criminal Law* (Routledge 2019).

[334] Souheir Edelbi, 'The Framing of the African Union in International Criminal Law: A Racialized Logic' (*Völkerrechtsblog: International Law & international Legal Thought*, 21 February 2018) <https://voelkerrechtsblog.org/the-framing-of-the-african-union-in-international-criminal-law-a-racialized-logic/> accessed 13 January 2022.

[335] Randle C DeFalco and Frédéric Mégret, 'The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System' (2019) 7(1) London Review of International Law 55, 56.

[336] Souheir Edelbi, 'Making Race Speakable in International Criminal Law: Review of Lingaas' The Concept of Race in International Criminal Law' (*TWAILR*, 14 April 2020) <https://twailr.com/making-race-speakable-in-international-criminal-law-review-of-lingaas-the-concept-of-race-in-international-criminal-law-%E2%80%A8/> accessed 13 January 2021.

[337] Indeed, TWAIL scholars have played an important role in identifying and exploring this blind spot, having drawn on CRT and postcolonial insights to do so. On this, see: Anna Spain Bradley, 'International Law's Racism Problem' (*Opinio Juris*, 4 September 2019) <http://opiniojuris.org/2019/09/04/international-laws-racism-problem/> accessed 13 January 2021. On the fruitful interactions between CRT and TWAIL, see: James Thuo Gathii, 'Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn From Each Other' (2021) 67 UCLA Law Review 1610. Similarly, on the dearth of engagements with 'race' within international law scholarship as found within the *American Journal of International Law*, see: James Thuo Gathii, 'Studying Race in International Law Scholarship Using a Social Science Approach' (2021) 22(1) Chicago Journal of International Law 1.

[338] DeFalco and Mégret (n 335) 56.

characterised this process as the judicial production of *savages, victims, and saviours.*[339] And the categories and concepts that underpin international criminal justice as an institutional and discursive practice act as vectors that carry "racial significance", despite their claims to universality.[340] Nesiah has thus illustrated how the *erasure* of race from particular categories of international crimes—in this case, crimes against humanity—has been effected by translating "questions regarding the racial ordering of the Atlantic world into legal questions."[341] In this way, *law* and *legal institutions* provided "cloaks of invisibility that translated the politics of race into technical legal questions".[342] Becoming attuned to how race figures within the institutional practices and disciplinary discourses of ICL thus requires us to critically interrogate the capacity of the legal categories around which the field is structured to be perceptive of the conditions that produce this kind of violence.

With these *blind spots* in mind, it is perhaps little surprise that the violence and suffering Patterson sought to capture in the CRC petition was thought not to fall within the scope of ICL. And by extension, it is also of little surprise that this episode has assumed a marginal role in our disciplinary histories and accounts about the development of ICL. What I hope to have shown in the preceding section, however, is that this episode was not simply *marginal* but was *marginalised* within these accounts. In this sense, to return to Trouillot, it has been *silenced*.[343] This 'silencing' occurred because the *We Charge Genocide* episode spoke to suffering the gaze of international criminal justice has rarely captured.

If ICL's core crimes are a site of "structural and racialised inequality",[344] paying attention to this episode—with a particular concern for the forms of violence the language of ICL was used to capture—provides a sense of how particular disciplinary blind spots have persisted throughout the field's history. Indeed, Heiskanen refers to the *We Charge Genocide*

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[339] Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law Journal 201. See also: S. Kendal and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood' (2013) 76(3/4) Law and Contemporary Problems 235; Sofia Stolk, 'A Sophisticated Beast? On the Construction of an "Ideal" Perpetrator in the Opening Statements of International Criminal Trials' (2018) 29(3) EJIL 677; and Schwöbel-Patel (n 318).

[340] Vasuki Nesiah, 'The Law of Humanity Has a Canon: Translating Racialized World Order into "Colorblind" Law' (*Polar Journal,* 15 November 2020) <https://polarjournal.org/2020/11/15/the-law-of-humanity-has-a-canon-translating-racialized-world-order-into-colorblind-law> accessed 22 October 2021. Gevers makes a similar point regarding the "international" in international law, which exists as a "racial imaginary" that emerged from and reinforced global white supremacy: Christopher Gevers, 'Unwhiteneing the World: Rethinking Race and International Law' (2021) 67(6) UCLA Law Review 1652.

[341] Vasuki Nesiah, 'Crimes Against Humanity: Racialised Subjects and Deracialised Histories' in Thomas Skouteris and Immi Tallgren (eds), *The New Histories of International Criminal Law: Retrials* (OUP 2019) 178.

[342] ibid.

[343] As per Chapter 3.

[344] Kamari Maxine Clarke, 'Negotiating Racial Injustice: How International Criminal Law Helps to Entrench Structural Inequality' (*Just Security*, 24 July 2020) <https://www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality/> accessed 22 October 2021. This point is expanded in: Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (CUP 2010).

specifically as illustrative of a moment when the legal and political meaning of genocide was "constrained" and deflected attention away from the "constitutive contradictions of the international order, especially its long history of racial and colonial violence."[345] And when contrasted with the Nuremberg narrative set out in the previous chapter, it counterbalances the triumphal and transcendent terms this period of ICL's history is typically presented. In this sense, the story of the *We Charge Genocide* petition can be read contrapuntally against the mainstream disciplinary narratives of Nuremberg as a way of exposing these blind spots.

5.11 Conclusion

In closing, there are at least three dimensions of particular note to the *We Charge Genocide* episode as I have engaged with it above. Firstly, it is notable as a failed attempt by radical African American activists to publicise their cause on the international stage by engaging the institutional architecture of the nascent international criminal justice system. Secondly, it is also notable that to do so, the CRC petitioners drew on the language of ICL to articulate the violence and oppression that formed the basis of the petition. And thirdly, this episode also gives us a sense of how the petition sought to stretch the established conceptual limits of genocide to cover forms of violence the field of ICL has historically overlooked.

By recovering this episode—lost as it is within mainstream accounts—we thus get a sense of how ICL norms were diffusing outside the familiar institutional settings we typically focus on when we look to chart the development of the field. In doing so, we are provided with an insight into how abstract concepts such as individual criminal responsibility for international crimes or specific forms of international criminality such as genocide gain resonance within particular communities or activist movements. This might constitute what Charlesworth has characterised as an insight into the "everyday life" of international law, where legal concepts are considered from the perspectives of non-elite groups with a particular view towards "structural injustice[s] that underpin everyday life" and which international law may have a role in either solving or sustaining.[346] Furthermore, as genocide is a "global concept" in search of *local* resonance,[347] this episode highlights a

[345] Heiskanen (n 325) 2-3.
[346] Hilary Charlesworth, 'International Law: A Discipline in Crisis' (2002) 65(3) The Modern Law Review 377, 391. For a brief overview of some of the literature that has grappled with international law and the 'everyday', see: Henrietta Zeffert, 'Home and International Law' (PhD Thesis, The London School of Economics and Political Science May 2017) 32-42. Also see: Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45(2) Law and Politics in Africa, Asia, and Latin America 195.
[347] Solomon (n 229) 130-1.

moment when this 'resonance' was struck. This moment of *resonance* signalled the emergence of a new *international legal consciousness*,[348] which saw the discourse of criminal justice transposed onto the discourse of sovereign power.[349] It is in this sense that the CRC petitioners sought to reclassify the "racism of government" as a "criminal policy",[350] and drew on the legal and moral precedent of Nuremberg to do so.[351]

As part of this reclassification, the CRC petitioners analogised their own experiences with the events 'genocide' as a legal norm developed in response to. To this end, Patterson stated that "[e]very word he [Robert Jackson] voiced against the monstrous Nazi beast applies with equal weight, we believe, to those who are guilty of the crime herein set forth."[352] Although, as we have seen, this rhetorical strategy proved unsuccessful due to the prevailing Cold War political conditions of the day, there was also a widespread perception that genocide was both legally, morally, and conceptually inapplicable to the circumstances the CRC petitioned in respect of.[353] This comparison is particularly significant given that perceptions of the Nazi crimes have, over time, crystalised to understand them as an act of unrivalled depravity,[354] to view them as standing alone in the history of atrocity,[355] and which have thus been elevated to the "archetypal event of mass murder in human history".[356] Illustrative of this, genocide has thus been classified as the "crime of crimes".[357]

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[348] On "legal consciousness" generally, see: Susan Silbey, 'Legal Culture and Legal Consciousness' in James Wright (ed), *International Encyclopedia of the Social & Behavioral sciences: Vol. 13* (2nd ed, Elsevier 2015) 468-73. Berman specifically identifies the trial and judgment of the Nuremberg IMT as establishing a new legal consciousness. See: Paul Schiff Berman, 'Seeing Beyond the Limits of International Law' (2006) 84 Texas Law Review 1265, 1289-91.

[349] Aaron Fichtelberg, 'Fair Trials and International Courts: A Critical Evaluation of the Nuremberg Legacy' (2009) 28(1) Criminal Justice Ethics 5, 21.

[350] William Patterson, 'Foreword' in Patterson (ed), *We Charge Genocide: The Crime of Government Against the Negro People* (International Publishers, 1970) vii.

[351] Patterson (n 84) 51 & 196.

[352] Patterson (n 95) xvi

[353] As we have seen in both the contemporary reactions to the petition, as well as some of the present-day appraisals of it that have been made. See: s.5.5.2.

[354] See, for example: Daniel Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (Knopf 1996) 4.; and Yehuda Bauer, *Rethinking the Holocaust* (Yale University Press 2001) 61. Similarly, see Mettraux describing them as of "unprecedented brutality and scale": Guénaël Mettraux, 'Trial at Nuremberg' in William Schabas and Nadia Bernaz (eds), *The Routledge Handbook of International Criminal Law* (Routledge 2012) 5.

[355] On this theme, as well as a critical engagement with the exceptionality of the Holocaust, see: David Moshman, 'Conceptual Constraints on Thinking About Genocide' (2001) 3(3) Journal of Genocide Research 431.

[356] Israel W. Charny, 'Toward a Generic Definition of Genocide' in George J. Andrepoulos, *Genocide: Conceptual and Historical Dimensions* (University of Pennsylvania Press 1994) 72.

[357] On genocide as the "crime of crimes", see: William Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press, 2009); and Schabas, 'National Courts Finally Begin to Prosecute Genocide, the Crime of Crimes' (2003) 1(1) Journal of International Criminal Justice 39. Similar references have been made in ICTR Judgments: *Prosecutor v Kambanda* (Sentencing) ICTR-97-23-s (4 September 1998) [16]; and *Prosecutor v Akayesu* (Sentencing) ICTR-96-4 (2 October 1998) [10].

In setting out how the resistance and reactions to the petition manifested, however, we also get a sense of how the Cold War politics of the day shaped the semantic possibilities of what kinds of violence 'genocide' might capture and the limits of the Nuremberg precedent more broadly.[358] Looking at the *We Charge Genocide* episode, we can thus shed light on what has proved to be a persistent blind spot for the field. It might thus be read as a prescient foretelling of ICL's continued failure to fully grapple with either the conditions of racism and racial violence ICL responds to or how race is constructed within our disciplinary discourses.[359] This *blind spot* is particularly concerning given that ICL is often viewed as a constraint on certain forms of racial violence produced by geopolitics.

In this regard, the *We Charge Genocide* episode holds much contemporary resonance for ICL. And we can certainly identify echoes of the petition in recent calls to the ICC made by Canadian lawyers to investigate the Canadian Government and the Vatican following the discovery of the remains of 215 children at the former Kamloops Indian Residential School.[360] This, of course, has particular resonance given the previous admission by the Canadian Government that the treatment of indigenous peoples constituted genocide,[361] which came in response to a report on missing and murdered indigenous women.[362] In this context, much like the CRC petition, the attempt to stretch the conventional boundaries of *genocide* beyond its archetypal context to the issue of the ongoing violence of settler colonialism became similarly animated.[363]

Of course, it should be noted that whilst attempts have been made to expand the conceptual and legal boundaries of genocide for various social justice causes—as in the

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[358] Smith makes a similar point in relation to W.E.B DuBois' activism at this time. See: Eve Darian Smith, 'Rereading W.E.B. Du Bois: The Global Dimensions of the Civil Rights Struggle' (2012) 7(3) Journal of Global History 483, 499.

[359] Meiches makes a similar argument in relation to the crime of genocide specifically, with the *We Charge Genocide* episode deepening the "invisibility of racist power in world politics" insofar as it supports the claims contemporary humanitarians make regarding the distinction between the violence of *slavery* and *colonialism* versus *genocide.* See*:* Meiches (n 289) 21.

[360] Meghan Grant, 'International Criminal Court Called on to Investigate Kamloops Residential School Findings' (*CBC News*, 3 June 2021) <https://www.cbc.ca/news/canada/calgary/calgary-canadian-lawyers-icc-residential-school-investigation-1.6052054> accessed 22 October 2021. See also: Tamara Pimentel, 'International Criminal Court will give 'consideration' to request to investigate Canada, Catholic church over residential schools' (*ATPN News*, 12 June 2021) <https://www.aptnnews.ca/national-news/international-criminal-court-will-give-consideration-to-request-to-investigate-canada-catholic-church-over-residential-schools/#.YNYri6BVnls.twitter> accessed 22 October 2021.

[361] Catharine Tunney, 'Trudeau Says Deaths and Disappearances of Indigenous Women and Girls Amount to "Genocide"' (*CBC News*, June 14 2019) <https://www.cbc.ca/news/politics/trudeau-mmiwg-genocide-1.5161681> accessed 21 October 2021.

[362] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019) <https://www.mmiwg-ffada.ca/final-report/> accessed 21 October 2021.

[363] For an overview see: Umut Özsu, 'Genocide as Fact and Form' (2020) 22(1) Journal of Genocide Research 62. Also see: Valarie Waboose, 'The Children Have Reawakened Canada' (*Third World Approaches to Inernational Law Review: Reflections #36/2021*, 12 August 2021) <https://twailr.com/the-children-have-awakened-canada/> accessed 22 October 2021.

case of the *We Charge Genocide* petition and in the application of the term to the settler colonial context—this strategy can also be used more regressively. We see this most recently in the international legal context in Russia's attempt to justify military aggression against Ukraine—which has entailed widespread and pervasive breaches of *jus ad bello* and *jus in bellum*—by drawing on the language of genocide and broader references to aims of *denazification*.[364] And similarly, in the context of the Covid-19 pandemic, the spectre of the Holocaust and the language of genocide have been invoked both by those accusing Global North countries of restricting access to vaccines in the Global South, as well as by vaccine sceptics.[365] Although both instances in their own way marked an attempt to unsettle the conceptual and legal certainty of genocide for particular political ends, this itself perhaps speaks to the *rhetorical* power of genocide noted by Weiss-Wendt.[366]

A renewed focus on the meaning particular international legal norms are ascribed by communities or activist groups beyond the formal institutional settings we typically focus on might thus help to inform our understanding of the semantic tensions that have accompanied the development of genocide since it first emerged as a *legal* concept. As we saw above, the petitioners drew on an understanding of genocide that diverged with the accepted doctrinal understandings at the time. In this regard, and as was argued above, they sought to characterise as *genocidal* certain kinds of violence that have traditionally escaped scrutiny by ICL practitioners and action by international criminal justice institutions. The petitioners, albeit unwittingly, in this sense pre-empted debates that have broken out in light of the distance between *legal* and *sociological* understandings of genocide.[367]

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[364] Dimitrios Kourtis, 'Are States Allowed to "Cry Wolf"? Genocide and Aggression in Ukraine v. Russia' (Opinio Juris, 21 March 2022) <http://opiniojuris.org/2022/03/21/are-states-allowed-to-cry-wolf-genocide-and-aggression-in-ukraine-v-russia/> accessed 9 April 2022; Malcolm Jorgensen, 'The Weaponisation of International Law in Ukraine' (Völkerrechtsblog, 15 March 2022) <https://voelkerrechtsblog.org/the-weaponisation-of-international-law-in-ukraine/> accessed 9 April 2022; Kim Christian Priemel, 'Why Cry "Genocide"? The Second World War Still Looms Large in Russia's Collective Memory' (Opinio Juris, 5 April 2022) <http://opiniojuris.org/2022/04/05/why-cry-genocide-the-second-world-war-still-looms-large-in-russias-collective-memory/> accessed 9 April 2022; Victoria Kerr, 'Debunking the Role of International Law in the Ukrainian Conflict' (Opinio Juris, 8 March 2022) <https://opiniojuris.org/2022/03/08/de-bunking-the-role-of-international-law-in-the-ukrainian-conflict/> accessed 9 April 2022; and Sergey Sayapin, 'Thou Shalt Not Distort the Language of International Law' (Opinio Juris, 7 March 2022) <https://opiniojuris.org/2022/03/07/thou-shalt-not-distort-the-language-of-international-law/> accessed 9 April 2022.

[365] On both trends, respectively, see: Dr Vittorio Bufacchi, 'Is Vaccine Hoarding a Kind of Genocide?' (*RTE News: Brainstorm*, 6 October 2021) <https://www.rte.ie/brainstorm/2021/1005/1250853-covid-vaccine-hoarding/> accessed 1 April 2022; and Kenneth Bandler, 'Normalization of Holocaust Parallels in Covid Era' (*The Jerusalem Post*, 26 December 2021) <https://www.jpost.com/opinion/article-689829> accessed 1 April 2022.

[366] Anton Weiss-Wendt, *A Rhetorical Crime: Genocide in the Geopolitical Discourse of the Cold War* (Rutgers University Press 2018).

[367] Kuper was arguably the pioneering scholar exploring this tension, which has subsequently generated a significant volume of scholarship within genocide studies. See: Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (Penguin 1981). More recently, Shaw has provided a sociological restatement of Lemkin's idea of genocide: Martin Shaw, *What is Genocide?* (2nd edn, Polity Press 2015); and Shaw, 'Sociology and

Campbell has, for example, argued that the definition contained in the Genocide Convention is a "legal, not a scientific definition", with social scientists viewing the former as "vague, too restrictive, too broad, or some combination of these."[368] Genocide is particularly interesting in this regard as its *legal* meaning crystalised before its *social* meaning had been extensively debated or settled—particularly when contrasted to other international crimes.[369]

Interestingly, this tension has been drawn out in two recent treatments of the *We Charge Genocide* petition by an anthropologist and a legal scholar. In a short piece on the petition and its legacy, Hinton argues that it is worth remembering as a moment when this group of activists looked to genocide to capture a kind of "structural genocide"—with Hinton thus arguing it has contemporary resonance for other forms of *structural* genocide occurring today, such as the "social death" imposed on the Uyghur people.[370] In response, and with full doctrinal vigour, Heller rejects the propriety of Hinton's claim regarding *structural* genocide. Although appalling, Heller argues, the conduct the petition concerned was not 'genocidal' based on accepted understandings of the law of genocide. Summing up, Heller comments that the treatment of African Americans will always be "one of the great stains" of American history, regardless of how we "legally describe it".[371] In doing so, Heller thus appears to reject the significance of the genocide claim made by the petitioners. However, as I have argued above, the use of genocide was itself significant and represented a moment at which this particular concept gained resonance beyond the institutional settings we typically associate it with—regardless of how closely this matched historical or contemporary legal understandings of the term. The *We Charge Genocide* episode is thus helpful for revealing these definitional tensions that inhered in the concept from its earliest moments.

Genocide' in Donald Bloxham and Dirk A. Moses (eds), *The Oxford Handbook of Genocide Studies* (OUP 2010).

[368] Bradley Campbell, 'Genocide as Social Control' (2009) 27(2) Sociological Theory 150, 152.

[369] Shaw (n 367) 38.

[370] Alex Hinton, '70 Years Ago Black Activists Accused the U.S. of Genocide: They Should Have Been Taken Seriously.' (*Politico*, 26 December 2021) <https://www.politico.com/news/magazine/2021/12/26/black-activists-charge-genocide-united-states-systemic-racism-526045> accessed 1 January 2022.

[371] Kevin Jon Heller, 'Is "Structural Genocide" Legally Genocide? A Response to Hinton' (*Opinio Juris*, 30 December 2021) <http://opiniojuris.org/2021/12/30/is-structural-genocide-legally-genocide-a-response-to-hinton/> accessed 1 January 2022. For Hinton's response to this, which perfectly illustrates the divergence that can occur when the semantic boundaries of genocide are queried from legal and other extra-disciplinary perspectives, see: Alex Hinton, 'Black Genocide and the Limits of the Law' (*Opinio Juris,* 13 January 2022) <http://opiniojuris.org/2022/01/13/black-genocide-and-the-limits-of-law/> accessed 1 May 2022.

Part III

Chapter 6: From Silence and Stagnation to Rebirth and Renaissance

6.1 Introduction

Building on the periodisation first identified in the introductory Chapter to the thesis and then expanded further in Chapter 2, the present Chapter takes as its focus the third and fourth phases. The first of these falls roughly between the early 1950s and 1989 and captures the development of ICL during the Cold War. The second falls between 1989 and 1998 and captures, in particular, the establishment of the ad hoc tribunals and the International Criminal Court (ICC). In terms of how these phases are presented within ICL scholarship, whilst the Cold War years are presented as a period of disciplinary 'hibernation', the period from 1989 onward is characterised by references to the 'rebirth' and 'renaissance' of ICL both as a project and as a field of institutionalised legal practice.

In the present Chapter, I will explore the historiographical sensibilities that make these kinds of understandings possible. With this aim in mind, I will argue that it is primarily a consequence of two historiographical gestures. Firstly, it more broadly reflects how the Cold War is presented within international law scholarship as a moment when the proper functioning of the international legal order was stalled or stymied by the prevailing Cold War politics of the day. And secondly, it also reflects an institutional focus that dominates ICL scholarship. In this kind of account, institutions are presented as the drivers of disciplinary development. The present Chapter thus functions to establish the accepted account of the development of ICL during the Cold War and in its immediate aftermath, with Chapters 7 and 8 that follow providing a critical response to counterbalance this narrative.

6.2 International Criminal Law and the Cold War: From *Silence* and *Stagnation* to *Rebirth* and *Renaissance*

As identified, the period following the 'pre-history' and 'inaugural' phases of ICL's history is generally presented as falling between the early 1950s and the late 1980s.[1] This starts with the slowing of the momentum built up with the trial and judgment of the Nuremberg IMT and ends with the close of the Cold War. Given a perceived lack of disciplinary development during these years, scholarly accounts of this period draw on the language of *silence* and

[1] As identified in Chapter 2, s.6.2.

stagnation to emphasise the lack of doctrinal or institutional developments. This *stagnation* is often held to encompass, for example, the loss of momentum in the projects for a draft code of crimes and a draft statute for a permanent international criminal court.[2] It is also a moment where Cold War politics appeared to stymy the newfound possibilities of accountability for state-sponsored violence. It was thus a period where the Nuremberg principles "remained without resonance", with this message only picked up when the post-Cold War *thaw* set in.[3] As a "period of slow progress" where the development of ICL was frozen due to Cold War politics,[4] ICL scholars frequently refer to it as a period of *standstill*,[5] *paralysis*,[6] *hiatus*,[7] *silence*,[8] or *dormancy*.[9] Consequently, a perceived lack of doctrinal or institutional progress justifies treating this period either sparingly or leaving it out entirely.[10]

The decades following this period, in contrast, are presented in notably more triumphal terms. This subsequent phase of ICL's history is generally taken to capture the development of the field between 1989 to 1998, primarily focusing on institutional developments during the 1990s. In terms of the disciplinary developments this captures, there is a predominant focus on the revived project for a PICC, the establishment of the ad hoc tribunals, and the Rome Statute negotiations, which eventually resulted in the foundation of the ICC. As the first *international* tribunals with jurisdiction over international crimes since Nuremberg and Tokyo, early responses to the ad hoc tribunals often emphasised how they revived the spirit of Nuremberg in inaugurating this new phase of disciplinary development.[11] And given that ICL was a "dead letter" in the preceding

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[2] The *project* for a *permanent international criminal court* will be referred to as the 'PICC', as distinguished from the *International Criminal Court* as a specific institutional project.
[3] Claus Kreß, 'International Criminal Law' in R. Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2009) para 48.
[4] See for example Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2nd edn, CUP 2010) 60. See also Werle and Jessberger noting a lack of political will to use penal sanctions against state-sponsored atrocities during the Cold War: Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (3rd edn, OUP 2014) 1. See similarly: Tracy Isaacs, 'Introduction: Accountability for Collective Wrongdoing' in Tracy Isaacs, Richard Vernon, *Accountability for Collective Wrongdoing* (CUP 2011) 2-3.
[5] Werle and Jessberger, ibid 12.
[6] Neff characterises international law as "paralysed", "ineffective", and "impotent" in this period: Stephen C. Neff, 'A Short History of International Law' in Malcolm D. Evans (ed), *International Law* (OUP 2003); and Neff, *Justice Among Nations: A History of International Law* (Harvard University Press 2014) 396, 404, 410, & 438.
[7] William A. Schabas, 'International Justice or International Crimes: An Idea Whose Times Has Come' (2006) 14(4) European Review 421, 422. Hafetz also uses the language of "hiatus": Jonathan Hafetz, *Punishing Atrocities Through a Fair Trial: International Criminal Law from Nuremberg to the Age of Global Terrorism* (CUP 2018) 21.
[8] Carsten Stahn, *A Critical Introduction to International Criminal Law* (CUP 2019) 164.
[9] Douglas Guilfoyle, *Introduction to International Criminal Law* (OUP 2016) para 3.5. Novak similarly employs the language of 'dormancy': Andrew Novak, *The International Criminal Court: An Introduction* (Springer 2015) 3.
[10] Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (3rd edn, OUP 2013) ch 14; Novak, ibid 11; Cryer et al (n 4) 122.
[11] Gilbert Guillaume, 'The Future of international Judicial Institutions' (1995) 44(4) The International and Comparative Law Quarterly 848, 848.

decades,[12] the sense of disciplinary expectation was particularly acute. This was also a period when the international criminal lawyer proper was born, given they now had both an institutional setting to work in and a growing body of positive law to analyse and apply. This disciplinary hope was also bolstered by the thawing geopolitics of the post-Cold War period which promised a new era of multilateralism.[13]

Given this seemingly rapid pace of development, scholarly treatments are keen to emphasise the contrast between the slow progress of the preceding decades with the rapidity of the new era.[14] The language employed reflects this, with ICL scholars referring to the "revival", "rebirth", and "renaissance" of ICL occurring in this moment.[15] For Kreß, this "renaissance" grew from the "Hegelian Nuremberg Tribunal formulation",[16] whilst Robinson and MacNeill have located it in the doctrinal and jurisprudential contributions of the ad hoc tribunals.[17] Others have linked the "remarkable renaissance" as connected to the new uses for the UN's peace and enforcement mechanisms.[18]

As argued earlier, in its historiographic usage, the term 'renaissance' is typically used to capture the perceived rebirth of certain ideas or values.[19] Within ICL scholarship, it serves much the same purpose. And particularly when contrasted with decades of *hiatus*, the sudden re-emergence of the Nuremberg formulation seems all the more stark. Describing this development as a 'renaissance' can thus be read as an attempt to convey this, as well as to create a sense of continuity between particular contemporary developments and earlier disciplinary waymarks.[20] In this regard, much as how characterisations of the

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[12] Werle and Jessberger (n 4) 14.
[13] Alison Pert, 'International Law in a Post-Post-Cold War World—Can it Survive?' (2017) 4(2) Asia & the Pacific Policy Studies 362, 363.
[14] M. Cherif Bassiouni and William A. Schabas (eds), *The Legislative History of the International Criminal Court: Volume 1* (2nd edn, Brill Nijhoff 2016) paras 2.1-2.2.
[15] On the theme of revival and rebirth more generally, see: Payam Akhavan; 'The Rise, and Fall, and Rise of International Criminal Justice' (2013) 11(3) Journal of International Criminal Justice 527; and Janine Natalya Clark, 'The Violent Death of Yugoslavia and the Rebirth of International Criminal Justice' in Janine Natalya Clark, *Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (Routledge 2014) 21. See also: Guilfoyle (n 9) para 3.5.
[16] Kreß (n 3).
[17] Darry Robinson and Gillian MacNeil, 'The Tribunals and the Renaissance of International Criminal Law: Three Themes' (2016) 110(2) AJIL 191.
[18] David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (OUP 2014) 34. Also Werle and Jessberger (n 4) 14.
[19] The term was, of course, famously first used by the French Romantic historian, Jules Michelet, although as a distinctive period of history it had been recognised long before that. In Michelet's characterisation, the main feature consisted of the revival of antiquity, scientific discoveries, geographical exploration, and rebirth of the human spirit. This was built on by Swiss historian Jacob Burckhardt who characterised the Renaissance period as one of progress, the emergence of reason, and the spirit of individualism. For an overview, see: William Caferro, *Contesting the Renaissance* (Wiley & Sons 2010) ch 1.
[20] Contemporary commentary on the early workings of the ICTY are often accompanied with references to Nuremberg: José E. Alvarez, 'Nuremberg Revisited: The Tadic Case' (1996) 7(2) EJIL 245; Jeremy Colwill, 'From Nuremberg to Bosnia and Beyond: War Crimes Trials in the Modern Era' (1995) 22(3) Racial & Political Injustice 111; Theodor Meron, 'From Nuremberg to the Hague' (1995) 149 Military Law Review 107; Michael P. Scharf, 'Have We Really Learned the Lessons of Nuremberg' (1995) 149 Military Law Review 65; Michael

Renaissance of early modern history have been contested,[21] we might be similarly sceptical of this language within ICL scholarship. As will be argued, two historiographic gestures, in particular, help to sustain this *renaissance* account; firstly, treating the Cold War era as one of *silence*, and secondly, by focusing on a particular sequence of institutional developments.

6.3 Cold War Narratives and the History of International Criminal Law: A Historiography of Hiatus?

As argued, accounts emphasising 'silence' or 'stagnation' during the Cold War seem apposite given this was a period where the kind of multilateralism historically associated with the development of ICL was politically unviable.[22] This kind of appraisal is similarly present within international law scholarship, which exhibits what has been characterised as a "historiography of hiatus".[23] In this account, international law during this period is similarly perceived as "paralysed" or "impotent",[24] with the "prolonged eclipse of [the] Grotian expectations of an 'emergent world order'" having passed.[25] Setting out his hopes for the post-Cold War era, Reisman predicted a move away from a "deformed" international law where UNSC deadlock prevented the proper functioning of the international order.[26] The end of the Cold War thus appeared as the "fulfilment of a destiny prefigured for international law and institutions in 1945."[27] In this regard, 1989 stands as an epochal breach between these two phases of history, which also reflected a new way of "thinking about the world, and of the role of international law within it."[28] Within ICL scholarship, references to the 'paralysis', 'hibernation', or 'silence' of the field reflect a similar *historiography of hiatus*. The

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P. Scharf, 'The Prosecutor v Dusko Tadic: An Appraisal of the First International War Crimes Trial Since Nuremberg' (1997) 60(3) Albany Law Review 861; Christian Tomuschat, 'International Criminal Prosecution: The Precedent of Nuremberg Confirmed' (1994) 5 Criminal Law Forum 237; D.L. Ungar, 'The Tadic War Crimes Trial: The First Criminal Conviction Since Nuremberg Exposes the Need for a Permanent War Crimes Tribunal' (1998-99) 20 Whittier Law Review 677; and Mark S. Zaid, 'Trial of the Century? Assessing the Case of Dusko Tadic Before the International Criminal Tribunal for the Former Yugoslavia' (1996-197) 3 ILSA Journal of International & Comparative Law 589.

[21] Feminist historians have, for example, probed the limits of the *Renaissance* as a descriptive term by asking: "Did women have a Renaissance?". On this, see: Joan Kelly, 'Did Women Have a Renaissance?' in Joan Kelly, *Women, History, and Theory: The Essays of Joan Kelly* (University of Chicago Press, 1984).

[22] W. Michael Reisman, 'International Law After the Cold War' (1990) 84(4) AJIL 859, 860.

[23] Matthew Craven, Sundhya Pahuja, and Gerry Simpson, 'Reading and Unreading a Historiography of Hiatus' in Matthew Craven, Sundhya Pahuja, and Gerry Simpson (eds), *International Law and the Cold War* (CUP 2019).

[24] Neff (n 6).

[25] Richard Falk, *Law in an Emerging Global Village: A Post-Westphalian Perspective* (Transnational Publishers 1998) 22.

[26] Reisman (n 22) 860.

[27] Craven et al (n 23) 1-2.

[28] ibid 7.

Cold War era has thus been characterised as a period where the "flame that ignited at Nuremberg spluttered and almost went out during the following half-century of inaction."[29]

This historiographical tendency has shaped how the Cold War is engaged with within international law scholarship. Certain scholars have attempted to pushback against this tendency, however. Which has included attempts to re-implicate international law in creating and sustaining the conditions of the Cold War, rather than being absent.[30] To this end, we might look to decolonisation as a major event and process occurring during this period, but which was in many respects managed by international law. And just as the *Cold War* was 'cold' only insofar as war did not break out in Europe,[31] it was a period of the profound intrusion of international law and institutions for many postcolonial states.[32] For newly independent states in particular, the Cold War was a period of intensified intervention as decolonisation got underway.[33] The conventional view of this era has similarly been challenged for the political bifurcation said to have been characteristic of it, which is undermined by the emergence of a distinctive *Third World* vision during this time.[34] Accounts of events such as the Bandung Conference in April 1955 challenge this conventional understanding,[35] which suggests that the Cold War was not only sustained by "two mutually incompatible ideologies" and visions of world order,[36] but also entailed attempts to suppress a *Third World* one.

As we can see, the Cold War era was thus not characterised by the *absence* of international law, but was actually generative of it, which at times acted as a "language and

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[29] Richard Goldstone, 'Historical Evolution - From Nuremberg to the International Criminal Court' (2007) 25(4) Penn State International Law Rev 763. Goldstone's characterisation is particularly interesting given his later work identifies developments that might undermine this account: Richard Goldstone and Adam Smith, *International Judicial Institutions: The Architecture of International Justice at Home and Abroad* (2nd edn, Routledge 2015) 83-105.

[30] ibid.

[31] Radha D'Souza, 'Victor's Law? Colonial Peoples, World War II, and International Law' (2017) 3(1) International Comparative Jurisprudence 67.

[32] On the various ways that international law has shaped the postcolonial state, see: Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 196-244; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011); Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (CUP 2015); and Mohammad Shahabuddin, *Minorities and the Making of Postcolonial States in International Law* (CUP 2021).

[33] See, for example Heonik Kwon, *The Other Cold War* (Columbia University Press 2010); and Odd Arne Westad, *The Global Cold War: Third World Interventions and the Making of Our Times* (CUP 2005). And more recently: Vincent Bevins, *The Jakarta Method* (Public Affairs 2020).

[34] Charlotte Peevers, 'Liberal Internationalism, Radical Transformation and the Making of World Orders' (2018) 29(1) EJIL 303. This *Third World* vision is said to have been based on ideas for a new global order based on economic and political justice: Jochen Von Bernstorff and Philipp Dann, 'Introduction' in Jochen Von Bernstorff and Philipp Dann (eds), *The Battle for International Law: south-North Perspectives on the Decolonisation Era* (OUP 2019) 31

[35] See for example: Vasuki Nesiah, Luis Eslava, Michael Fakhri (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (CUP 2017).

[36] Reisman (n 22).

practice through which the Cold War could be made public and globalised".[37] This was certainly true of decolonisation, with international law providing norms to frame independence struggles.[38] More generally, decolonisation also saw the universalisation of specific economic development models expressed through international law.[39] International law was thus not *absent* and instead proved a pervasive force in managing decolonisation.[40] In this sense, it was not the case that the international legal order was paralysed by the "political struggle between the [two] blocs."[41] Rather, it was animated by it.

Treatments of the Cold War within international law scholarship are also characterised by a distinctly epochal tone, particularly insofar as the end of the Cold War marked the shift into a new age. Important to conveying the *epochal* transition the end of the Cold War marked,[42] is juxtaposing the preceding decades as periods of *absence* or *hiatus*. The year '1989' thus takes on a symbolic quality, marking one of two "high points of legal utopianism" along with '1945'.[43] ICL scholarship adopts a similar narrative strategy, positioning a generic period of absence in juxtaposition with the rapid developments of post-Cold War years.[44]

Characteristic of this was the new possibility of *global* consensus as well as various political transformations in the international order.[45] Several "inaugural gestures" are taken to mark this transition, such as the proclamation of a *New World Order* by President George W. Bush Sr. in 1991 and the publication of the Agenda for Peace in 1992 by UN Secretary-General Boutros Boutros-Ghali.[46] Events such as the establishment of the World Trade Organisation in 1995, the ad hoc tribunals, and the ICC seemed to manifest these changes. In this context, a new image of international lawyers emerged, now appearing as "managerialists shaped by a new world order professionalism".[47] This *professional* and

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[37] Craven et al (n 23).
[38] Westad, for example, argues that in the context of decolonisation, Third World elites often framed their political agendas using development models provided by the rival superpowers: Westad (n 32) 3.
[39] Pahuja (n 32).
[40] On the framing of decolonization struggles in the language of international law, see: Martti Koskenniemi, 'International Law in the World of Ideas' in James Crawford and Martti Koskenniemi (eds), *Cambridge Companion to International Law* (CUP 2012) 56.
[41] Antonio Cassese, *International Criminal Law* (2nd ed, OUP 2008) 324.
[42] Randall Lesaffer, 'The End of the Cold War as an Epochal Event in the History of International Law' (2010) Tilburg Working Paper Series on Jurisprudence and Legal History No. 10-01 <http://dx.doi.org/10.2139/ssrn.1663871> accessed 13 February 2022.
[43] Craven et al (n 23) 1-2.
[44] See for example: Isaacs (n 4) 2-3; Hafetz (n 7) 27; Alette Smeulers and Fred Grünfeld, *International Crimes and Other Gross Human Rights Violations: A Multi and Interdisciplinary Textbook* (Martinus Nijhoff 2011) 17-8; and Antonio Cassese, *International Criminal Law* (OUP 2003) 334.
[45] Neff, *Justice Among Nations* (n 6) 45; and Scott Newton, 'Postwar to New World Order and Post-Socialist Transition: 1989 As Pseudo-Event' in Fleur Johns, Richard Joyce, Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge 2011) 106.
[46] Craven et al (n 23).
[47] Anne Orford, 'Embodying Internationalism: The Making of International Lawyers' (1998) 19 Australian Yearbook of International Law 1. On the interventionist post-Cold War international law, see: Orford,

managerial vision also found expression within the international criminal justice field, particularly as ICL institutions formed part of a new legal technology designed to respond to peace and security crises.[48] These strongly interventionist impulses emerged as a corrective to the perceived absence of international law during the Cold War.[49]

ICL scholarship makes similar references to the possibility of substantive development only once the political conditions of the Cold War had subsided.[50] To this end, a persistent trope within ICL scholarship are references to the 'new world order' that is said to have facilitated this.[51] This transition is also identified through references to globalisation and the movement towards a "more globalised society".[52] For Koskenniemi, the rise of ICL in the 1990s thus represented the *globalisation* of the anti-impunity project.[53] 'Globalisation' is often used to capture a diverse set of trends from human rights and democratic governance to free trade and environmental regulation which has proved to be one of the defining phenomena of the post-Cold War age.[54] Broadly speaking, it captures the increased interconnectivity between peoples, regions, ethnicities, cultures, and commercial interests under a single economic system.[55] In this setting, international law could be used to regulate transnational actors, respond to global threats, and bring about far-reaching changes in societal and political integration.[56] Other understandings have emphasised the hegemonic and homogenising side of this process.[57]

'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10 EJIL 679; and Orford, 'Locating the International: Military and Monetary Interventions After the Cold War' (1997) 38 Harvard International Law Journal 443.

[48] Stahn (n 8) 164-5.

[49] Orford (n 47).

[50] See for example Cassese (n 44) 334; Hafetz (n 7) 27; Werle and Jessberger (n 4) 18.

[51] See, for example: John B Anderson, 'An International Criminal Court—An Emerging Idea' (1991) 15(2) Nova Review 433, 436 & 447; Michael D Greenberg, 'Creating an International Criminal Court' (1992) 10(1) Boston University International Law Journal 119, 126; William N. Gianaris, 'The New World Order and the Need for an International Criminal Court' (1992) 16(1) Fordham International Law Journal 88; M. Cherif Bassiouni and Christopher L. Blakesley, 'The Need for an International Criminal Court in the New International World Order' (1992) 25(2) Vanderbilt Journal of Transnational Law 151; Alfred de Zayas, 'An International Criminal Court' (1992-1993) 61 Nordic J Int'l L 271, 276; and Payam Akhavan, 'Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order' (1993) 15(2) Human Rights Quarterly 262, 289.

[52] Bassiouni and Schabas (n 14) 46.

[53] Martti Koskenniemi, 'Foreword' in Thomas Skouteris and Immi Tallgren, *New Histories of International Criminal Law: Retrials* (OUP 2019) v.

[54] Frédéric Mégret, 'Globalization' in R. Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2009).

[55] Miena Sterio, 'The Evolution of international Law' (2008) 31(2) Boston College of International and Comparative Law Review 213, 213-4. See also: William Twining, *Globalisation & Legal Theory* (CUP 2000) 2.

[56] Stephan Hobe, 'The Era of Globalisation as a Challenge to International Law' (2002) 40(4) Duquense Law Review 655, 656.

[57] Koskenniemi, for example, characterises it as the process of states "universalising their preferences" over others: Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17(2) Cambridge Review of International Affairs 197, 210 & 212.

Within ICL scholarship, globalisation has proved a similarly influential frame through which to view its development.[58] This covers two possible registers. Firstly, certain scholars with an interest in *transnational* and *international* criminal law have looked at how the processes of globalisation have materially contributed to the conditions leading to and the incidence of *international crimes*[59] And secondly, a relationship between the two has been considered insofar as the development of ICL and ICL institutions is considered an expression of globalisation itself, given that it reflected "new spatial and political opportunities for human rights to develop".[60] ICL institutions thus emerged as a way of protecting these "community interests".[61] On this view, the ICC figures as an expression of the "new conception of state" that globalisation set the stage for.[62] Further, given institutions such as the ad hoc tribunals and the ICC work towards *international community* interests,[63] they are viewed as expressions of these globalised impulses.[64] As in international law scholarship, then, references to the *international community* represent the movement towards a new value-based order across international law's various projects.[65]

With these narrative tendencies and strategies in mind, the *historiography of hiatus* appears to reflect a desire to tell a particular kind of story about the development of international.[66] As Kumar has characterised this tendency in another context, it is a

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[58] Cassese, for example, presents the history of the field as progressively advancing towards this international community, with the end of the Cold War as a distinct phase in this process: Antonio Cassese, *International Law* (2nd edn, OUP 2005) 22; and Cassese, 'Soliloquy' in Cassese (ed), *The Human Dimension of International Law: Selected Papers* (OUP 2008) xxiii.

[59] Louise Shelley, 'The Globalization of Crime' in Mangai Natarajan (ed), International Criminal Justice (CUP 2010) 4 & 8; and also Robert Cryer, 'The Future of Global Transnational Criminality and International Criminal Justice' in M. Cherif Bassiouni (ed), *Globalization and its Impact on the Future of Human Rights and International Criminal Justice* (Intersentia 2015).

[60] M. Cherif Bassiouni, 'The Future of Human Rights in the Age of Globalization' (2011) 40(1) Denver Journal of International Law and Policy 22, 36.

[61] Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests are Protected in International Law' (2010) 21(2) EJIL 387.

[62] Rod Jensen, 'Globalization and the International Criminal Court: Accountability and a New Conception of State' in Ige F. Dekker and Wouter G. Werner, *Governance and International Legal Theory* (Martinus Nijhoff 2004) 160-1.

[63] On international criminal courts as defined by their pursuit of international community interests, see: Astrid Kjeldgaard-Pedersen, 'What Defines an International Criminal Court?: A Critical Assessment of "the Involvement of the International Community" as a Deciding Factor' (2015) 28(1) LJIL 113. On the justification of punishment in the interests of the international community, see: Immi Tallgren, 'The Voice of the International: Who is Speaking?' (2015) 13(1) Journal of International Criminal Justice 135. Corrias and Gordon further assert that the very act of international punishment constitutes this *international community*: Luigi D.A. Corrias and Geoffrey M. Gordon, 'Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public' (2015) 13(1) Journal of International Criminal Justice 97.

[64] Mégret (n 54) 6.

[65] Christian J. Tams, 'International Community' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019) 508-9. Soirila makes a similar point regarding references to "humanity" and "mankind": Ukri Soirila, 'Humanity' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019) 361 & 366.

[66] Craven et al (n 23) 7.

"sensibility" we perform in our scholarship.[67] Similarly within ICL scholarship, characterising the years covering the Cold War as a period of disciplinary silence helps to convey a particular type of story about the progressive development of the field. It acts as a narrative trope that supports the 'renaissance' the field is said to have undergone from the early 1990s onward. Our accounts of this period are thus imbued with a sense of inevitability to the extent that once the politics of the Cold War had subsided, international criminal justice institutions such as the ad hoc tribunals *had* to emerge.[68] The result of this narrative tendency, however, is that the Cold War tends to be scarcely scrutinised by ICL scholars. And whilst it might help us to understand the emergence of certain kinds of international institutions from the 1990s onward, it provides little in the way of serious engagement with the development of international criminal law and justice norms for a period of around four decades. Having identified this narrative trope and historiographic tendency, Chapters 7 and 8 will challenge it by arguing that ICL and the broader project of international criminal justice underwent substantive development during this period, with these developments not typically captured or acknowledged within the dominant accounts. Before doing so, in the remainder of this Chapter I will identify a second scholarly tendency that helps to sustain this *historiography of hiatus*: the institutional focus adopted within ICL scholarship.

6.4 The Institutional View: Scale, Perspective, and the Architecture of International Law

As we have seen, institutional developments act as important plot points when the history and development of ICL is recounted. And this is equally true of ICL in its *Renaissance* era when international criminal justice institutions proliferated, as it is of the *hiatus* era when their absense is said to have evidenced the broader stagnation of the field. In this regard, institutional developments appear as the drivers of disciplinary change and progress, with the birth and life of institutions providing the primary plot points in accounts of the field's history. These institutional plot points act as something akin to what Koller has characterised as the "metaphysical geographies" of international law, where locations, chronological markers, and institutional developments are imbued with a symbolic meaning

[67] Vidya Kumar, 'On Scripts and Sensibility: Cold War International Law and Revolutionary Caribbean Subjects' (2020) 21(8) German Law Journal 1541, 1553.
[68] Sluiter, for example, notes that: "After the end of the Cold War, the time was ripe for further and spectacular developments in international criminal law". Göran Sluiter, 'Ad Hoc International criminal Tribunals (Yugoslavia, Rwanda, Sierra Leone)' in William A. Schabas (ed), *Cambridge Companion to International Criminal Law* (CUP 2015) 117.

that conveys the progressive advance of the field.[69] With this in mind, in the following subsections I will identify some possible explanations for this tendency to construct the history of ICL around a specific sequence of institutional development.

One immediate explanation of this preference for an institutional view of the development of the field, is that it is a natural consequence of the scale and perspective we typically adopt within international scholarship. International legal histories tend to approach the past on a grand scale which often covers relatively long expanses of time at a relatively high level of abstraction. This leads us to adopt the "telescope rather than the microscope when investigating historical events and their legal consequences."[70] This tendency might also be characterised as a preference for *macro* rather than *micro*-history. Whilst the former is characterised by a concern for the broad sweeps of historical change, the latter captures a more gradualist view. Furthermore, if our concern as international lawyers is for the acts and relations of states and the legal framework within which such relations take place, this view is perhaps also inevitable. There is thus a tendency to focus on the "origins of legal rules and doctrines, the decisions of courts and other formal tribunals, the views of professors and legal theorists and diplomats, and the evolution of the legal profession."[71] This results in what has been labelled a kind of "foreign office international legal history", which displays a relatively narrow institutional interest.[72]

Even when more critical perspectives are attempted, we tend to replicate this hierarchical and top-down view.[73] This is principally an expression of international lawyers' cosmopolitan and institutional desires.[74] There is also a methodological dimension to this, given that our concern for the history and development of our particular field of concern lies in *making meaning move across time*.[75] It thus seems natural that there would be a tendency to focus on the institutional settings that breathe life into the norms, principles, and doctrines being accounted for. Further, as our analyses tend to start from the perspective of "present concepts and institutions as starting points" and thus sketch a

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[69] David Koller, '…and New York and The Hague and Tokyo and Geneva and Nuremberg and…: The Geographies of International Law' (2012) 23(1) EJIL 97.
[70] Valentina Vadi, 'Perspective and Scale in the Architecture of International Legal History' (2019) 4. A similar characterisation is made in: Edward James Corredera, 'Why International Lawyers Measure Time with a Telescope: Groatian Moments & Richard Falk's Histories of the Future' (2021) 42(2) Grotiana 212.
[71] Jacob Katz Cogan, 'A History of International Law in the Vernacular' (2020) 22(2-3) Journal of the History of International Law 205, 205.
[72] David J. Bederman, 'Foreign Office International Legal History' in Matthew Craven, Malgosia Fitzmaurice, and Maria Vogiatzi (eds), *Time, History and International Law* (Brill 2007).
[73] Cogan (n 71).
[74] Annelise Riles, 'The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law' (1995) 6(1) Law and Critique 39, 40.
[75] Anne Orford, 'International Legal Method' (2013) 1(1) London Review of International Law 166.

"tradition operating as a conversation across generations", this naturally creates a focus on the institutional settings where they are given meaning.[76]

In terms of the influence of this *institutional view* on how we account for the development of international law, de la Rasilla has identified the "international institutional" approach as one of the most influential ways of periodising the field's history.[77] This view captures the three main waves of institutional development in the twentieth century, corresponding with the end of the First World War, the Second World War, and the Cold War.[78] These institutional landmarks provide influential "temporal ordering factors" which provide a break between the phases of international law's development.[79]

6.4.1 The Search for Institutions and the History of International Criminal Law

Beyond the scale and scope of our analyses, another reason for this *institutional* view relates to our disciplinary attachment to them. There is a large degree of disciplinary angst attached to the presence or absence of institutions within international law scholarship, which reflects underlying anxieties about the coherence and effectiveness of international law as a system of law.[80] And if the central problematic of the international legal system is posited as this question of how best to create order amongst equal sovereigns, it seems natural that this embeds a desire for institutions to bring about a "continual transcendence of chaos, a continual movement forward from its origin and differentiation from its own history".[81]

Within ICL scholarship, we can identify similarly strong desires for international institutions. This is particularly acute given that the possibility of enforcement is central to the very idea of international criminal justice and its underlying justifications.[82] This tendency shapes how the development of the field is recounted, with Bassiouni, for example, referring to the development of the "direct enforcement system" as contrasted with the "indirect enforcement system" that went before it.[83] Other accounts have characterised ICL as concerned with those crimes over which "international courts and

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[76] Martti Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View' (2013) 27(2) Temple international & Comparative Law Journal 215, 227.
[77] Igancio de la Rasilla, 'The Problem of Periodisation in the History of International Law' (2019) 37(1) Law and History Review 275, 288.
[78] De La Rassila identifies this approach as present in: David Kennedy, 'The Move to Institutions' (1987) 8(5) Cardozo Law Review 841.
[79] de la Rasilla (n 77) 289.
[80] Richard Collins, *The Institutional Problem in Modern International Law* (Hart 2016) 3.
[81] Kennedy (n 78) 848.
[82] Frédéric Mégret, 'International Criminal Courts and Tribunals: The Anxieties of International Criminal Justice' (2016) 29(1) LJIL 197, 200.
[83] M. Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn, Martinus Nijhoff 2014) 28.

tribunals have been given jurisdiction under general international law", which naturally imbues it with an institutional focus.[84] The ability to actually enforce ICL norms before duly-empowered international tribunals is central to the justification of the field.[85] And without the ability to enforce these norms, they would stand as little more than aspirational statements. For this reason, "[i]nstitutions have played determinative roles in how justice has been defined and dispensed."[86] They have played a crucial role in "framing" the history and development of international criminal justice.[87] And without them, contemporary ICL would be "greatly impoverished, thinner in details, weaker in its scope, and perhaps still in its post-Nuremberg hibernation."[88]

The prospect of enforcement thus embeds a desire for institutions and institution building within the field, which has intensified along with the proliferation of international organisations within the international legal system. This desire has manifested in calls for a PICC stretching back at least as far as Moynier's proposal for an international body empowered to punish violations of the Geneva Convention.[89] And as Bassiouni's comprehensive overview shows, this desire has most often manifested in various scholarly projects and proposals over the years.[90] The efforts of academic and professional bodies have proved particularly important when the political desire for such institutions was low.[91]

Long before the IMT had rendered judgment, international law scholars viewed such institutions as essential to the establishment and functioning of an international criminal jurisdiction.[92] Indeed, writing in the late 1930s, Hudson noted that during the 1920s the call for a PICC was a "spell" that was "exercised on many minds."[93] These desires intensified during the Second World War as institutions and an international criminal jurisdiction were

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[84] Cryer et al (n 4) 4.
[85] Indeed, as the judgment of the Nuremberg IMT stated: "…individuals have international duties which transcend the national obligations of obedience imposed by the individual state." See: *International Military Tribunal (Nuremberg), Judgment and Sentences* (1947) 41(1) AJIL 172, 221.
[86] Goldstone and Smith (n 29) 46.
[87] Stahn (n 8) 159.
[88] Robinson and MacNeil (n 17) 209.
[89] Hall characterises it as the first serious proposal for a PICC. For an overview see: C.K. Hall, 'The First Proposal for a Permanent International Criminal Court' (1998) 38(322) International Review of the Red Cross 57.
[90] Cherif M. Bassiouni, 'Chronology of Efforts to Establish an International Criminal Court' (2015) 86(3-4) Revue Internationale de Droit Pénal 1163.
[91] At various points this has included calls for a PICC by the Committee of Jurists of the League of Nations, the International Association of Penal Law, and the International Law Association, amongst others. See: Stahn (n 8) 160-161. Lewis also notes how the development of international criminal justice was, before and during the Nuremberg era, driven by the efforts of scholars and jurists: Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950* (OUP 2014).
[92] See for example: J.L. Brierly, 'Do We Need an International Criminal Court?' (1927) 8 British Yearbook of International Law 81; M.A. Caloyanni, 'An International Criminal Court' (1928) 14 Transactions of the Grotius Society 69; and E. Stanislaus Rappaport, 'The Problem of the Inter-State Criminal Law' (1932) 18 Transactions of the Grotius Society 41.
[93] Manley O. Hudson, 'The Proposed International Criminal Court' (1938) 32(3) AJIL 549, 551.

looked to as tools for protecting world peace.[94] Following Nuremberg, these desires intensified—something reflected in the scholarship produced at the time.[95] This desire is also present in the work of Special Rapporteur Ricardo J. Alfaro, who viewed a properly empowered international institution as necessary to give effect to an international criminal jurisdiction.[96] These calls for a PICC continued in the decades following Nuremberg,[97] becoming particularly acute from the 1990s onward when a PICC was viewed as indispensable to the enforcement of ICL, maintaining international peace and security, achieving international justice, and securing a *new world order*.[98] Calls for a PICC were also amplified in the context of settling the terms of a draft code of international crimes, which required a properly empowered international body to enforce it.[99]

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[94] Georg Weis, 'International Criminal Justice in Time of Peace' (1942) 28 Transactions of the Grotius Society 27, 50-3.

[95] See for example: T.B. Murray, 'The Present Position of International Criminal Justice' (1950) 36 Transactions of the Grotius Society 191, 191 & 207; Vepasian V. Pella, 'Towards an International Criminal Court' (1950) 44(1) AJIL 37, 66 & 68; John J Parker, 'An International Criminal Court: The Case for Its Adoption' (1952) 38(8) ABA Journal 641; and W.E. Benton, 'Some Early Developments of an International Criminal Jurisdiction' (1954) 8(1) Southwestern Law Journal 65. Other scholars, whilst more sceptical of the current state of the ICL and the international criminal jurisdiction, viewed the project as largely unworkable without any such institutional or sovereign authority: Georg Schwarzenberger, 'The Problem of an International Criminal Law' (1950) 3(1) Current Legal Problems 263; George A. Finch, 'An International Criminal Court: The Case Against Its Adoption' (1952) 38(8) ABA Journal 644; George A. Finch, 'Draft Statute for an International Criminal Court' (1952) 46(1) AJIL 89; and Quincy Wright, 'Proposal for an International Criminal Court' (1952) 46(1) AJIL 60.

[96] See: Special Rapporteur Ricardo Alfaro, 'Report on the Question of International Criminal Jurisdiction' (1950) A/CN.4/15 and Corr.1, 2.

[97] See for example: John W. Bridge, 'The case for an International Court of Criminal Justice and the Formulation of International Criminal Law' (1964) 13(4) The International and Comparative Law Quarterly 125, 128; Benjamin Ferencz, *An international Criminal Court: A Step Toward World Peace—A Documentary History and Analysis, Vol I: Half a Century of Hope* (Oceana Publications 1980); M. Cherif Bassiouni and Daniel H. Derby, 'Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments' (1981) 9(2) Hofstra Law Review 523; and L.C. Green, 'Is there an International Criminal Law?' (1983) 21(2) Alberta Law Review 251.

[98] See for example: Bernhard Graefrath, 'Universal Criminal Jurisdiction and an International Criminal Court' (1990) 1(1) EJIL 67; M. Cherif Bassiouni, 'The Time Has Come for an International Criminal Court' (1991) 1(1) Indiana International & Comparative Law Review 1; Bassiouni and Blakesley (n 51); Gianaris (n 51); Joel Cavicchia, 'The Prospects for an International Criminal Court in the 1990s' (1992) 10(2) Dickinson J Int'l L 223; Zayas (n 51); Caroline Krass, 'Bringing the Perpetrators of Rape in the Balkans to Justice: Time for an International Criminal Court' (1994) 22(2-3) Denver Journal of International Law & Policy 317; Matthew Lippman, 'Towards an International Criminal Court' (1995) 3(1) San Diego Justice Journal 1. For a more critical view of the potential of an ICC, see for example Derby arguing against blindly replication the Nuremberg model and Warbrick calling for it to be integrated more squarely within the UN system: Daniel H. Derby, 'An International Criminal Court for the Future' (1995) 5(1) Transnational Law & Contemporary Problems 307; and Colin Warbrick, 'The United Nations System: A Place for Criminal Courts' (1995) 5(2) Transnational Law & Contemporary Problems 237.

[99] The work of Bassiouni was particularly important, in this regard: M. Cherif Bassiouni, *International Criminal Law: A Draft International Criminal Code* (Sijthoff & Noordhoff Publishers 1980); Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Brill, 1987); and Bassiouni, 'The History of the Draft Code of Crimes Against the Peace and Security of Mankind' (1993) 27(1-2) Israel Law Review 1. See also Leslie C. Green, 'An International Criminal Code—Now?' (1976) 3 Dalhousie Law Journal 560; Green, 'New Trends in International Criminal Law' (1981) 11 Israel Yearbook of International Law 9; and Green (n 97); Robert Friedlander, 'The Foundations of International Criminal Law: A Present-Day Inquiry' (1983) 15(1) Case Western Reserve Journal of International Law 13; Friedlander, 'The Enforcement of International Criminal Law: Fact or Fiction' (1985) 17(1) Case Western Reserve Journal of International Law 79; and Yoram Dinstein, 'International Criminal Law' (1985) 20(2-3) Israel Law Review 206.

Institutions also form part of the justifications for ICL itself, particularly insofar as they can override the "state's absolute sovereignty and dominance in the conduct of world politics",[100] act as an alternative to the politics of international intervention in conflicts,[101] can operate impartiality,[102] and will possess a deterrent effect.[103] To this end, they are viewed as an antidote to the politics of impunity that prevailed during the Cold War.[104] In this regard, it was not necessarily the case that ICL institutions could bypass politics, but that they could "transform the world's political imagination to de-sanctify violence committed in the name of state or group".[105] Institutions such as the ICC have thus become an essential part of the project to "reimagine international politics with reference to ideals of 'humanity'" by incorporating criminal law systems within international relations.[106] In so doing, the ICC embodied both a particular *kind* of politics for the international order,[107] as well as the possibility that the politics of justice would no longer give way to the politics of impunity.[108] In light of these expectations for new forms of politics in the international order, it is perhaps little wonder the re-emergence of ICL institutions in the 1990s was viewed—as noted above—as evidence of a *new world order*. And in the years following the end of the Cold War, this phrase was frequently invoked within ICL discourses as a way of framing

[100] Cenap Çakmak, 'The International Criminal Court in World Politics' (2006) 23(1) International Journal on World Peace 3, 12.
[101] Kenneth Anderson, 'The Rise of International Criminal Law: Intended and Unintended Consequences' (2009) 20(2) EJIL 331, 333-7.
[102] Richard Goldstone and Gary Bass, 'Lessons from the International Criminal Tribunals' in Sarah Sewell and Carl Kaysen (eds), *The United States and the International Criminal Court: National Security and International Law* (Rowman & Littlefield 2000) 52.
[103] C. W. Mullins and D. L. Rothe, 'The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment' (2010) 10(5) International Criminal Law Review 771, 771-2; and M.C. Bassiouni, 'Justice and Peace: The Importance of Choosing Accountability Over Realpolitik' (2003) 35(2) Case Western Reserve Journal of International Law 191.
[104] On the institutionalisation of post-conflict politics and justice, see: Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2002). For more critical engagements with this theme, see Mégret for an overview of some of the main works: Frédéric Mégret, 'The Politics of International Criminal Justice' (2002) 13(5) EJIL 1261. Also see Krever for a critique of this as an "ideology" of ICL discourse: Tor Krever, 'International Criminal Law: An Ideology Critique' (2013) 26(3) LJIL 701.
[105] David Luban, 'After the Honeymoon: Reflections on the Current State of International Criminal Justice' (2013) 11(3) Journal of International Criminal Justice 505.
[106] Dylan Bushnell, 'Re-thinking International Criminal Law: Re-connecting Theory with Practice in the Search for Justice and Peace' (2009) 28(1) Australian Yearbook of International Law 57, 58.
[107] Although Ballin has, more recently, questioned whether this international political climate is now beginning to change: Ernst Hirsch Ballin, 'The Value of International Criminal Justice: How Much International Criminal Justice Can the World Afford' (2019) 19(2) International Criminal Law Review 201.
[108] For example Bassiouni (n 14) 121; Bassiouni, 'From Versailles to Rwanda: The Need to Establish a Permanent International Criminal Court' (1997) 10 Harvard Human Rights Journal 1.

the emergence of these institutions.[109] The passage of the Rome Statute was similarly celebrated as a moment of *constitutional* significance for the international legal order.[110]

Given these longstanding desires, the arrival of the ICC is often presented with an air of inevitability. Bassiouni and Schabas, for example, described the signing of the Rome Statute as a "slow" and "painstaking" goal that was "finally" achieved.[111] Werle and Jessberger characterise it as the "crystallisation" and "final milestone" in the development of ICL itself,[112] whilst Kreß describes the establishment of the ICC as the culmination of *history* itself.[113] And with a similar sense of inevitability, Sikkink positions the ICC as the culmination of a "justice cascade" that had long been underway.[114]

This sense of institutional inevitability is also present in how past disciplinary developments are related to the present day. These events and locations form part of a "metaphysical geography" which embed and convey both a sense of origin, as well as movement forward towards an identified end.[115] This is often expressed within ICL scholarship as some variation of the 'Road to Rome' or 'From Nuremberg to The Hague', with these institutional locations used to anchor and convey a sense of the progressive development of the field.[116] In addition to carrying the movement of disciplinary time more generally and signalling future directions for the field,[117] it might also be employed to anchor a story about the emergence of an international community, the development of the project of international criminal justice, or to establish the legitimacy of a new legal order emerging

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[109] See the works referenced in (n 51) above. Also see: Michael Scharf, *Balkan Justice: The Story Behind the First War Crimes Trial Since Nuremberg* (Carolina Academic Press 1997) 228; and Antonio Cassese, 'On the Current Trend towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law ' (1998) 9 EJIL 2, 8.
[110] Leila Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Transnational Publishers 2003) 103.
[111] Bassiouni and Schabas (n 14) 49
[112] Werle and Jessberger (n 4) 2 & 17.
[113] Claus Kreß, 'The International Criminal Court as a Turning Point in the History of International Criminal Justice' in Antonio Cassese (ed), The Oxford Companion to International Criminal Justice (OUP 2009) 143.
[114] Kathryn Sikkink, *Justice Cascade: How Human Rights Prosecutions are Changing the World* (Norton & Co 2011) 115.
[115] Koller (n 69).
[116] See: Mohamed Elewa Badar, 'From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity' (2004) 5(1) San Diego International Law Journal 73; Pascal Chenivesse & Christopher J Piranio, 'What Price Justice? On the Evolving Notion of 'Right to Fair Trial' from Nuremberg to The Hague' (2011) 24(3) Cambridge Review of International Affairs 403; Brian Dube, 'Understanding the Content of Crimes Against Humanity: Tracing Its Historical Evolution from the Nuremberg Charter to the Rome Statute' (2015) 9(5) African Journal of Political Science and International Relations 181; Hilaire McCoubrey, 'From Nuremberg to Rome: Restoring the Defence of Superior Orders' (2001) 50(2) International and Comparative Law Quarterly 386; Theodor Meron, 'International Humanitarian Law from Agincourt to Rome' (2000) 75 US Naval War College International Law Studies Series 321; Kinglsey Chiedu Moghalu, 'International Humanitarian Law from Nuremberg to Rome: The Weighty Precedents of the International Criminal Tribunal for Rwanda' (2002) 14(2) Pace International Law Review 273; and Phillip L. Weiner, 'Fitness Hearings in War Crimes Cases: From Nuremberg to The Hague' (2007) 30(1) Boston College International and Comparative Law Review 185.
[117] Philippe Sands (ed), *From Nuremberg to The Hague: The Future of International Criminal Justice* (CUP 2003).

post-Nuremberg.[118] ICL scholars have also employed it to call for particular forms of action.[119] This trope has often been deployed when writing about the ad hoc tribunals, with Nuremberg positioned beside them to express a sense of perceived continuity.[120] It is typically employed at a high level of abstraction to convey a sense of the progression of the field's history.[121]

Positioning these events in relation to each other in this manner helps to create a sense of continuity and coherence between the institutional developments that have punctuated the history of ICL.[122] So, for example, we tend to view the ICC as the expression of the same cosmopolitan energies that manifested in an identified historical antecedent—be it Nuremberg, Tokyo, or the ad hoc tribunals. And by employing this narrative trope, we imbue our scholarship with a progressive edge and a sense of inevitability. Nielsen, for example, uses a critical version of this to outline the *civilising mission* this sequence of institutional developments carried forward.[123]

The result of these desires for international institutions—as a product of our desires for international criminal justice and appropriate mechanisms of enforcement—is that it embeds a tendency to make sense of the development of ICL itself through international institutions. Consequently, the dominant historiographical tendency when recounting the development of ICL, it to make sense of the emergence and development of international criminal justice through these institutional waymarks. As I will argue in Chapters 7 and 8 that follow, however, this impoverishes our understanding as it leads us to overlook the

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[118] Benjamin Ferencz, 'The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century' (2000) 18(1) Security and Peace 25; Dieter Kastrup, 'From Nuremberg to Rome and Beyond: The Fight against Genocide, War Crimes, and Crimes against Humanity' (1999) 23(2) Fordham International Law Journal 404; D.D.N. Nsereko, 'Bringing Aggressors to Justice: From Nuremberg to Rome' (2005) 2(12) Botswana Law Journal 5; Christoph Rudolph, 'Power and Principle from Nuremberg to The Hague' in Christoph Rudolph (ed), *The Politics of International Criminal Courts* (Cornell University Press 2017) 15-16.
[119] See for example: Henry T. King and Theodore Theofrastous, 'From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy' (1999) 31(1) Case Western Reserve Journal of International Law 47; and Peggy Rancillo, 'From Nuremberg to Rome: Establishing an International Criminal Court and the Need for U.S. Participation' (2001) 78(2) University of Detroit Mercy Law Review 299.
[120] Bassiouni (n 108); Manfred Dauster, 'From Nuremberg to the Hague and beyond: International criminal law in courts: Court of Bosnia And Herzegovina as an example' (2019) 3(2) Bratislava Law Review 76; and Michele Caianiello and Giulio Illuminati, 'From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court' (2001) 26 North Carolina Journal of International Law and Commercial Regulation 407.
[121] Benjamin Ferencz, 'A Prosecutor's Personal Account: From Nuremberg to Rome' (1999) 52(2) Journal of International Affairs 455; Goldstone (n 29); Claus Kreß, 'Versailles – Nuremberg – The Hague: Germany and International Criminal Law' (2006) 40(1) International Lawyer 15; David Matas, 'From Nuremberg to Rome: Tracing the Legacy of the Nuremberg Trials' (2006-2007) 10 Gonzaga Journal of International Law 17; and Meron (n 20).
[122] See, for example, Bosco referring to the "Road to Rome" in the context of the emergence of the ICC: Bosco (n 18) 38. Also see Meron labelling the history of ICL as "From Nuremberg to The Hague": Theodor Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals' (2006) 100(3) AJIL 551, 559.
[123] Claire Nielsen, 'From Nuremberg to The Hague: The Civilizing Mission of International Criminal Law' (2008) 14(4) Auckland U L Rev 81. Zolo provides another more 'critical' example of this: Danilo Zolo, *Victor's Justice: From Nuremberg to Baghdad* (M.W. Weir tr, Verso 2020).

political, ideological, cultural, or other factors at play in creating the conditions in which these institutions have emerged.

6.5 Conclusion

In the preceding sections of this chapter I identified two important scholarly tendencies which shape how the development of ICL during the Cold War years and their immediate aftermath are recounted. Firstly, ICL scholarship has largely absorbed the *historiography of hiatus* present within international law scholarship. A second tendency is the institutional view these accounts adopt, which focuses attention on ICL institutions to convey a sense of the field's development.

There are a number of consequences to telling the history of ICL in this manner. Firstly, and as we have seen, the *historiography of hiatus* and the institutional view have monopolised how we tell and frame the history of the field. Secondly, as this history has involved a move from *less* to *more* institutions, it gives these accounts a progressive edge—particularly given the longstanding disciplinary desires for a PICC. And thirdly, given that we thus view institutions as the drivers of disciplinary development, we find ourselves distanced from the ideas, concepts, and normative and political desires that might have preceded or underlined these institutional developments. Our focus is thus on the birth of such institutions as decontextualised historical events, rather than as the product of ideas and political conditions that made up the historical context from which they emerged.

There is, in this regard, a marked contrast between how ICL scholars have presented the emergence of the ICC and how it has been treated by scholars working in other fields. So for example, international politics, international relations, and criminology scholars have identified the ICC as the product of an evolving global civil society,[124] an expression of a new form of cosmopolitanism,[125] or as part of a global governance project mounted both by states and civil society actors.[126] From these disciplinary perspectives, the ICC is viewed

[124] Marlies Glasius, *The International Criminal Court: A Global Civil Society Movement* (Routledge 2006).
[125] Jennifer Biedendorf, *Cosmopolitanism and the Development of the International Criminal Court: Non-Governmental Organizations' Advocacy and Transnational Human Rights* (Rowman & Littlefield 2019).
[126] See for example: Eric K. Leonard, *The Onset of Global Governance: International Relations Theory and the International Criminal Court* (Routledge 2005); Dawn Rothe and Christopher Mullins, *Symbolic Gestures and the Generation of Global Social Control: The International Criminal Court* (Lexington Books 2006); Steven C. Roach (ed), *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (OUP 2009); and Michael Struett, *The Politics of Constructing the International Criminal Courts: NGOs, Discourse, and Agency* (Palgrave 2008).

as a product of political, cultural, and normative "streams" forming into a "river of justice",[127] rather than simply as an institutional development the field of ICL had long been waiting for.[128] This contrasts with ICL scholarship, where the tendency is to focus on the institutional and diplomatic occurrences that made the ad hoc tribunals or the ICC possible,[129] rather than any cultural or political conditions they emerged from.

As a corrective to this, future historiographic efforts by ICL scholars might work towards an intellectual or social history approach to the development of ICL to give us a better sense of these conditions. ICL scholarship has suffered from a dearth of this kind of work, although the recent collection by Mégret and Tallgren perhaps provides an initial corrective.[130] This would help to reduce our disciplinary reliance on institutions to tell the story of ICL, in which the messiness of the past is rendered into a smooth narrative of progressive institutional success.[131] It is towards uncovering some of this 'messiness' that my attention will turn in the following chapters.

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[127] This is the explanation and metaphor used by the international relations scholar Schiff. See: Benjamin Schiff, *Building the International Criminal Court* (CUP 2008) ch 1.

[128] Although it should be noted that these alternative disciplinary perspectives do not in any way prefigure or predetermine such explanations. International relations scholar Bosco, for example, provides a relatively scant explanation beyond noting various institutional precursors and diplomatic developments leading to the ICC: Bosco (n 18) ch 2.

[129] See for example: Bassiouni and Schabas (n 14) para 2.1-2.6.

[130] Frédéric Mégret and Immi Tallgren (eds), *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents* (CUP 2020). As do the collections put together under the editorial guidance of Bergsmo and Buis. See: Morten Bergsmo and Emiliano J. Buis (editors), *Philosophical Foundations of International Criminal Law: Correlating Thinkers* (TOEAP 2018).

[131] On how a focus on singular "events" smooths out the messiness of the past, see: Sundhya Pahuja, 'Decolonisation and the Eventness of International Law' in Fleur Johns, Richard Joyce, Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge 2011)

Chapter 7: Reappraising the Historiography of Hiatus

7.1 Introduction

In the preceding Chapter, I identified two narrative premises that anchor the *accepted account* of the development of international criminal law (ICL) between the early 1950s and the emergence of the ICC in 1998. Firstly, it is broadly understood that the Cold War years marked a period of disciplinary *silence* due to the absence of substantive doctrinal and institutional developments. This was termed the *historiography of hiatus*. Secondly, and relatedly, from the early 1990s onward the field underwent a period of *rebirth and renaissance*. This was brought about as the establishment of the ad hoc tribunals revitalised the institutional form of the Nuremberg paradigm and breathed life into the field of international criminal justice once again. These narratives of *hiatus* and *renaissance* are dyadic insofar as the period of *renaissance* was only possible because it had been preceded by this long period of *hiatus*. This also gives our account of ICL across these decades an extemporal quality, with the preceding period of *silence* heightening the sense of its sudden revitalisation.

With this in mind, in the present Chapter I will push back against this standard account. To do so I will argue, firstly, that there were developments occurring during this period of *hiatus* that have shaped the contemporary practice of international criminal justice. I will thus argue that the Cold War can be thought of as generative, rather than stagnant, in terms of its contribution to the development of ICL. And secondly, pushing back against the *renaissance* account, I will argue that not only do we tend to over-emphasise the contribution of the ad hoc tribunals in revitalising the field of international criminal justice in the 1990s. Additionally, we also tend to over-rely on specific plot points to chart the progression towards the International Criminal Court (ICC)—in particular, the proposal by Trinidad and Tobago in 1989 which is said to have reintroduced the idea for a permanent international criminal court.

With these in mind, the argument forwarded in this chapter is that the building momentum towards the establishment of the ICC was a product of various factors and changing political conditions at the time, which tend to be overlooked in favour of an account which emphasises a more narrow range of institutional developments. With that said, I will focus on three specific areas that illustrate this. Firstly, the domestic development of ICL

and international criminal justice norms. Secondly, specific doctrinal developments in the core ICL crimes. And thirdly, a broader punitive turn that was occurring within human rights and international law.

7.2 International Criminal Law in the Cold War: Hibernation or Misplaced Gaze?

In contrast to the dominant accounts which point to the lack of institutional or doctrinal developments as evidence of the hibernation of ICL during the Cold War, in the present section, I will identify developments occurring in the domestic, rather than international, context. By shifting our gaze from the *international* to the *domestic*, we can identify areas in which the international criminal justice project underwent development. To this end, I will argue that certain highly publicised historic prosecutions for international crimes committed during the Second World War (WW2) and the gradual spread of domestic atrocity laws evidence the diffusion of the international criminal justice norms emerging from the trial and judgment of Nuremberg.

7.2.1 International Criminal Law in the Cold War: The Trial of Eichmann

The trial of high ranking Nazi official Adolf Eichmann was one of the most widely publicised criminal trials in the twentieth century.[1] And although held before a domestic court, it powerfully evoked both the moral and legal precedent of Nuremberg, as well as generating some of the early theoretical musings on the nature of international criminal justice.[2] Despite this, it has received relatively scant attention as a doctrinal precedent and tends to be considered on its own idiosyncratic terms.[3] Nevertheless, it was significant as the first

[1] Indeed, Felman describes it as the "trial of the century": Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (HUP 2002).
[2] Hannah Arendt, *Eichmann in Jerusalem: The Banality of Evil* (Viking Press 1963). The dialogue between Shklar and Arendt has influenced thinking about the didactic and political value of ICL trials: Judith Shklar, *Legalism: Law, Morals, and Political Trials* (HUP 1964); and Samantha Ashenden and Andrew Hess, 'Totalitarianism and Justice: Hannah Arendt's and Judith Shklar's Political Reflections in Historical and Theoretical Perspective' (2016) 45(3-4) Economy and Society 505. On the contemporary influence of Shklar see: Samuel Moyn, 'Judith Shklar Versus the International Criminal Court' (2013) 4(3) Humanity 473; and Moyn, 'Judith Shklar on the Philosophy of International Criminal Law' (2014) 14(4-5) International Criminal Law Review 717. On the influence of Arendt see: David Luban, 'Hannah Arendt as a Theorist of International Criminal Law' (2011) 11(3) International Criminal Law Review 621; and Peg Birmingham, 'Hannah Arendt's Philosophy of Law Approach to International Criminal Law' (2014) 14(4-5) International Criminal Law Review 695.
[3] William Schabas, 'The Contribution of the Eichmann Trial to International Law' (2013) 26(3) LJIL 668.

judicial application of the Genocide Convention,[4] for advancing the jurisprudence on crimes against humanity as the first prosecution for this crime outside a wartime context,[5] and for developing the practice of universal jurisdiction for international crimes.[6]

Beyond any doctrinal contribution, the trial was also important as a historical event building on the paradigm of international criminal justice emerging from Nuremberg. The Eichmann trial had better provided for victim participation and in this regard marked a shift towards the "witness driven" atrocity trial.[7] This itself perhaps explains why the trial assumed such an important role in shaping post-War Holocaust memory and Israeli national identity.[8] The Eichmann trial also further popularised the term 'Holocaust',[9] where it acquired a "universal significance" that extended beyond this specific political context.[10] By centring the crimes against Jewish people specifically and including victims more directly, it contributed to the emergence of the Holocaust as a "moral paradigm".[11]

It seems, then, the Eichmann trial possesses disciplinary significance that extends beyond its immediate doctrinal utility. And although it was a *domestic* trial rather than an *international* one, it nevertheless represented an important expression of the *ius puniendi* of the international community in respect of the core ICL crimes—perhaps even more acutely so given that it involved the assertion of universal jurisdiction for historic atrocities.[12]

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[4] Although note that Eichmann was charged with "crimes against the Jewish people" under the relevant Israeli law that had given effect to the Genocide Convention. See ibid 672-676.
[5] ibid 676.
[6] Gary Bass, 'The Adolf Eichmann Case: Universal and National Jurisdiction' in S. Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious crimes Under International Law* (University of Pennsylvania Press 2004); and Leora Bilsky, 'The Eichmann Trial and the Legacy of Jurisdiction' in Seyla Benhabib, Roy Tsao, and Peter Verovšek (eds), *Politics in Dark Times: Encounters with Hannah Arendt* (CUP 2010).
[7] Stephan Landsman, 'The Eichmann Case and the Invention of the Witness-Driven Atrocity Trial' (2012) 51(1) Columbia Journal of Transnational Law 69; and Leora Bilsky, 'The Eichmann Trial: Towards a Jurisprudence of Eyewitness Testimony of Atrocities' (2014) 12(1) Journal of International Criminal Justice 27
[8] Tom Segev, *The Seventh Million: The Israelis and the Holocaust* (Picador 2000) 11. On this dynamic more generally, see: Ylana N. Miller, 'Creating Unity Through History: The Eichmann Trial as Transition' (2002) 1(2) Journal of Modern Jewish Studies 131. Alhough Lipstadt cautions that the Holocaust was not quite as absent from Israeli life as Segev suggests, she nevertheless argues the trial "enhanced Israel's conviction that the nation had a legitimate right to represent world Jewish interests." See: Deborah Lipstadt, *The Eichmann Trial (*Schocken Books 2011) 247 & 252.
[9] Lipstadt ibid 245. See also: Jon Petrie, 'The Secular Word HOLOCAUST: Scholarly Myths, History, and 20th Century Meanings' (2000) 2(1) Journal of Genocide Research 31.
[10] Devin O. Pendas, 'The Eichmann Trial in Law and Memory' in Jens Meierhenrich & Devin O. Pendas (eds), *Political Trials in Theory and History* (CUP 2016) 207. Also see Douglas on the didactic dimensions of the trial and its contribution to a cosmopolitan Holocaust memory: Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press 2001) ch 6.
[11] David Cesarani, 'Introduction' in David Cesarani (ed), *After Eichmann: Collective Memory and Holocaust Since 1961* (Taylor and Francis 2005) 1 & 12. See also Pendas (n 10) 227.
[12] On universal jurisdiction as an expression of the *ius puniendi* of the international community, see: Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Brill 2019) 32-35; and Frédéric Mégret, 'The International Criminal Court: Between International Ius Puniendi and State Delegation' in (2020) 23(1) Max Planck Yearbook of United Nations Law Online 161. On the *ius puniendi* more specifically, see: Kai Ambos, *Treatise on International Criminal Law, Volume 1: Foundations and General Part* (OUP 2013) 57-60. On the theoretical underpinning of universal

The Eichmann trial thus represented a "catalyst for ushering in an age of global justice",[13] which continues to be relevant for the contemporary practice of international criminal justice.[14] As a moment that was both highly publicised when it occurred and which has continued to live on in the disciplinary memory of ICL,[15] this speaks to how the international criminal justice norms emerging from Nuremberg diffused in a period when they are said to have remained without resonance.

7.2.2 International Criminal Law Before the French Courts: Post-War Reckoning and the Touvier and Barbie Trials

Other trials occurring during this period of 'hiatus' similarly speak to the resonance the Nuremberg paradigm struck. This was particularly true in post-War France, where in addition to the thousands of trials undertaken in the immediate aftermath of the War,[16] the high-profile trials of certain Vichy officials captured national and international attention. These arose under *Law number 64-1326* of 26 December 1964,[17] which removed statutory limitations regarding crimes against humanity. As many of the previous prosecutions had been for war crimes, this allowed the French Courts to develop the meaning of *crimes against humanity*,[18] with the Paul Touvier episode in the early 1970s providing such an

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jurisdiction, see: M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42(1) Virginia Journal of International Law 81, 96-104.

[13] Matthew Lippman, 'Genocide: The Trial of Adolf Eichmann and the Quest for Global Justice' (2002) 8(1) Buffalo Human Rights Law Review 45, 121.

[14] Particularly in light of the recent resurgence and successes of universal jurisdiction cases, see for example: Christopher F. Schuetze, 'Syrian Doctor Indicted in Germany for Crimes Against Humanity' (*The New York Times*, 28 July 2021) <https://www.nytimes.com/2021/07/28/world/europe/syria-doctor-indicted-germany.html> accessed 29 July 2021; and Roger Lu Phillips, 'A Drop in the Ocean: A Preliminary Assessment of the Koblenz Trial on Syrian Torture' (*Just Security*, 22 April 2021) <https://www.justsecurity.org/75849/a-drop-in-the-ocean-a-preliminary-assessment-of-the-koblenz-trial-on-syrian-torture/> accessed 29 July 2021.

[15] According to Gould, there were 750 international journalists in Jerusalem covering the trial: Allan Gould, 'The Eichmann Effect' (*The National Post*, 1 June 2012) <https://nationalpost.com/opinion/allan-gould-the-eichmann-effect> accessed 2 February 2022. Writing shortly after the trial, Crespi similarly described the it as one of the major news events of 1961 whilst also referring to a poll conducted by Gallup at the time which found that 87% of adult Americans had heard or read about the trial, with 3/4 of these "very or fairly" interested in it. See: Irving Crespi, 'Public Reaction to the Eichmann Trial' (1964) 28(1) The Public Opinion Quarterly 91.

[16] In contrast to the subsequent Nuremberg Trials held under the Control Council Law No.10, the *Épuration Légale* ('legal purge') trials were held under French domestic law rather than military law. This was, of course, in addition to the thousands of instances of *rough justice* enacted by members of the public in what was known as the *Èpuration Sauvage* or 'wild purge'. Thousands of individual cases were investigated to bring to justice those who had collaborated with the Nazi regime within the Vichy government. Of these, many were progressed through the French courts and received *in asbentia* judgments for treason and other offences. For a broad overview, see: Yves Beigbeder, *Judging War Crimes and Torture: French Justice and International Criminal Tribunals and Commissions (1940-2005)* (Brill 2006) ch 7.

[17] Joseph Powderly, 'The Trials of Eichmann, Barbie and Finta' in William Schabas and Nadia Bernaz (eds), *The Routledge Handbook of International Criminal Law* (Routledge 2011) 39.

[18] Although other trials had concerned war crimes and other aspects of the Nuremberg principles, the Touvier case in 1975 was the first concerning crimes against humanity: L.S. Wexler, 'The Interpretation of the

opportunity.[19] As the Touvier affair stalled before the courts, the Klaus Barbie case garnered the attention of the world media. It was particularly notable as the first conviction of a Nazi official in France for crimes against humanity,[20] which also enriched both domestic and international understandings of this crime,[21] particularly as regards the applicability of universal jurisdiction.[22]

Much like Eichmann, however, the significance of the Barbie trial extended beyond any immediate doctrinal contribution. This became apparent as the trial got underway and it started to generate significant domestic and international media attention. Emblematic of this, Marcel Ophuls' reportage of the trial noted that the Mayor of Lyons—where the trial was held—had left promotional material in the hotel rooms of press members attending the trial extolling all Lyons had to offer.[23] And with some eight-hundred journalists present, interest in the trial stretched far beyond France.[24] To this end, it was considered not just the most controversial trial in France since the *Dreyfus Affair,* but also "one of the three Great War crimes trials in the West" along with Nuremberg and Eichmann.[25]

Barbie had secured the services of Jacques Vergès, who used this attention as part of his defence strategy. This was possible thanks to the financial support of François Genoud, a sympathiser and benefactor to the Nazi diaspora. Vergès—who had come to prominence defending National Liberation Front (FLN) militants during the Algerian War of Independence—adopted what he had earlier termed a *defence of rupture*, which involved trying to reframe the context of the trial.[26] This saw Vergès positing a moral equivalence between the atrocities committed by French colonial forces and those by Barbie. This was bolstered by the fact that Charles de Gaulle had earlier granted amnesties to French officers for the same acts Barbie now stood trial for.[27] Vergès used this to disrupt the moral

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Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again' (1995) 32 Columbia Journal of Transnational Law 289, 317-8.

[19] Although given that the Touvier case was stalled before the French courts for several years, the opportunity did not properly arise until the 1990s. For an overview, see: L.S. Wexler, 'Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France' (1995) 20 Law and Social Inquiry 191.

[20] The French Court of Cassation was the first Supreme Court anywhere in the world to define it: Antoine Reinhard, 'Barbie' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 598.

[21] ibid 600.

[22] Powderly (n 17) 43.

[23] Marcel Ophuls, 'Letter from Lyons: Klaus Barbie's Circus of Evil' (*The Nation*, 27 June 1987) 884-5. Ophuls would later go on to direct a well-known documentary on the trial*:* Marcel Ophuls (dir), *Hotel Terminus: The Life and Times of Klaus Barbie* (Memory Pictures 1988).

[24] Noting the presence of eight-hundred journalists: Guyora Binder, 'Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie' (1989) 98(7) Yale Law Journal 1321, 1322.

[25] *The New York Times*, quoted in Binder ibid 1322.

[26] As referenced in: Jacques Vergés, *De la Stratégie Judiciaire* (Minuit 1981).

[27] William B. Cohen, 'The Algerian War, the French State and Official Memory' (2002) 28(2) Historical Reflections 219, 222-5.

legitimacy of the trial. According to a later interview, the intention was to *humanise* Barbie.[28] Vergès thus called on witnesses to testify that the French atrocities in Algeria matched those committed by the Nazis in France. [29]

In attempting to create a moral equivalency beween the crimes of Nazism and colonialism, and thus to accept Barbie as a fellow imperialist,[30] Vergès echoed a similar argumentative strategy employed earlier by Cesairé in his comment that by failing to apply the lessons of WW2 to their own racist policies, France perpetuated the conditions that enabled the rise of Nazism.[31] Vergès thus questioned whether a "crime against humanity is to be defined as only one of Nazis against the Jews or if it applies to more serious crimes…the crimes of imperialists against people struggling for their independence?"[32] This played on tensions within French society at the time regarding the Vichy era and was heightened in light of recent scandals regarding instances of torture committed by the French against Algerians.[33] Henri Alleg had, for example, recently published an account which revealed his torturers had admitted to borrowing techniques used by the Gestapo against the French resistance.[34] Other accounts had similarly undermined France's moral authority in Algeria,[35] including one co-written by Vergès.[36]

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[28] Vergès recalled saying to Barbie: "What I want is for you to take on a human dimension. You're not a monster. You're not innocent, but neither are you a monster. You're an officer…of an occupying army in a country that resists. You're no better and no worse than a French officer in Algeria, an American officer in Vietnam, a Russian officer in Kabul." See: Angelique Chrisafis, 'I Said to Klaus Barbie: I Want People to See Your Human Side' (*The Guardian* 15 May 2008) <https://www.theguardian.com/world/2008/may/15/france.internationalcrime> accessed 7 December 2021.
[29] Richard Bernstein, 'Six Witnesses Take the Stand in Barbie's Defense' (*The New York Times*, 16 June 1987) <https://www.nytimes.com/1987/06/16/world/six-witnesses-take-the-stand-in-barbie-s-defense.html> accessed 7 December 2021.
[30] Binder (n 24) 1371.
[31] Cesairé himself drew on the works of radical black intellectuals, including most notably W.E.B. Du Bois, who viewed "fascism as a blood relative of fascism as a blood relative of slavery and imperialism, global systems rooted not only in capitalist political economy but racist ideologies that were already in place at the dawn of modernity." See Robin D.G. Kelley, 'Introduction: A Poetics of Anticolonialism' in Aimé Césaire, *Discourse on Colonialism* (Trns Joan Pinkham, Monthly Review Press, 2000) 20. In a particularly impassioned passage, Césaire states that what makes the crimes of Hitler and Nazism so repugnant is that they were "the crime against the white man" rather than "the humiliation of man as such", given that until Hitler, this sort of violence had been reserved for colonial subjects. See Aimé Césaire, *Discourse on Colonialism* (Trns Joan Pinkham, Monthly Review Press, 2000) 36-7.
[32] Jacques Vergès quoted in Cohen (n 27) 230.
[33] On the dissemination of reports of torture in the French media at the time, see: Martin Evans, *The Memory of Resistance: French Opposition to the Algerian War (1954-1962)* (Berg Publishers 1997) 77-8.
[34] As published in: Henri Alleg, *La Question* (Éditions de Minuit 1958). Also see: Benjamin Stora, *Algeria, 1830–2000: A Short History* (Jane Marie Todd tr, Cornell University Press 2001) 88–9.
[35] For example, Simone de Beauvoir and Gisèle Halimi's work *Djamila Boupacha* about the torture of a young Algerian woman, as well as *La Gangrène*. See: Simone de Beauvoir and Gisèle Halimi, *Djamila Boupacha: The Story of the Torture of a Young Algeria Girl which Shocked Liberal French Opinion* (Peter Green tr, MacMillan 1962); and *The Gangrene* (Robert Sivers trns, Lyle Stuart 1960).
[36] George Arnaud and Jacques Vergès, *Pour Djamila Bouhired* (Editions de Minuit 1957).

By re-contextualising the trial in these two sensitive histories—Vichy and Algeria—Vergès amplified the media attention it received. And whilst undoubtedly opportunistic,[37] this strategy of rupture created a significant moment of reckoning in challenging the histories and traumas shaping post-War France.[38] Beigbeder thus characterises the trial as serving the same function for French society as the Nuremberg trials did for post-War Germany.[39] Vergès achieved this through what was described by the opposition prosecutor Pierre Truche as a "defence of diversion".[40] And whilst Vergés was ultimately unsuccessful in deploying it,[41] with Barbie eventually being convicted and later dying in prison while serving a life sentence, he was nevertheless successful in muddying the narrative of the trial and amplyfing global attention to it.[42] In one sense, the trial acted as a crucible of sorts for the international criminal justice norms contained within the Nuremberg paradigm, given how contested and open for capture it was by Vergès on such a public stage. This case also tells us something about the popularisation of international criminal justice norms in the Cold War decades, with the Barbie trial just one of several highly publicised trials occurring in this period. To this end, the trials of Barbie, Paul Touvier, René Bousquet, and Maurice Papon stood as a testament to the idea that justice for such atrocities was possible. Further, these cases also give us a sense of how international criminal justice norms were diffusing in the post-Nuremberg decades, as well as the broader cultural significance they were achieving.[43]

7.2.3 The Demjanjuk Trial and the Precarity of International Criminal Justice: Cracks in the Nuremberg Paradigm?

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[37] As argued by: Alain Finkielkraut, *Remembering in Vain: The Klaus Barbie Trial and Crimes Against Humanity* (Columbia University Press 1992).
[38] Alice Y. Kaplan, 'On Alain Finkielkraut's "Remembering in Vain": The Klaus Barbie Trial and Crimes against Humanity' (1992) 19(1) Critical Inquiry 70, 84.
[39] Beigbeder (n 16) 232.
[40] Richard Bernstein, 'Six Witnesses Take the Stand in Barbie's Defense' (*The New York Times*, 16 June 1987) <https://www.nytimes.com/1987/06/16/world/six-witnesses-take-the-stand-in-barbie-s-defense.html> accessed 5 June 2020.
[41] What Vergès attempted is best characterised as a *tu quoque* strategy, which is essentially an argumentative strategy that critiques the proceedings in question on the basis that because others have not been prosecuted for similar offences, this evidences the illegitimacy of the proceedings as a whole. See: Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (OUP 2009) 279. As famously employed by Milosevic: Jonathan Graubart and Latha Varadarajan, 'Taking Milosevic Seriously: Imperialism, Law, and the Politics of Global Justice' (2013) 27 International Relations 439, 442.
[42] This is, at least, the conclusion reached by Finkielkraut (n 37).
[43] For an overview of how the offence of crimes against humanity was deployed and evolved in these cases and, in particular, how this legal category was shaping discourses about France's war-time conduct and post-War memory, see: Vivian Grosswald Curran, 'Politicizing the Crime Against Humanity: The French Example' (2003) 78(3) Notre Dame Law Review 677, 687-96.

Another highly publicised attempt at securing a form of international criminal justice in this period was the effort to prosecute John Demjanjuk for atrocities committed during WW2. Between 1977 and 2002, Demjanjuk appeared before various courts and tribunals in the US, Israel, and finally Germany, which saw him eventually convicted for crimes committed during the War. Born in rural Ukraine in the early 1920s, Demjanjuk was later drafted into the Soviet Army, however he eventually ended up as one of many thousands of POWs put to work in Nazi death camps.[44] Having survived this, Demjanjuk settled in Cleveland, where he became a naturalised US citizen and started a family. At the heart of Demjanjuk's legal odyssey, however, was a question as to how he had spent his time as a POW in furtherance of the Holocaust and whether he was, in fact, a notoriously cruel and sinister camp guard called 'Ivan the Terrible'.[45]

Denaturalisation proceedings had been initiated against Demjanjuk in 1977 on the basis that he had illegally procured an immigration visa and lied in the course of his citizenship application. He was thus stripped of his citizenship in 1981, after which he requested asylum rather than face deportation.[46] Israel requested Demjanjuk's extradition following his identification as *Ivan the Terrible* and pursuant to an arrest warrant that charged him with offences under the Israeli *1950 Nazi and Nazi Collaborators (Punishment) Law*.[47] This was acceded to on the basis that crimes against humanity were universal jurisdiction crimes—as per the Eichmann precedent—and he was extradited to Israel in February 1986.[48] A trial was subsequently iniated before a special tribunal of the District Court of Jerusalem in November, with the substantive hearing taking place between February 1987 and April 1988.[49]

As a case tried in Israel on the basis of universal jurisdiction, there were obvious similarities to Eichmann.[50] It also served similar didactic aims as the Eichmann trial had,[51] and falling twenty years after Eichmann, it presented the Israeli State with an opportunity

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[44] Lawrence Douglas, *The Right Wrong Man: John Demjanjuk and the Last Great Nazi War Crimes Trial* (Princeton University Press 2016) ch 1.
[45] For an overview, see: Orna Ben-Naftali, 'Demjanjuk, Ivan (John)' in Antonio Cassese, *The Oxford Companion to International Criminal Justice* (OUP 2009) 641.
[46] For an overview of the immigration proceedings against Demjanjuk, see: Avid Gelfand, 'Nazi War Criminals in the United States: It's Never Too Late for Justice' (1986) 19(4) Vanderbilt Journal of Transnational Law 855, 885-892; and Rena Hozore Reiss, 'The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offence Doctrine' (1987) 20(2) Cornell International Law Journal 281.
[47] Gelfand ibid 888.
[48] ibid 889; and Reiss (n 46) 283.
[49] Lawrence Douglas, 'Demjanjuk, John (Ivan)' in Peter Cane and Joanna Conaghan, *The New Oxford Companion to Law* (OUP, 2009).
[50] Some of these had been intentionally cultivated, such as the conduct of the trial and the physical space it was held in: Douglas (n 44) 68-70.
[51] ibid 185.

to grapple with the complex and traumatic memory of the Holocaust.[52] In contrast to Eichmann, however, the defence strategy hinged on the identity of Demjanjuk rather than the nature of complicity itself.[53] Following a lengthy and highly publicised trial in the world media, Demjanjuk received what was the second death sentence in the history of the Israeli State—second only to Eichmann.[54] This triggered an automatic appeal to the Israeli Supreme Court, where fresh evidence calling into question his identity as *Ivan the Terrible* was considered.[55] In addition to other issues raised on appeal, the Court determined his identity had not been adequately proved.[56] Demjanjuk's citizenship was subsequently restored, however he later faced fresh charges in Germany for acts committed as a Sobibor death camp guard—rather than strictly as *Ivan the terrible.*[57] Following a further extradition saga, he was convicted as an accessory to the murder of Jews at Sobibor death camp in May 2011. He died in 2012 with an appeal pending, which invalidated the original conviction.[58]

Whilst the doctrinal contribution of this episode to contemporary ICL might be relatively narrow, it nevertheless did much to publicise the possibility of international criminal justice—particularly as an exercise of universal jurisdiction.[59] It received considerable media attention in both the domestic and international press, as well as generating a range of memoirs and other popular accounts.[60] There was also a more uncomfortable side to this long-running legal odyssey. And if Eichmann stood as the high point of the Nuremberg era of justice, Demjanjuk was a moment when cracks began to appear. It might thus be read as a cautionary tale revealing the vulnerabilities of the "slow-moving elaborate, witness-

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[52] Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale university Press 2005) 185.
[53] Demjanjuk's lawyer proved a controversial figure and would later go on to write two books on the trial: Yoram Sheftel, *The Demjanjuk Affair: The Rise and Fall of a Show-Trial* (Haim Watzman trs, Victor Gollancz 1994); and Sheftel, *Defending "Ivan the Terrible": The Conspiracy to Convict John Demjanjuk* (Regency 1996).
[54] *Israel v. Demjanjuk*, Crim. Case (Jerusalem) No. 373/86 (Apr. 18, 1988).
[55] For an overview of the Supreme Court decision see: Lisa J. Del Pizzo, 'Not Guilty – But Not Innocent: An Analysis of the Acquittal of John Demjanjuk and its Impact on the Future of Nazi War Crimes Trials' (1995) 18(1) Boston College of International & Comparative Law Review 137; and Andrew David Wolfberg, 'Israel v. Ivan (John) Demjanjuk: Wachmann Demjanjuk Allowed to Go Free' (1995) 17(2) Loyola of Los Angeles International and Comparative Law Review 445.
[56] *Israel v. Demjanjuk*, Crim. App. No. 347/88 (Sup. Ct. July 29, 1993).
[57] For an overview of the judgment and the responses to it, see: Douglas (n 44) ch 8 & 9; and Douglas, 'Convicting the Cog: The Munich Trial of John Demjanjuk' in Norman J.W. Goda (ed), *Rethinking Holocaust Justice: Essays Across Disciplines* (Berghahn Books 2018).
[58] Gareth Jones, 'Former Nazi Guard Demjanjuk Dies in Germany Aged 91'(*Reuters*, 17 March 2012) < https://www.reuters.com/article/us-germany-demjanjuk-idUSBRE82G08Y20120317> accessed 9 November 2021.
[59] Douglas describes the lengthy denaturalisation proceedings Demjanjuk went through in the 1970s and 1980s as the most highly publicised in U.S. history. Douglas (n 57) 189.
[60] See for example: Sheftel (n 53); Tom Teicholz, *The Trial of Ivan the Terrible: State of Israel vs. John Demjanjuk* (St Martins 1990); Jim McDonald, *John Demjanjuk: The Real Story* (Amana Books 1990); and Philip Roth, *Operation Shylock: A Confession* (Simon & Schuster 1993).

dependent trial".[61] This was heightened as the elapse of time between atrocity and trial was so long,[62] which created practical difficulties in securing a prosecution given fragility of human memory and the demands of the trial process. For this reason, the trial included extensive expert testimony on the reliability of memory in recollecting trauma.[63] In circumstances where witness testimony was used for didactic ends, it created the risk of victims and their trauma subsuming into the legal spectacle itself. And whilst this affair ultimately resulted in two convictions, both had been unsettled by the time Demjanjuk died. Wolfberg thus described it as the "latest tragedy of the Holocaust."[64] If Eichmann and Barbie before it showed that the arc of justice was long, Demjanjuk perhaps hinted that it can be fleeting, if not elusive.

7.2.4 Domestic Atrocity Laws and the Diffusion of International Criminal Justice Norms

When exploring the legacy of these highly publicised trials, it is important to remember that they were only possible because of another phenomenon occurring in the preceding decades: the domestication of international criminal justice norms. Recent empirical work by Berlin has provided significant insight into this phenomenon, which illustrates that whilst prosecutions for international crimes were important but sporadic instances of *exemplary justice*,[65] the broader projects of criminalising international crimes was not on *hiatus*. Berlin thus identifies developments occurring during the Cold War years that would prove consequential to the institutional revival of ICL from the 1990s onward. This includes the institutionalisation of international criminal justice norms through ICL treaties and the emergence of supporting legal doctrines, diffusion and domestication of atrocity laws, and the emergence of a professional class of international criminal lawyers.[66] These developments facilitated the institutional developments occurring from the 1990s onward, once the necessary political changes had occurred.[67] This domestication occurred through

[61] Landsman (n 7) 105.
[62] Stephan Landsman, *Crimes of the Holocaust: The Law Confronts Hard Cases* (University of Pennsylvania Press 2005) 169.
[63] Douglas (n 52) 196-7.
[64] Wolfberg (n 55) 475.
[65] Edwin Bikundo, 'The International Criminal Court and Africa: Exemplary Justice' (2012) 23(1) Law Critique 21.
[66] Mark S. Berlin, 'Revisiting the "Hibernation" Narrative: Technocratic Legal Experts and the Cold War Origins of the "Justice Cascade"' (2020) 42(4) Human Rights Quarterly 878.
[67] ibid 880-1.

two pathways: firstly, through targeted legislation and secondly, through large-scale legislative reform projects.[68]

We thus get a sense that whilst the development of ICL in the international sphere was limited during the Cold War, a different impression is gained by focusing on the domestic setting. And by focusing on the spread of domestic atrocity laws and the high profile trials they enabled, we get a sense of the diffusion of ICL norms, rather than their *hibernation*. By overlooking these sorts of developments, we are drawn into producing and repeating a particular narrative about the development of the field.[69] And whilst these domestic atrocity trials might have been limited in their jurisprudential or institutional contributions, they were nevertheless important in publicising the possibility of international criminal justice, solidifying the cosmopolitan memory of atrocity from which ICL emerged, and consolidating the nascent *ius puniendi* of the international community.

Rather than a period in which ICL and the project of international criminal justice remained without resonance, this period instead helped to consolidate the moral and legal precedent of Nuremberg and to build momentum towards future disciplinary developments. These developments have particular relevance for the present-day shape of international criminal justice project which is increasingly 'domestic' in terms of its deliverables—albeit with the ICC still drawing much of our gaze. Of these, the assertion of universal jurisdiction by domestic courts has proved prominent in recent years. And to this end, Langer and Eason have identified the "quiet expansion" of universal jurisdiction in respect of the core international crimes.[70] This is a particularly interesting development given that universal jurisdiction has ebbed and flowed in terms of its desirability beyond the post-WW2 domestic prosecutions,[71] having since undergone periods of sustained attack.[72] In one sense the

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[68] Mark S. Berlin, *Criminalizing Atrocity: The Global Spread of Criminal Laws Against International Crimes* (OUP 2020).

[69] Kastner makes a similar point in the context of an argument that we need to pay more attention to domestic ICL trials, rather than our tendency to focus on trials before international criminal tribunals: Philipp Kastner, 'Domestic War Crimes Trials: only for "Others"? Bridging National and International Criminal Law" (2015) 39(1) University of Western Australia Law Review 29.

[70] Máximo Langer and Mackenzie Eason, 'The Quiet Expansion of Universal Jurisdiction' (2019) 30(3) EJIL 779. For explorations of this phenomena with reference to specific recent cases, see: W. Kaleck and P. Kroker, 'Syrian Torture investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?' (2018) 16(1) Journal of International Criminal Justice 165; Lachezar Yanev, 'Dutch Criminal Justice for Ethiopian War Crimes: The *Alemu* Case' (2019) 17(3) Journal of International Criminal Justice 633; and Jessica Doumit, 'Accountability in a Time of War: Universal Jurisdiction and the Strive for Justice in Syria' (2020) 52(1) Georgetown Journal of International Law 263.

[71] On this, see: Sandrine LeFrance, 'A Tale of Many Jurisdictions: How Universal Jurisdiction is Creating a Transnational Judicial Space' (2021) 48(4) Journal of Law and Society 573; and Natalie Rosen, 'Evaluating the Practice of Universal Jurisdiction Through the Concept of Legitimacy' (29 November 2021) Journal of International Criminal Justice (Online) <https://doi-org.ucd.idm.oclc.org/10.1093/jicj/mqab073>.

[72] Harmen van der Wilt, 'Universal Jurisdiction Under Attack: An Assessment of African Misgivings Towards International Criminal Justice as Administered by Western States' (2011) 9(5) Journal of International Criminal Justice 1043.

Rome Statute itself ensures this legacy is carried on, given that the principle of complementarity underpinning the ICC gives primacy to domestic prosecution.[73] This feature of contemporary international criminal justice ensures that to a large degree, the future of ICL will perhaps always be *domestic*.[74] *Hibernation*, it seems, is a matter of perspective and focus.

7.3 The Doctrinal Development of International Criminal Law and the Hibernation Narrative

Contrary to the *accepted account* which positions the Cold War as an era of "standstill" where the Nuremberg precedent remained without resonance and undernourished,[75] in the following subsections I will identify areas in which the core ICL crimes experienced doctrinal development. Although other areas might be identified, the following subsections will focus on slavery, torture, apartheid, aggression, and the law of war crimes more generally. With these areas of development in mind, I will argue that this period of ICL's history might be thought of as *generative*, rather than *stagnant*.

7.3.1 The International Crime of Slavery, Enslavement, and its Associated Practices

In addition to the international prohibitions on the slave trade that stretch back to the early 1800s, contemporary international law provisions regarding slavery and its associated practices span international human rights law,[76] as well as international humanitarian law and international criminal law.[77] The most relevant for contemporary ICL is the *Convention*

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[73] As per Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) preamble para 6, and arts 1 and 17. For an overview of complementarity and ICL practice in historical and contemporary view, see: Carsten Stahn, 'Taking Complementarity Seriously: On the Sense and Sensibility of "Classical", "Positive", and "Negative" Complementarity' in Carsten Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge 2014).

[74] On this relationship, see: Harmen van der Wilt, 'Domestic Courts' Contribution to the Development of International Criminal Law: Some Reflections' (2013) 46(2) Israel Law Review 207.

[75] Kirsten Sellars, 'Definitions of Aggression as Harbingers of International Change' in Leila Nadya Sadat (ed), *Seeking Accountability for the Unlawful Use of Force* (CUP 2018) 150-3.

[76] See for example: Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 4; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 4, para 1; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 8; and African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 5.

[77] Writing in the early 1990s, Bassiouni identified seventy-nine separate international instruments and documents that addressed the issue of slavery, the slave trade, and various other slave related practices. Bassiouni also sub-categorised these into: those instruments arising under the law of peace, which includes

to Suppress the Slave Trade and Slavery ('1926 Slavery Convention') signed under the auspices of the League of Nations.[78] This was amended in 1953 to bring it into alignment with the institutional setting of the UN,[79] which was further updated with the 1956 Supplementary Convention.[80] The 1926 Slavery Convention contained definitions of "slavery" and the "slave trade", [81] which were retained in the 1956 Supplementary Convention—albeit with an expanded list of acts and practices.[82] The 1956 Supplementary Convention reaffirmed the international commitment to ending these practices, as well as expanding coverage to any acts or practices not caught by the 1926 Convention.[83]

Although they were suppression treaties,[84] the influence of these conventions carries through to contemporary *stricto sensu* ICL under the category of crimes against humanity. This is evident in the Rome Statute, with the crime against humanity of enslavement contained in Article 7(1)(c) and as defined in Article 7(2)(c) essentially reproducing the definition contained in the 1926, 1953, and 1956 Conventions.[85] This connection is identified in the ICC Elements of Crimes,[86] which refers to what Allain characterises as the

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both general human rights instruments as well as other international instruments, and those international instruments arising under the law of armed conflicts. See: M. Cherif Bassiouni, 'Enslavement as an International Crime' (1991) 23(2) NYU Journal of International Law & Politics 445, 454.

[78] Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253.

[79] Protocol Amending the Slavery Convention Signed at Geneva on 25 September 1926 (adopted 23 October 1953, entered into force 7 December 1953) UNGA Res 794 (VIII).

[80] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 3. On this, see: Jean Allain, 'The Legal Definition of Slavery into the Twenty-First Century' in Jean Allain (ed), *The Legal Understanding of Slavery* (OUP 2012) 308-314; and Allain, 'Property in Persons: Prohibiting Contemporary Slavery as a Human Right' in Ting Xu and Jean Allain (eds), P*roperty and Human Rights in a Global Context* (Bloomsbury 2015) 98.

[81] Slavery is defined in the 1926 Slavery Convention, art 1(1) as: the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". The slave trade is defined in art 1(2) as: "all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves."

[82] As per the 1956 Supplementary Convention, art 7. As per art 1, these acts included: debt bondage, serfdom, any institution or practice whereby a woman was forced to marry in return for a payment of some form or could be transferred as property or inherited, and any practice where someone under the age of eighteen was delivered to another person for the purposes of exploiting their labour.

[83] Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff 2008) 18.

[84] That is, international criminal law conventions that require State Parties to criminalise the designated acts within their national legal systems. These are generally taken to be characteristic of transnational criminal law. See for example 1926 Slavery Convention art 2, and 1956 Supplementary Convention arts 1 and 3.

[85] Allain (n 83) 4.

[86] As per Rome Statute, art 7(2)(c): "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children." The ICC Elements of Crimes makes specific reference to the 1956 Supplementary Convention, which notes that it entails a "deprivation of liberty" which may include: "exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956." See: International Criminal Court, *Elements of Crimes* (2011) art 7, available at <https://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf> accessed 1 April 2022.

agreed-upon definition of slavery in international law.[87] Similarly, sexual slavery is included as a war crime in Articles 8(b)(xxii) and 8(e)(vi),[88] as well as a crime against humanity under Article 7(1)(g).[89] These come in addition to the various other ICL instruments containing prohibitions on slave labour and enslavement.[90] Common across these definitions and restatements is an emphasis that the prohibited act entails the powers attaching to the right of ownership, with *ownership* the essential element of slavery as defined by international law.[91]

Other international prohibitions on slavery also proliferated during this period, with Bassiouni identifying in the early 1990s seventy-nine international instruments addressing slavery,[92] some of which addressed slavery and its related practices directly,[93] whilst other instruments did so indirectly by addressing closely related conduct and forms of discrimination.[94] This shift, Allain notes, occurred in the 1960s when the focus on slavery within the UN shifted to become a platform to criticise colonialism and practices associated with apartheid.[95] A question has thus arisen as to whether we are beginning to see a shift from slavery understood as *ownership*—as above—to slavery understood as *control*.[96] Other instruments emerging in this period are of more direct relevance to contemporary

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[87] Jean Allain, 'The Definition of "Slavery" in General international Law and the Crime of Enslavement Within the Rome Statute' in Jean Allain (ed), *The Law and Slavery: Prohibiting Human Exploitation* (Brill 2015) 420.
[88] As either a grave breach of the Geneva Conventions or as a serious violation of common article 3 of the four Geneva Conventions.
[89] The ICC Elements of Crimes similarly references the 1956 Convention in respect of both: Elements of Crimes, 8, 28, & 37.
[90] See for example: Statute of the International Tribunal for the former Yugoslavia, UNSC Res 827 (25 May 1993) UN Doc S/RES/827 ('ICTY Statute'), art 5(c); Statute of the International Tribunal for Rwanda, UNSC Res 955 (8 November 1994) UN Doc S/RES/955 ('ICTR Statute'), art 3(c); 'Draft Code of Offences Against the Peace and Security of Mankind' (1954) II Yearbook of the International Law Commission 150-2; and 'Draft Code of Crimes Against the Peace and Security of Mankind' (1996) II Yearbook of the International Law Commission 17, 47-8.
[91] Allain (n 83) 420. A similar understanding of slavery as a crime against humanity was relied on by the ICTY. In particular, the Appeals Chamber accepted the essential connection between the paradigmatic forms of *chattel slavery* as the earlier Slavery Conventions responded to and contemporary forms of slavery, both of which were captured by the prohibitions of torture as a matter of customary international law. The essential component of both was that it entailed the exercise of powers attaching to the right of ownership over a person. See: *Prosecutor v Kunarac et al* (Appeals Chamber Judgment) IT-96-23-A & IT-96-23/1-A (12 June 2002) [117]; and *Prosecutor v Kunarac et al* (Trial Chamber Judgment) IT-96-23-T & IT-96-23/1-T (22 February 2001) [539]-[540]. The ICC Trial Chamber also relied on a similar understanding when considering sexual slavery as a distinct form of enslavement: *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Pre-Trial Chamber I, Decision on the Confirmation of Charges) ICC-01/04-01/07-717 (30 September 2008) [430]. More recently, however, a question has emerged as to whether we are beginning to see a shift from slavery understood as *ownership* to *control*.
[92] Bassiouni (n 77) 454.
[93] See for example: ICCPR, art 8; African Charter, art 5.
[94] See, for example: International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 12 March 1969) 666 UNTS 195 (CERD) and the ICCPR.
[95] Allain (n 80) 308-312.
[96] On this, see: Harmen van Der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts' (2014) 13(2) Chinese Journal of International Law 297, 334; and Carsten Stahn, *A Critical Introduction to International Criminal Law* (CUP 2018) 59.

ICL, such as the Additional Protocols to the Geneva Conventions.[97] With all these developments in mind, we can identify the proliferation of international instruments during the Cold War decades that have shaped the prohibition of enslavement as a core international crime.

7.3.2 Torture as an International Crime

Torture has been prohibited in a range of international legal instruments,[98] which includes general human rights instruments,[99] the statutes of international criminal tribunals and various other international criminal law instruments,[100] and under international humanitarian law.[101] The prohibition has been confirmed as a *jus cogens* norm under customary international law,[102] international humanitarian law,[103] and international criminal law.[104] And by confirming the *jus cogens* status of prohibitions against torture as a war crime and crime against humanity,[105] international criminal tribunals have relied on and expanded upon developments occurring in the Cold War decades. Perhaps most immediately, the definition

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[97] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 85; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II) adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, art 4(2)(f).

[98] For the most substantive, see: Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res 3452 (XXX) (9 December 1975); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT); Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS Treaty Series No 67; and European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted 26 November 1987, entered into force 1 February 1989) ETS No 126.

[99] See for example: UDHR, art 5; ICCPR, art 7; ECHR, art 3; and African Charter, art 5.

[100] See for example: ICTY Statute, arts 2(b) and 5(f); ICTR Statute, arts 3(f) and 4(a); Rome Statute, arts 7(1)(f), 8(2)(a)(ii), & 8(2)(c)(i). Also note previous references to 'ill-treatment' or 'other inhumane acts': IMT Charter, art 6(b)-(c); Nuremberg Principles, Principle VI(b)-(c).

[101] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, arts 3 & 12; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Geneva Convention II) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85, arts 3 & 12; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, arts 3 & 17 ; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) (12 August 1949, adopted 21 October 1950) 75 UNTS 287, arts 3 & 32.

[102] *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal) (Judgment) [2012] ICJ Rep 422 [99].

[103] In the context of both international and non-international conflicts. On this, see: Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *International Committee of the Red Cross Customary International Humanitarian Law, Volume 1: Rules* (CUP 2009) Rule 90, 315-19.

[104] Cassese argues a general rule of customary international law has evolved which prohibits individuals from committing acts of torture, and which authorises states to prosecute and punish perpetrators of torture as a universal crime. See: Antonio Cassese, *International Criminal Law* (Oxford University Press 2003) 119; and also Erik de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law' (2004) 15(1) EJIL 97.

[105] Of course, acts of torture might also be characterised as genocidal in nature depending on the context.

of torture contained in Article 1(1) of the *Convention Against Torture and Other Cruel, Inhuman, or Degrading Punishment* of 1984 ('Torture Convention') has been identified by international criminal tribunals as indicative of customary international law and as possessing *jus cogens* character.[106]

Despite any divergence that might have emerged,[107] the definition provided in Article 1(1) of the Torture Convention has proved influential to contemporary ICL.[108] And there has been considerable interplay between various treaties and institutional settings in defining torture as a prohibition of international law.[109] Although ICL prohibitions on torture stretch further back, the Torture Convention itself was a creature born of the Cold War era.[110] Indeed, it was certain states' direct experiences with torture in these decades that helped to nudge the international community towards more strongly prohibiting it at the international level. [111] Advocacy work by NGOs in the preceding years was also important in bringing this about.[112]

7.3.3 The Cold War and the Development of the Law of War Crimes

As a consequence of the gradual accretion of treaties related to and the more general development of international humanitarian law and the law of armed conflict during the Cold War decades, the contemporary law of war crimes has been indelibly shaped by this period.

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[106] See for example: *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998) [681]; and *Prosecutor v Furundžija* (Judgment) IT-95-17/I-T (10 December 1998) [138], [151]-[152], & [159]-[162].

[107] In particular, a move away from torture as inflicted for a specific purpose and by a public official or someone acting in an official capacity, as in CAT, art 1(1). Hall and Stahn have drawn out this shift with reference to both the art 7(1)(f) and 7(2)(e) of the Rome Statute, as well as the jurisprudence of both the ad hoc tribunals and the ICC. See: Christopher K. Hall and Carsten Stahn, 'Article 7' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Hart 2016) 272-3. Although it should be noted that torture as a crime against humanity in Article 7 is narrower in the circumstances it can cover than as a war crime under Article 8, given the requirement in the former for torture to be inflicted "upon a person in the custody or under the control of the accused", as per Rome Statute, art 7(2)(e).

[108] Schabas notes CAT, art 1 is largely replicated in the ICC Elements of Crimes: William Schabas, 'The Crime of Torture and the International Criminal Tribunals' (2006) 37(2) Case Western Reserve Journal of International Law 349, 360.

[109] On this interplay, see: Nigel S. Rodley, 'The Definition(s) of Torture in International Law' (2002) 55(1) Current Legal Problems 467.

[110] The notable precursors to the Torture Convention include: UNGA Res 3452 (XXX) (9 December 1975); and 'Draft Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment', UNGA Res 32/62 (8 December 1977) UN Doc A/RES/32/62.

[111] See generally: Manfred Nowak, Moritz Birk, Giuliana Monina, 'Introduction' in Manfred Nowak, Moritz Birk, Giuliana Monina (eds), *The United Nations Convention Against Torture and Its Optional Protocol: A Commentary* (2nd edn, OUP 2019) 2-7; Christopher Einolf, 'The Fall and Rise of Torture: A Comparative and Historical Analysis' (2007) 25(2) Sociological Theory 101; and Matthew Lippman, 'The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment' (1994) 17(2) Boston College International & Comparative Law Review 275.

[112] Amnesty International were particularly influential in this regard, following the launch of a worldwide campaign against torture on Human Rights Day in 1972, as well as through their international surveys on torture. See: Amnesty International, *Report on Torture* (2nd edn, Amnesty International Publications 1975).

Notably, many of these developments were uniquely reflective of this period. Most immediately, the Additional Protocols I and II of 1977 represented significant developments,[113] which considerably expanded the scope of IHL and have proved formative for the current law of war crimes.[114] In the contemporary law of war crimes, the influence of the Additional Protocols is particularly notable on Article 8 of the Rome Statute, which represents a "comprehensive stocktaking" of the customary international law that has evolved since 1977.[115] It exists as a somewhat of a jumbled mass of over fifty discrete war crimes,[116] with the influence of the Additional Protocols evident in the subsections contained in Articles 8(2)(b)[117] and 8(2)(e).[118]

The influence of the Additional Protocols can specifically be noted in, for example, the prohibitions on child soldiers and the war crime of starvation contained in the Rome Statute. The Additional Protocols significantly expanded the previously limited protections for children in armed conflict in the 1949 Geneva Conventions,[119] which primarily concerned the obligations of occupying powers towards protected persons.[120] This has been carried over into the Rome Statute in Articles 8(2)(b)(xxvi) and 8(2)(e)(vii),[121] and has also been prosecuted in other international criminal justice contexts.[122]

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[113] François Bugnion, 'Adoption of the Additional Protocols of 8 June 1977: A Milestone in the Development of International Humanitarian Law' (2018) 99(905) International Review of the Red Cross 785.
[114] 'War crimes' as comprised of certain breaches of IHL and as found in, for example, the: IMT Charter, art 6(b); ICTY Statute, arts 1, 2, & 3; ICTR Statute, art 4; Rome Statute, art 8.
[115] Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (Hart 2016) 118-9. See also Bassiouni referring to the Rome Statute as the most important codification of the law of war crimes: M. Cherif Bassiouni, 'Codification of International Criminal Law' (2017) 45(3) Denver Journal of International Law & Policy 333, 338-9.
[116] Michael Cottier, 'Article 8' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Hart 2016) 137.
[117] Rome Statute, art 8(2)(b) covers serious violations of the laws and customs applicable in international armed conflict, and in this regard draws primarily from, *inter alia*, the 1907 Hague Regulations, Additional Protocol I, and various other international instruments. See: Cottier, ibid 354.
[118] Rome Statute, art 8(2)(e) covers serious violations of the laws and customs applicable in armed conflicts not of an international character and draws primarily from Additional Protocol II—although the acts listed in Article 8(2)(e) are more extensive than those listed in Additional Protocol II.
[119] Additional Protocol I, art 77(2); and Additional Protocol II, art 4(3)(c).
[120] As per Geneva Convention IV, arts 50 & 51. On the limits of these, see: Matthew Happold, 'Child Soldiers in International Law: The Legal Regulation of Children's Participation in Hostilities' (2000) 47 NILR 27, 30-1.
[121] Although the language of "conscription or enlistment" is used rather than "recruitment". On this, see: Nina Jørgensen, 'Child Soldiers and the Parameters of International Criminal Law' (2012) 11(4) Chinese Journal of International Law 657. This offence formed the basis for the inaugural ICC prosecution. For an overview and analysis, see: Kai Ambos, 'The First judgment of the International Criminal Court (*Prosecutor v Lubanga*): A Comprehensive Analysis of the Legal Issues' (2012) 12(2) International Criminal Law Review 115. Also see more recently the conviction of Bosco Ntaganda for, *inter alia*, the war crime of conscripting and enlisting children under the age of 15 years: *Prosecutor v Bosco Ntaganda* (Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment') (ICC-01/04-02/06 A A2 (30 March 2021).
[122] Most notably by the Special Court for Sierra Leone. See: Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute) (signed 16 January 2002, entered into force 12 April 2002) 2178 UNTS 137, art 4(c), Statute of the Special Court for Sierra Leone. The SCSL would later declare this to be part of customary law in: *Prosecutor v Sam Hinga Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)) SCSL 2004-14-

In much the same way, the Rome Statute—albeit in a staggered manner—carried forward the war crime of the starvation of civilians as a method of war which was included in the Additional Protocols. Although Article 23 of the Geneva Convention IV did provide limited protection,[123] it did not extend to non-international armed conflicts given the limits of Common Article 3. This was ameliorated by the Additional Protocols, which prohibited the "[s]tarvation of civilians as a method of warfare" in both international and non-international conflicts.[124] The war crime of intentionally starving civilians was included in Article 8(2)(b)(xxv) of the Rome Statute, although initially only applied to *international* armed conflict. This was eventually remedied by a unanimous vote of the Assembly of State Parties on 6 December 2019, which extended this prohibition to non-international armed conflict.[125] Efforts to criminalise this act under the Rome Statute came as part of a broader effort at the international institutional level to prohibit the use of starvation as a method of war.[126]

In light of these developments, of which there are other possible ones we might identify,[127] we thus get a sense of how this period paved the way for later developments in the contemporary law of war crimes. It was, in this regard, a period that was *generative* rather than *stagnant*. These developments are particularly noteworthy as they were in many

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AR-72E (31 May 2004) [50]-[51].

[123] Geneva Convention IV, art 23 provided for the "free passage of all consignments of essential foodstuffs" in addition to medical supplies, objects necessary for religious worship, clothing, and tonics.

[124] Additional Protocol I, art 54; and Additional Protocol II, art 14. For an overview of the development of the war crime of starvation in a longer historical context, see: Nicholas Mulder and Boyd van Dijk, 'Why Did Starvation Not Become the Paradigmatic War Crime in International Law?' in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (OUP 2021).

[125] 'Resolution on Amendments to Article 8 of the Rome Statute of the International Criminal Court', Resolution ICC-ASP/18/Res.5 (adopted 6 December 2019). Interestingly, although the statutes of the ad hoc tribunals and various other hybrid ICL courts have not included express provisions relating to starvation in international or non-international armed conflicts, the African Union's 'Malabo Protocol', did. See: Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ('Malabo Protocol') 28D(e)(xvi). On this, see: Manuel J Ventura, 'Prosecuting Starvation Under International Criminal Law: Exploring the Legal Possibilities' (2019) 17(4) Journal of International Criminal Justice 781.

[126] On this, see: Tom Dannenbaum, 'A Landmark Report on Starvation as a Method of Warfare' (*Just Security*, 13 November 2020) <https://www.justsecurity.org/73350/a-landmark-report-on-starvation-as-a-method-of-warfare/> 1 April 2022.

[127] For example, we might also mention the influence of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 215. The influence of the convention can be noted on Additional Protocol I, art 53 and Additional Protocol II, art 16, as well as on the Rome Statute, arts 8(2)(b)(ix) & art 8(2)(e)(iv). On this, see: Caroline Ehlert, 'Article 8(2)(e)(ix)' & 'Article 8(2)(e)(iv) in Mark Klamberg (ed), *Commentary on the Law of the International Criminal Court* (Torkel Opsaahl Academic EPublisher 2017) 89-91 & 129-131. A conviction was secured under the Rome Statute for this crime in: *Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016). The 1954 Convention has also contributed to the formation of customary international law regarding the protection of cultural and historical property in international and non-international armed, as was referenced in: *Prosecutor v Duško Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) [98] & [127]. The destruction of cultural property also grounded charges in ICTY cases, with the Court also noting the customary status of this norm, as in: *Prosecutor v Pavle Strugar* (Trial Chamber II Judgment) IT-01-42-T (31 January 2005) [229]-[230]. On the criminalisation of this more generally, see: Micaela Frulli, 'The Criminalization of Offences Against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (2011) 22(1) EJIL 203.

respects uniquely reflective of the Cold War era they took place in, with newly independent and socialist states playing a role in advocating for them.[128] The Additional Protocols thus emerge as one of many international legal projects pursued by newly independent and decolonising states.[129] Indeed, Mantilla argues that the negotiation of the 1949 Geneva Conventions and the 1977 Additional Protocols cannot be understood *without* reference to this context and the political antagonisms at play.[130] Alexander has similarly identified the importance of the decolonial context in shaping the contours of the Additional Protocols, with decolonisation itself changing the legal and political discourses about law, war, and violence.[131] This context influenced the content of the Additional Protocols directly, particularly those provisions relating to the protection of civilians, partisans, and other resistance groups, as well as the extension of specific provisions of the Geneva Conventions to internal conflicts and the protection of self-determination struggles as international conflicts.[132] The effect of this was that, by virtue of Additional Protocol I, armed conflicts occurring in the context of colonial domination, alien occupation, and resistance struggles against racist regimes now benefitted from enhanced protections. As Cassese

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[128] Grosecu and Richardson-Little have argued that this historiographical blind spot marginalises the contributions of the USSR and the Socialist States of Central and Eastern Europe to ICL and IHL. See: Raluca Grosecu and Ned Richardson-Little, 'Revisiting State Socialist Approaches to International Criminal Law and International Humanitarian Law: An Introduction' (2019) 21(2) Journal of the History of International Law 161. Mulder and Van Dijk make this point with reference to the inclusion of the war crime of starvation: Mulder and Van Dijk (n 124).

[129] See: Fabian Klose, 'The Colonial Testing Ground: The International Committee of the Red Cross and the Violent End of Empire' (2011) 2(1) Humanity: An International Journal of Human Rights, Humanitarianism, and Development 107; and Emma Stone Mackinnon, 'Contingencies of Context: Legacies of the Algerian Revolution in the 1977 Additional Protocols to the Geneva Conventions' in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (OUP 2021). Okimoto has similarly argued that this period and the Vietnam War in particular were important in shaping the general development of IHL, as well as the Additional Protocols specifically. See: Okimoto (n 3).

[130] Giovanni Mantilla, 'The Origins and Development of the 1949 Geneva Conventions and the 1977 Additional Protocols' in Matthew Evangelista and Nina Tannenwald (eds), *Do the Geneva Conventions Matter?* (OUP 2017); and Mantilla, 'Social Pressure and the Making of Wartime Civilian Protection Rules' (2019) 26(2) European Journal of International Relations 443. Van Dijk has drawn broadly similar conclusions with reference to the drafting process of the Geneva Conventions, arguing that whilst all those involved were broadly committed to the idea of taming the brutality of war, they were ultimately embedded in different past experiences and expectations of the future of world order: Boyd Van Dijk, *Preparing for War: The Making of the Geneva Conventions* (OUP 2022) 5.

[131] Amanda Alexander, 'International Humanitarian Law: Postcolonialism and the 1977 Geneva Protocol I' (2016) 17(1) Melbourne Journal of International Law 1; and Alexander, 'A Short History of International Humanitarian Law' (2015) 26(1) EJIL 109. And with reference to Chapter 8 that follows, Alexander has identified the Vietnam War, in particular, as having arguably the biggest impact of all conflicts from this period on the project undertaken with the Additional Protocols. Notably, interested parties and states with experiences of the Vietnam War sought both to enhance and constrain, respectively, the protections the Additional Protocols could potentially offer. As Alexander notes, one of principles enhanced by the Additional Protocols, and which was uniquely reflective of Vietnam War experiences, was the civilian/combatant distinction. On this, see: Amanda Alexander, 'The Vietnam War and the Civilian/Combatant Distinction in International Humanitarian Law' in Victor Kattan (ed), *Insights: The Vietnam & Arab-Israeli Conflicts, International Migrations, Comparisons & Connections* (Middle East Institute, NUS 2019) 45.

[132] Giovanni Mantilla, 'The Protagonism of the USSR and the Socialist States in the Revision of International Humanitarian Law' (2019) 21(2) Journal of the History of International Law 181.

notes, national liberation movements could now claim to be international subjects entitled to "exercise rights and duties on the international level" rather than being viewed simply as rebels.[133]

7.3.4 The Crimes Against Humanity of Apartheid and Enforced Disappearances

The crime against humanity of apartheid is another international crime that developed during this period of *hibernation* and which is also important for contemporary ICL. Although references to apartheid stretch back to 1929 in a policy context, as an international crime it developed much later.[134] And whilst the wrongful nature and consequences of apartheid policies had been raised early on in the life of the UN in the context of the treatment of ethnic Indians in South Africa,[135] it was not characterised in a penal manner until much later.

The General Assembly condemned the policies and practices of apartheid on numerous occasions during the 1950s[136] and 1960s,[137] noting in particular that these policies constituted a breach of South Africa's obligations under the Charter of the United Nations. Additionally, certain resolutions by the UN Security Council referred to apartheid as an international crime, notably describing it as a "crime against the conscience and dignity of mankind" in response to the Soweto Uprising in 1976,[138] and later in 1984.[139] It had also been characterised as disturbing international peace and security.[140] The practice of apartheid has also been censured by the International Court of Justice in an Advisory

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[133] Antonio Cassese, 'Wars of National Liberation and Humanitarian Law' in Antonio Cassese, Paola Gaeta, and Salvatore Zappalà (eds), *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (OUP 2008) 100. On the interactions between national liberation movements and international law, see: Konstantinos Mastorodimos, 'National Liberation Movements: Still a Valid Concept (With Special Reference to International Humanitarian Law)?' (2015) 17 Oregon Review of International Law 71.
[134] The first recorded entry of 'apartheid' in a policy context was made in 1929. See: Shamira M. Gelbman, 'Apartheid' in Stephen Caliendo and Charlton McIlwain (eds), *The Routledge Companion to Race and Ethnicity* (Routledge 2011) 103. Although note that Lingaas describes 'apartheid' as the official policy of South Africa as first being used in 1944. See: Carola Lingaas, 'The Crime Against Humanity of Apartheid in a Post-Apartheid World' (2015) 2(2) Oslo Law Review 86, 88-9.
[135] See for example: UNGA Res 44(I) (8 December 1946) UN Doc A/RES/44(I); and UNGA Res 265(III) (14 May 1949) UN Doc A/RES/265(III). See also: 'Letter Dated 12 July 1948 from the Representative of India to the Secretary-General Concerning the Treatment of Indians in South Africa' (16 July 1948) UN Doc A/577 <https://digitallibrary.un.org/record/1324842?ln=en> accessed 1 April 2022.
[136] See for example: UNG Res 395(V) (2 December 1950) UN Doc A/RES/395(V); UNGA Res 616(VII) (17 December 1952); UNGA Res 721 (VIII) (8 December 1953); UNGA Res 820(IX) (14 December 1954); UNGA Res 917(X) (6 December 1955); UNGA Res 1016(XI) (30 January 1957); UNGA Res 1178(XII) (26 November 1957); UNGA Res 1248(XIII) (30 October 1958); UNGA Res 1375 (XIV) (17 November 1959).
[137] UNGA Res 1598 (XV) (13 April 1961).
[138] UNSC Res 392 (1976) (19 June 1976).
[139] UNSC Res 556 (1984) (23 October 1984).
[140] UNSC Res 282 (1970) (23 July 1970) UN Doc S/RES/282(1970); UNSC Res 311(1972) (4 February 1973) UN Doc S/RES/311(1972); UNSC Res 392(1976) (19 June 1976) UN Doc S/RES/392(1976).

Opinion in the context of South Africa's control of South West Africa, with the Court holding that these policies violated South Africa's obligations under the Charter.[141]

One of the earliest characterisations of apartheid in South Africa as a crime against humanity came in 1965 UNGA Resolution, which was repeated in later resolutions.[142] However, the earliest censure of apartheid in an international legal instrument came via the 1966 *International Convention on the Elimination of All Forms of Racial Discrimination,*[143] which was followed by the first attempt to characterise the penal dimensions of apartheid in 1968.[144] The most substantive attempt at criminalisation came with the *International Convention on the Suppression and Punishment of the Crime of Apartheid* ('Apartheid Convention') in 1973,[145] which in Article 1 declared apartheid a crime against humanity. Apartheid also received censure as a breach of IHL under Article 85(4)(c) of Additional Protocol I.[146]

Notwithstanding any disagreement as regards the customary status of apartheid,[147] the legacy of these developments is evident in the Rome Statute, which criminalises apartheid as a crime against humanity.[148] The Rome Statute largely preserved 'apartheid' as contained in the Apartheid Convention, although notably it expressly broadened its application beyond those settings mirroring the South African context.[149] The inclusion of apartheid proved somewhat of a sticking point during negotiations, particularly whether it should be subsumed into existing categories of crimes.[150] Nevertheless, it was included as

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[141] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16.
[142] UNGA Res 2054(XX) (15 December 1965); UNGA Res 2074(XX) (17 December 1965); UNGA Res 2202(XXI) (16 December 1966); UNGA Res 2307(XXII) (13 December 1967); UNGA Res 2396 (XXIII) (2 December 1968); UNGA Res 2671 F (XXV) (8 December 1970); UNGA Res 2775 E (XXVI) (29 November 1971).
[143] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD), preamble & art 3.
[144] Convention on the Non-Applicability of Statutory Limitations of War Crimes and Crimes Against Humanity (adopted 26 November 1968, 11 November 1970) 754 UNTS 73, art 1(b).
[145] International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243.
[146] This identified "practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination" as "grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol". See: Additional Protocol I, art 85(4)(c).
[147] For a primer and critical response to this view, see: John Dugard and John Reynolds, 'Apartheid, International Law, and the Occupied Palestinian Territory' (2013) 24(3) EJIL 867.
[148] As per Rome Statute, art 7(1)(j) & 7(2)(h).
[149] For an overview see Stahn (n 91) 69. Although this issue remains live, as we see in the recent *EJIL:Talk!* Symposium, which provides an example of how the discourse around the question of whether the Israeli state's policies towards Palestine and Palestinians can properly be labelled apartheid is often limited by a notion of an archetypal form of apartheid. See, in particular: Joshua Kern, 'Uncomfortable Truths: How HRW Errs in its Definition of "Israeli Apartheid", What is Missing, and What are the Implications?' (*EJIL: Talk!*, 7 July 2021) <https://www.ejiltalk.org/uncomfortable-truths-how-hrw-errs-in-its-definition-of-israeli-apartheid-what-is-missing-and-what-are-the-implications/> accessed 9 August 2021.
[150] Paul Eden, 'The Role of the Rome Statute in the Criminalisation of Apartheid' (2014) 12(2) Journal of International Criminal Justice 171, 184-5.

a crime against humanity, although how this impacts the crystallisation of customary international law is uncertain.[151] The Rome Statute thus marked a significant step in carrying forward these earlier developments. The emergence of the Apartheid Convention in the Cold War decades marked a "moral point of no return"[152] that made it impossible for the ILC to avoid including it in any draft codes of crimes produced in the 1990s.[153] And although this journey has been presented as a feat of *politicised* legal engineering,[154] its inclusion in the Rome Statute—as the most significant codification of international crimes—illustrates the success of the transnational anti-apartheid movement.[155] This is in spite of the relatively sparing attention international lawyers paid to it.[156]

Apartheid—as an international legal norm with penal characteristics—was also notable in providing a language through which anti-imperial sentiment could be expressed and mobilised and which provided a "rallying call" for the international human rights movement.[157] To dismiss it as a feat of politicised *legal engineering*, or to overlook the significance of its contribution as an important moment in the history of ICL, is thus to overlook how successfully grass-roots and extra-institutional movements mobilised to secure its censure and prohibition.[158] This process was also uniquely reflective of the dual context of the Cold War and decolonisation, not least because in both domestic and international settings, the Soviet Union and other Soviet-aligned states, provided support for the anti-apartheid movement.[159]

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[151] ibid 188-91.
[152] Stahn (n 91) 68.
[153] As in: 'Report of the International Law Commission on the Work of its Forty-Third Session (29 April – 19 July 1991)' (1991) II(2) Yearbook of the International Law Commission 79, 102; and 'Draft Code of Crimes Against the Peace and Security of Mankind' (1996) II Yearbook of the International Law Commission 17, art 18(f).
[154] On this, see: Alexander Zahar, 'Apartheid as an International Crime' in Antonio Cassesse (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 245-6; and Asad G. Kiyani, 'International Crime and the Politics of Criminal Theory: Voices and Conduct of Exclusion' (2015) 48(1) NYU Journal of International Law 129. Also see Lingaas noting this perception is itself rooted in older anxieties connected to a fear of Soviet influence: Lingaas (n 134), 90.
[155] Stevens describes it as one of the "largest, most widely supported, longest sustained, most significant, and most successful transnational movements of the twentieth century." See Simon Stevens, 'The External Struggle Against Apartheid: New Perspectives' (2016) 7(2) Humanity 295.
[156] Duggard and Reynolds note that despite codification attempts in various international instruments, it has received relatively scant attention from international lawyers: Dugard and Reynolds (n 147).
[157] John Reynolds, 'Third World Approaches to International Law and the Ghosts of Apartheid' in D. Keane and Y. McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar 2012). Although as a counterbalance, Mamdani has critiqued the application of the *Nuremberg paradigm* as a response to apartheid: Mahmood Mamdani, *Neither Settler Nor Native: The Making and Unmaking of Permanent Minorities* (HUP 2020) 192-5.
[158] Thörn has, for example, argued that the transnational anti-apartheid movement was a core part of the construction of global political culture and civil society during the Cold War. See: Håkan Thörn, *Anti-Apartheid and the Emergence of a Global Civil Society* (Palgrave MacMillan 2006); and Thörn, 'The Emergence of a Global Civil Society: The Case of Anti-Apartheid' (2006) 2(3) Journal of Civil Society 249.
[159] On Soviet support in the domestic context, see: Irina Filatova, 'South Africa's Soviet Connection' (2008) 6(2) History Compass 389; Sue Onslow (ed), *Cold War in Southern Africa: White Power, Black Liberation* (Routledge 2009); and Irina Filatova & Apollon Davidson, *The Hidden Thread: Russia and South Africa in the*

With much the same understanding in mind, our exploration of the development of crimes against humanity might also be expanded to include other forms of international criminality such as enforced disappearances. In contemporary ICL, enforced disappearance is included as a crime against humanity in Article 7(1)(i) of the Rome Statute. Whilst firm international commitments to outlaw this practice did not arrive until 1992 and 2006,[160] much of the advocacy work on bringing this issue to the fore occurred in the preceding decades.[161] These later international commitments had also been preceded by declarations by non-governmental organisations, regional human rights courts, and international organisations such as the Organisation of American States and the UN, that had characterised enforced disappearances as having the quality of a crime against humanity.[162] This produced "mutually reinforcing standards defining enforced disappearance as a human rights violation and characterizing it as a crime against humanity."[163]

Much like apartheid, the international crime of enforced disappearances was also uniquely reflective of Cold War decades. In this regard, specially affected states—such as those in Latin America—were crucial in advocating for its prohibition at the international level in this period.[164] And it is because of these efforts that a customary rule of international law emerged prohibiting enforced disappearances, which was subsequently reflected in the drafting of the Rome Statute in 1998.[165] Dulitzky has thus described Latin-America as a "norm innovator" for its contribution to coalescing a norm against enforced

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Soviet Era (Jonathan Ball Publishers 2013). For a broad overview and accompanying bibliography of this relationship in the international context, see: Sebastian Gehrig, James Mark, Paul Betts, Kim Christiaens, and Idesbald Goddeeris, 'The Eastern Bloc, Human Rights, and the Global Fight Against Apartheid' (2019) 46(2-3) East Central Europe 290.

[160] As per the Declaration on the Protection of All Persons from Enforced Disappearance, UNGA Res 47/133 (18 December 1992) UN Doc A/RES/47/133; Inter-American Convention on Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996) (1994) 33 ILM 1429; and International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3.

[161] With a notable first step made in: UNGA Res 33/173 (20 December 1978) UN Doc A/RES/33/173.

[162] Kirsten Anderson, 'How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?' (2006) 7(2) Melbourne Journal of International Law 245, 254-6.

[163] Christopher K. Hall & Larissa van den Herik, 'Article 7' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2nd ed, Beck Hart 2016) [87]-[91].

[164] On this generally, see: Barbara A. Frey, '*Los Desaparecidos:* The Latin American Experience as a Narrative Framework for the International Norm Against Enforced Disappearances' in Karina Ansolabehere, Leigh A. Payne, and Barbara A. Frey (eds), *Disappearance in the Post-Transition Era in Latin America* (OUP 2021); and Dawn Marie Paley, 'Cold War, Neoliberal War, and Disappearance: Observations from Mexico' (2021) 48(1) Latin American Perspectives 145.

[165] Antonio Cassese, *International Criminal Law* (1st edn, OUP 2003) 80. It should also be noted that whilst it was not defined in the ICTY or ICTR statutes, the Trial Chamber nevertheless accepted that it could constitute "other inhumane acts" under Article 5(i) of the ICTY Statute. See: *Prosecutor v Kupreškić et al* (Judgment) IT-95-16-T (14 January 2000) [566]

disappearances.[166] With both apartheid and enforced disappearances in mind, we thus get a sense of the wider development of ICL during this period.

7.3.5 Criminalising Acts of Aggression

The crime of aggression also underwent notable development during the Cold War, with this legacy visible in contemporary ICL. After a series of earlier attempts, the trial and judgment of the Nuremberg IMT marked the first successful imposition of individual criminal responsibility for waging a war of aggression.[167] The Charter of the IMT had criminalised "crimes against peace",[168] with the tribunal's judgment also characterising it as the "supreme international crime.[169] Despite these successes, the criminal prohibition against waging aggressive war struggled to coalesce as an international crime at the same pace that genocide, crimes against humanity, and war crimes did in subsequent years. This was despite the affirmation of this norm in the *Nuremberg Principles*,[170] as well the importance of prohibitions on the use of force in the UN Charter.[171] A lack of consensus regarding a definition of aggression stymied the progress of the ILC projects on a Draft Code of Crimes and a Draft Statute for a Permanent International Criminal Court.[172] The next substantive step came in 1974 following the General Assembly's adoption of Resolution 3314 (XXIX).[173]

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[166] Ariel E. Dulitzky, 'The Latin-American Flavor of Enforced Disappearances' (2019) 19(2) Chicago Journal of International Law 423. Although note that Finucane has argued, not uncontroversially, that enforced disappearances has older roots and derives from the laws of war: Brian Finucane, 'Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War' (2010) 35 Yale Journal of International Law 171.

[167] Kirsten Sellars, 'Delegitimising Aggression: First Steps and False starts After the First World War' (2012) 10(1) Journal of International Criminal Justice 7. For the attempts predating the post-First World War context, see: Randall Lesaffer, 'Aggression Before Versailles' (2018) (29(3) EJIL 773.

[168] This covered the "planning, preparation, initiation or waging of a war of aggression, or war in violation of international treaties, agreements or assurances, or preparation in a common plan or conspiracy for the accomplishment of any of the foregoing" as per the IMT Charter, art 6(a); and 'Charter of the International Military Tribunal for the Far East' as reprinted in Robert Cryer (ed), *International Criminal Law Documents* (CUP 2019), art 5(a)

[169] As the judgment of the IMT stated: "[t]o initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." See: *International Military Tribunal (Nuremberg), Judgment and Sentences* (1947) 41(1) AJIL 172, 186.

[170] See Principle VI of the Nuremberg Principles: 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal' (1950) II Yearbook of the International Law Commission 374, 376. Also see: Affirmation of the Principles of International Law Recognised by the Nürnberg Tribunal, UNGA Res 95(I) (11 December 1946).

[171] As per Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI ('UN Charter'). Preamble, art 1 & art 2.

[172] For an overview of how these complementary projects stalled, see: Cherif Bassiouni, 'The History of the Draft Code of Crimes Against the Peace and Security of Mankind' (1993) 27(1-2) Israel Law Review 247; and Leila Sadat, 'The Proposed Permanent International Criminal Court: An Appraisal' (1996) 29(3) Cornell Journal of International Law 665.

[173] Definition of Aggression, UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/3314.

Several attempts had been made to settle a definition in the preceding years,[174] with the Annex to Resolution 3314 (XXIX) adopting the definition of aggression produced by the 1967 Special Committee. Given that the resolution was intended to guide practice by the Security Council in finding acts of aggression by Member States, it also included a list of illustrative acts and integrative directions. However, this ultimately meant the Resolution was of limited value as regards the imposition of individual criminal responsibility, with the resolution primarily concerned with acts of *states* rather than *individuals.*[175] This is notwithstanding the statement in Article 5(2) of the Annex that a "war of aggression is a crime against international peace" giving rise to international responsibility.

Despite these limitations, Resolution 3314(XXIX) has proved influential to contemporary ICL by way of the Rome Statute,[176] which, as per Article 5, gave the Court jurisdiction over the crime of aggression.[177] The ICC eventually gained active jurisdiction over the crime of aggression following the activation of the Kampala Amendment on 17 July 2018.[178] Resolution 3314(XXIX) evidently influenced the formulation and drafting of the Kampala Amendment.[179] This is evident in the express reference to Resolution 3314(XXIX) in the definition of "acts of aggression" found in Article 8 *bis*(2), which also replicates word for word the list of illustrative acts contained in the resolution.[180] Although both provisions are not without their points of divergence, particularly given that Article 8*bis*(1) requires any acts of aggression by their "character, gravity and scale" to constitute "a manifest violation of the Charter of the United Nations."[181] A further point of dissonance, amongst others we

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[174] See: UNGA Res 688 (VII) (20 December 1952); UNGA Res 895 (IX) (4 December 1954); UNGA Res 1181 (XII) (29 November 1957); and UNGA Res 2330 (XXII) (18 December 1967). Also see: Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UNGA 2625(XXV) (24 October 1970). Resolution 2625(XXV) stated under the principle of the prohibition of the use of force that "a war of aggression constitutes a crime against the peace for which there is responsibility under international law". The ICJ later considered this resolution as evidence of customary international law in *Nicaragua v. United States* (n 175).

[175] This quality is noted by the ILC in their work on the *Draft Code of Crimes*. See: ILC, 'Report of the International Law on the Work of its 46th Session' (2 May-22 July 1994) UN Doc A/49/10, 38-39.

[176] Interestingly, although including crime of aggression, the commentary on the later *Draft Code of Crimes* did not refer to the definition contained in Resolution 3314 (XXIX), instead only referring to the Charter of the Nuremberg Tribunal. See: 'Draft Code of Crimes Against the Peace and Security of Mankind' (1996) II Yearbook of the International Law Commission 17, 42-3 (art 16).

[177] Although ultimately a full definition of aggression was left to a future date. See Rome Statute, art 5(2), as deleted in accordance with RC/Res.6, annex I, of 11 June 2010.

[178] Assembly of State Parties Resolution ICC-ASP/16/Res.5 (14 December 2017).

[179] Sean Summerfield, 'The Crime of Aggression: The Negotiations to Bring the Crime into Force and the Extent to which they have Advanced International Criminal Justice' (PhD Thesis, University of Sussex, 2019) <http://sro.sussex.ac.uk/id/eprint/82909/> accessed 2 November 2021, 35-7 & 43.

[180] Rome Statute, art 8 *bis* (2): "For the purpose of paragraph 1, "act of aggression" means 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. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression".

[181] On this as a new standard, see: Sean D. Murphy, 'The Crimes of Aggression at the International Criminal Court' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 552-5.

might identify,[182] is found in Article 5(2) of the Annex to Resolution 3314(XXIX) which suggests that only *wars* of aggression will constitute crimes against peace, rather than every act of aggression.[183] More generally, it should also be noted that the influence of Resolution 3314(XXIX) on Article 8*bis* has not avoided criticism.[184]

Notwithstanding these and other possible criticisms, however, Resolution 3314(XXIX) has clearly shaped contemporary ICL,[185] as well as the formation of customary international law more generally.[186] And by finding its way into the Rome Statute in this manner, it has brought the longstanding project of *outlawing war* to somewhat of a close—at least insofar as the definitional side of the project is concerned.[187] For this reason, McDougall argues that despite any limitations we might identify, Resolution 3314(XXIX) prompted the "rehabilitation of the international criminal court project."[188] Reclaiming this legacy is important not only for showing that substantive development did occur during the Cold War and at times emerged in response to the unique conditions of this period itself,[189] but also to the extent it highlights the contribution of the Soviet Union and members of the Non-

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[182] Murphy provides an overview of these. See ibid, 540-1 & 552-60.
[183] Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2011) 135.
[184] Sayapin, for example, criticises Article 8 *bis* for its reliance on a form of "soft law", whilst McDougall argues the state-centric aggression paradigm contained in Resolution 3314 (XXIX) is an awkward fit for the imposition of *individual* criminal responsibility. See: Sergey Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State* (Springer 2014) 264-5; and Carrie McDougall, *The Crime of Aggression Under the Rome Statute of the International Criminal Court* (CUP 2013) ch 3.
[185] Although opinions abound as to how productive this relationship has been. Cassese has, for example, criticised the definition contained in Resolution 3314(XXIX) for its potentially politicised usage: Antonio Cassese, 'On Some Problematical Aspects of the Crime of Aggression (2007) 20 LJIL 841, 844.
[186] As recognised by the House of Lords in: *R v Jones et al* [2006] UKHL 16, para 15 (Lord Bingham). As also considered by the ICJ in, for example: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 195; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 173, para 146. It should be noted that this influence is evident on legal understandings of aggression both as an international crime and as a prohibition under *jus ad bellum* and the international law on the use of force. On this overlap, see: Mary Ellen O'Connell and Mirakmal Niyazmatov, 'What is Aggression?: Comparing the Jus ad Bellum and the ICC Statute' (2012) 10(1) Journal of International Criminal Justice 189; Dinstein (ibid) 134-40; Murphy (n 181) 556-7; and Yudan Tan, *The Rome Statute as Evidence of Customary International Law* (Brill Nijhoff 2021) ch 5. This overlap is evident in Resolution 3314(XXIX) itself, given that it was intended both to define aggression as an international crime and to provide a guide for the UNSC when called upon to determine the existence of an act of aggression.
[187] Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster 2017); and Hathaway and Shapiro, 'International Law and Its Transformation Through the Outlawry of War' (2019) 95(1) International Affairs 45. It should be noted that as a matter of practice the UN Security Council has tended not to refer to this definition, although this should not necessarily be taken as a measure of its success alone: Ellen and Niyazmatov (n 186) 194-5.
[188] McDougall (n 184) 5-6.
[189] Particularly insofar as it had to respond to the increasingly indirect use of force during the Cold War years and whether it would be limited to *armed* aggression alone—Indeed, it was precisely this question that was at issue in the *Nicaragua* ICJ case mentioned above in (n 186). On this, see: McDougall (n 184) 94-95. For an overview of how debates on the crime of aggression were shaped by and developed during the course of the Cold War, see: Kirsten Sellars, 'The Legacy of the Tokyo Dissents on "Crimes Against Peace"' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (CUP 2017) 122-130. Contra this, Stahn characterises aggression as having fallen into "abeyance" during the Cold War when it was hampered by "competing visions about the legality of the use of force". See: Stahn (n 91) 98.

Aligned Movement (NAM).[190] It is also notable that NAM members did so with a distinctive understanding of aggression in mind, which reflected their broader political goals.[191]

7.3.6 The Cold War as 'Silent' or Generative?

With the above developments in mind, we get a sense that although there was certainly a lack of progress in terms of the institutional development of international criminal justice in this period, it is not fully accurate to characterise it as a period of *hiatus*, *stagnation*, or disciplinary *silence* where the spirit of Nuremberg fell silent.[192] Rather, the Cold War decades produced a number of important doctrinal developments that have shaped the contours of contemporary ICL.

Although this insight does not necessarily fatally undermine the 'hiatus' account—indeed, its basic premise is accepted here insofar as it recognises that the broader political context of the Cold War made the establishment of a permanent international criminal court infeasible—it nevertheless prompts us to consider its limits. Perhaps the most immediate of these relates to our understanding of the Cold War and how it impacted—or as is the case within the standard account, stunted—the development of ICL in this period. As we see in the above section, several notable doctrinal developments emerged in this period which continue to shape ICL today in terms of the crimes international criminal justice institutions assert jurisdiction over. Importantly, as was noted above, some of these developments were directly tied to the conditions of the Cold War itself. And in this sense, the Cold War left an indelible mark on the shape of ICL. This differs from the standard account to the extent that the Cold War might be viewed as an era that was generative, rather than unproductive or even counterproductive, in the development of the international criminal justice project. In this way, by highlighting the limits of the standard narrative it presents an opportunity to reappraise what has itself become an *unproductive* account of the field's development. The limits of this standard narrative will be further probed in the sections that follow.

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[190] As Bartman notes, the Soviet Union were one of the strongest proponents of settling the terms of a definition of aggression, with this project stretching back to the early 1930s: Christi Scott Bartman, 'Lawfare and the Definition of Aggression: What the Soviet Union and the Russian Federation Can Teach Us' (2010) 43(1) Case Western Reserve Journal of International Law 423. On the contribution of the NAM, see: Kirsten Sellars, '*Crimes Against Peace' and International Law* (CUP 2013) 265-76.

[191] Particularly insofar as economic aggression and acts of colonialism would be captured. On this, see Sellars (n 75) 133-5.

[192] See for example: Claus Kreß, 'International Criminal Law' in R. Wolfrum (ed), *Max Planck Encylopedia of Public International Law* (OUP 2009) para 48; Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurtst, *An Introduction to International Criminal Law and Procedure* (2nd edn, CUP 2010) 60; and Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (3rd edn, OUP 2014) 12.

7.4 The Achievements of the Ad hoc tribunals, the *Renaissance* of ICL, and the Movement Towards the ICC: A Story Oversold?

As noted previously, in the accepted account, the ad hoc tribunals are typically viewed as having been instrumental in bringing about a broad revival of ICL and, in particular, the new found desires for a permanent international criminal court ('PICC').[193] ICL scholarship is thus littered with references to the ad hoc tribunals as having paved the "road to Rome" [194] insofar as their successes brought about a kind of "cultural transformation" that created the conditions that made the ICC both desirable and viable.[195] The International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) were established by UN Security Council action in 1993 and 1994, respectively.[196] The first ICTY sentencing decision did not come until 1996 with a guilty plea in the *Erdemović* case.[197] And although indictments had been issued as early as November 1994,[198] it was only in mid-1996 that the focus shifted from issuing indictments and holding so-called 'Rule 61' hearings towards bringing the indicted to trial.[199] The budgetary resources needed to support this workload only materialised in December 1997,[200] with the preceding years plagued by funding, cash-flow, and staffing issues.[201] Only once these resource deficits had been addressed could the output of the Court increase. The ICTR

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[193] Georges Abi-Saab, 'The Concept of "War Crimes"' and Gabrielle Kirk McDonald, 'Contributions of the International Criminal Tribunals to the Development of Substantive International Humanitarian Law' in Sienho Yee and Wang Tieya (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge, 2003) 99 & 11 and 446-8.

[194] For examples of the "road to Rome" language, see: Leila Sadat, 'The International Criminal Court' in William Schabas (ed), *Cambridge Companion to International Criminal Law* (CUP 2015) 137; and Douglas Guilfoyle, *International Criminal Law (*OUP 2016) para 3.5. See also Clarke pointing out this tendency in ICL scholarship: Kamari Maxine Clarke, 'Founding Moments and Founding Fathers: Shaping Publics Through the Sentimentalisation of History Narratives' in Immi Tallgren and Thomas Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (Oxford University Press 2019) 36-41.

[195] Note the comments made in interviews conducted by Mégret in: Frederic Megret, 'The Legacy of the ICTY as Seen Through Some of its Actors and Observers' (2011) 3(3) Goettingen Journal of International Law 1011, 1021-2. See also: Fanny Benedetti, John L. Washburn, and Krine Bonneau, *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Brill 2013) 3-4.

[196] UNSC Res 808 (1993) UN Doc S/RES/808 (1993); UNSC Res 827 (1993) UN Doc S/RES/827 (1993); and UNSC Res 995 (8 November 1994) UN Doc S/RES/995.

[197] *Prosecutor v Erdemović* (Trial Chamber Judgment) IT-96-22-T (29 November 1996).

[198] *Prosecutor v Dragan Nikolic* (Review of Indictment) IT-94-2-I (4 November 1992).

[199] As per Rule 61 of the Rules and Procedure of Evidence of the ICTY, so-called 'Rule 61 Hearings' were a public restatement of indictment of the accused which both served as a reminder that they were wanted, and offered "victims of atrocities in the former Yugoslavia an opportunity to create an historical record against the accused." See: 'Rule 61 hearing scheduled for three JNA officers charged with Vukovar hospital massacre' (ICTY Press Release, 15 March 1996) CC/PIO/045-E <https://www.icty.org/en/press/rule-61-hearing-scheduled-three-jna-officers-charged-vukovar-hospital-massacre> accessed 9 November 2021.

[200] Sean D. Murphy, 'Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (1999) 93(1) AJIL 57, 58-60.

[201] Cryer et al (n 192) 125.

suffered a similar fate and had been hampered by funding and organisational issues up to February 1997 when the UN Office of Internal Oversight issued a rebuke,[202] with the first conviction coming in September 1998.[203]

In terms of how these contributions are taken to have created a "political consensus on creating an international criminal court that was not previously present",[204] we should note that by the time the *Preparatory Committee* had been established,[205] only a single decision had been rendered by the ICTY in the landmark *Tadić* decision.[206] The General Assembly created the Preparatory Committee on the Establishment of the International Criminal Court to prepare a consolidated draft text to be used in negotiations.[207] It held six meetings between 1996 and 1998,[208] with a final consolidated draft submitted to the Diplomatic Conference at Rome, which was due to run between 15 June and 17 July 1998.[209]

Without wanting to downplay the contributions the ad hoc tribunals made to bringing about this *cultural* and *political* transformation,[210] what I find interesting within ICL scholarship is how other contributing factors tend to be marginalised in favour of emphasising of this one set of institutional factors.

7.4.1 The Establishment of the ICC, Experiences with Post-Conflict Justice, and the Punitive Turn

As we have seen, when accounting for the emergence of the political will that would eventually give rise to the ICC, it is typically the achievements of the ad hoc tribunals,[211] as

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[202] UN Secretary General, 'Report of the Secretary-General on the Activities of the Office of Internal Oversight Services' (6 February 1997) A/51/789.
[203] *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998).
[204] Sadat (n 172) 666.
[205] As established by UNGA Res 50(46) (11 December 1995) UN Doc A/RES/50/46.
[206] *Prosecutor v Duško Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995).
[207] The Preparatory Committee had itself been established by the General Assembly following on from the work of the Ad Hoc Committee on the Establishment of an International Criminal Court. The Ad Hoc Committee had been established following the presentation of a final draft by the ILC to the General Assembly in 1994. On this, see: Ambos (n 12) 23, notes 168 and 169.
[208] ibid 23.
[209] Cassese (n 104) 342.
[210] Indeed, based on certain accounts of those involved in the negotiations it appears that the mere existence of the ad hoc tribunals, although not necessarily the success of its caseload, was a factor. See for example: John Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century' (1999) 11(2) Pace International Law Review 361, 364; Philippe Kirsch and Valerie Oosterveld, 'Negotiating an Institution for the Twenty-First Century: Multilateral Diplomacy and the International Criminal Court' (2001) 46(4) McGill Law Journal 1141, 1146; and Philippe Kirsch and John T. Holmes, 'The Birth of the International Criminal Court: The 1998 Rome Conference' (1999) 36 Canadian Yearbook of International Law 3. On this more generally, see: Benedetti et al (n 195) 2-3.
[211] Stuart Ford, 'The Impact of the Ad Hoc Tribunals on the International Criminal Court' in Milena Sterio and Michael Scharf (eds) *The Legacy of the Ad Hoc Tribunals in International Criminal Law: Assessing the ICTY's and the ICTR's Most Significant Legal Accomplishments* (CUP 2019) 2; Benedetti et al (n 195) 3.

well as a growing sense of tribunal fatigue,[212] that is said to have prompted a move from *ad hoc* to *permanent* international criminal justice. However, often overlooked in this account are the various attempts at post-conflict and post-atrocity justice that occurred in the preceding decades and which primed the international community for these institutional developments occurring from the mid-1990s onward. Although not always strictly following the *Nuremberg paradigm*, these efforts included criminal trials, truth commissions, reparation schemes, lustration, as well as museums, public monuments, and other sites of memorialisation.[213]

Truth commissions proved particularly popular, with Hayner identifying a total of seventeen having been initiated by the time the Rome Statute negotiations were held.[214] Notably, truth commissions had been held by Argentina and South Africa, who would draw on these experiences in the Rome Statute negotiations.[215] These experiences were channelled through their work as part of the so-called 'like-minded group' (LMG), which was one of the more active and influential groupings of states during the negotiations. The LMG had formed during the meetings of the Ad Hoc Committee and the Preparatory Committee for the Establishment of an International Criminal Court (PrepCom) and would eventually grow to a coalition of over sixty states.[216] Notably, this grouping included many states with fresh experiences of human rights atrocities, with South American and African states well-represented.[217] Amongst these, Argentina and South Africa assumed prominent roles for their regional blocs, [218] both of whom, as we have seen, had recent experiences with post-

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[212] M. Cherif Bassiouni, 'Establishing an International Criminal Court: Historical Survey' (1995) 149 Military Law Review 49, 57; Philippe Kirsch, 'The International Criminal Court: Current Issues an Perspectives' (2001) 64(1) Law & Contemporary Problems 3, 4.

[213] On this trend, see: Elizabeth Jellin, *State Repression and the Labors of Memory* (University of Minnesota Press 2003).

[214] Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2011) 256-262.

[215] Argentina held a truth commission between December 1983 and 1984 to investigate forced disappearances, extra-judicial killings, and torture, whilst South Africa had initiated a truth commission between 1995 and 2002, which was supported by amnesties, as part of the post-Apartheid transition. See: Aryeh Neier, *The International Human Rights Movement: A History* (Princeton University Press 2012) 260 & 262-3.

[216] M. Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32(3) Cornell International Law Journal 443, 455. It included: Australia, Austria, Argentina,Belgium, Canada, Chile, Croatia, Denmark, Egypt, Finland, Germany, Greece, Guatemala, Hungary, Ireland, Italy, Lesotho, the Netherlands, New Zealand, Norway, Portugal, Samoa, Slovakia, South Africa, Sweden, Switzerland, Trinidad and Tobago (representing 12 Caricom states), Uruguay, and Venezuela.

[217] The South American states included Argentina, Chile, Costa Rica, and Venezuela. Whilst African members included Benin, Burkina Faso, Burundi, Congo (Brazzaville), Gabon, Ghana, Lesotho, Malawi, Namibia, Senegal, Sierra Leone, South Africa, Swaziland, and Zambia. The full list of sixty-two states is provided in: William Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011).

[218] Washburn (n 210) 368. South Africa took a prominent role both informally through the like-minded group, as well as through their membership of the South African Development Community (SADC). See: Schabas, ibid 16.

atrocity justice.[219] Alvarez specifically references Argentina's history of military dictatorship, political repression, extra-judicial killings, forced disappearances, and torture when accounting for their involvement.[220] This was also true of South Africa,[221] who raised questions regarding the treatment of amnesties granted in conjunction with a truth and reconciliation commission during negotiations.[222]

Bassiouni identifies the LMG as important to the eventual success of the diplomatic conference,[223] with these states "solidly united behind the creation of a court through the conference, and in the end agreed to make significant concession for the sake of its establishment."[224] It thus seems little surprise that states in this grouping—particularly Sierra Leone, Argentina, Germany, Bosnia, and Sri Lanka, amongst others—made express references to their own experiences dealing with human rights atrocities in their speeches during the negotiations.[225] Their efforts were also helped by the many NGOs present during the negotiation process,[226] who had particularly close relationships with the LMG.[227] Despite these experiences and how they impacted the Diplomatic Conference's ultimate success, it is most often the successes of the ad hoc tribunals and the shifting politics of the post-Cold War era that are identified as creating the conditions in which the ICC could emerge.[228]

Another factor we might identify as contributing to this turn towards the ICC, is a more broadly punitive turn underway at the time—particularly as it was occurring within the international human rights movement. Writing in 1991, for example, Ortenlicher noted the limits of amnesty laws and argued for a move towards criminal prosecutions for human rights abuse.[229] For Ortenlicher and others, prosecutions were increasingly viewed as the

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[219] Kirsch and Holmes (n 210) 9; and Washburn (n 210) 367-8.
[220] Alejandro E. Alvarez, 'The Implementation of the ICC Statute in Argentina' (2007) 5(2) Journal of International Criminal Justice 480, 480-1. Also see Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement* (Routledge 2005) 22. As argued above in ss.7.3.2 & 7.3.4 above, this influence can be noted with regard to torture, enforced disappearances, and apartheid as crimes against humanity in contemporary ICL.
[221] Benedetti et al (n 195) 37.
[222] Hayner (n 214) 110.
[223] Bassiouni (n 216) 449.
[224] Kirsch and Holmes (n 210) 9.
[225] Washburn (n 210) 365 & 367.
[226] On the importance of NGOs for the ICC: Cenap Çakmak, 'Transnational Activism in World Politics and Effectiveness of a Loosely Organised Principled Global Network: The Case of the NGO Coalition for an International Criminal Court' (2008) 12(3) International Journal of Human Rights 373; and Zoe Pearson, 'Non-Governmental Organisations and the International Criminal Court: Changing Landscapes of International Law' (2006) 39(2) Cornell international Law Journal 243.
[227] Gina E. Hill, 'A Case of NGO Participation: International Criminal Court Negotiations' in James Walker and Andrew Thompson (eds), *Critical Mass: The Emergence of Global Civil Society* (Wilfred Laurier University Press 2008) 142-4; and Barbara Bedont and David Matas, 'Negotiating for an International Criminal Court: The Like Minded and the Non-Governmental' (*Peace Magazine,* September 1998) <http://peacemagazine.org/archive/v14n5p21.htm> accessed 4 November 2021.
[228] Kirsch and Holmes (n 210); and Benedetti et al (n 195) 3-4.
[229] Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100(8) The Yale Law Journal 2537.

appropriate method for bringing about democratic transitions in post-conflict and post-atrocity societies, as well as a matter of international obligation.[230] Concomitantly, there was a decreased appetite for pursuing state accountability for international crimes and a move towards *individual* criminal accountability.[231]

Engle argues this criminal turn within the international human rights movement crystalised in the early 1990s as a culture of "anti-impunity" took root and increasingly focused on punitive, rather than transitional justice measures.[232] Two trends indicate this: firstly, increased calls for international criminal institutions, and secondly, a punitive trend in the jurisprudence of human rights institutions such as the Inter-American Court of Human Rights.[233] This latter trend saw human rights institutions increasingly imposing positive obligations on states to criminalise, prosecute, and punish whilst also limiting the use of clemencies or amnesties.[234] Huneeus describes this as the "quasi-criminal jurisdictions" of human rights courts.[235] Consequently, criminal processes became the preferred transitional justice mechanism ahead of truth and reconciliation commissions or amnesty laws—particularly in South America.[236] And where truth commissions were used, they also increasingly took on a *criminal* character,[237] which Mamdani notes of the South African truth and reconciliation process.[238] We thus get a sense of the growing influence of *criminal* paradigms on responses to human rights violations.[239]

Viewed from this vantage point, projects such as the ad hoc tribunals and the ICC were thus not just the products of the *rebirth* and *renaissance* of older ideas about international criminal justice that lay dormant during the Cold War. Rather, they were also connected to

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[230] For example: Ortenlicher, ibid; Carlos S. Nino, 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991) 100(8) The Yale Law Journal 2619; Nino, *Radical Evil on Trial* (Yale University Press 1996); and Naomi Roht-Arriaza, 'Combating Impunity: Some Thoughts on the Way Forward' (1996) 59(4) Law and Contemporary Problems 93, 93.
[231] Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100(5) Cornell Law Review 1069, 1071; and Kathryn Sikkink, *The Justice Cascade: How Human Rights prosecutions are Changing the World* (W.N. Norton 2011) 28.
[232] Karen Engle, 'A Genealogy of the Criminal Turn in Human Rights' in Karen Engle, Zinaida Miller, and D.M. Davis (eds), *The Human Rights Agenda and the Struggle Against Impunity* (CUP 2016) 17-19.
[233] Karen Engle, 'Mapping the Shift: Human Rights and Criminal Law' (2018) 112 ASIL: Proceedings of the Annual Meeting 84; and Engle (n 231) 1079.
[234] Mattia Pinto, 'Historical Trends of Human Rights Gone Criminal' (2020) 42(4) Human Rights Quarterly 729, 749; and Pinto, 'Awakening the Leviathan Through Human Rights Law - How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34(2) Utrecht Journal of International and European Law 161, 182.
[235] Alexandra Huneeus, 'International Criminal Law by other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107(1) AJIL 1.
[236] Kathryn Sikkink and Carrie Booth Walling, 'The Impact of Human Rights Trials in Latin America' (2007) 44(4) Journal of Peace Research 427; Cath Collins, 'State Terror and the Law: The (Re)Judicialization of Human Rights Accountability in Chile and El Salvador' (2008) 35(5) Latin American Perspectives 20.
[237] Hayner (n 214) 235.
[238] Mahmood Mamdani, 'Beyond Nuremberg: The Historical Significance of the Post-apartheid Transition in South Africa' (2015) 43(1) Politics & Society 61.
[239] Engle (n 231) 1072.

changes in the nature and focus of human rights discourses and a growing anti-impunity project that had roots in places such as South America and Africa. It seems limited, then, to explain a development that was evidently multi-causal by focusing on one particular institutional trend. Nevertheless, this tendency persists within ICL scholarship. And we thus tend to single out the contributions of the ad hoc tribunals as triggering the *renaissance* of ICL and moving us towards the ICC. In this regard, ICL scholarship repeats a familiar narrative of institutional progress where, following decades of disciplinary stasis, the sudden emergence of the ad hoc tribunals revitalised the project of international criminal justice and *paved the road to Rome*.[240] As we have seen, however, these institutional developments occurred within a much broader confluence of factors that increased demand for international criminal justice institutions in the decades preceding the *renaissance*. Rather than simply repeating a narrative in which institutional success brought about a "cultural transformation",[241] we should thus recognise that the causes of this transformation might also have roots outside the familiar institutional settings we typically focus on.[242]

7.5 The Resurrection of the Project for a Permanent International Criminal Court: Moving Beyond the Standard Narrative

In addition to the more general influence of the ad hoc tribunals, another important plot point that is said to mark the transition between the *hibernation* and *renaissance* phases is the proposal put forward by Trinidad and Tobago for a PICC.

This proposal was put forward in a special session held by the UN General Assembly on international Drug Trafficking, and requested the inclusion on the agenda of the forty-fourth session a proposal that envisioned a specialised international criminal court to deal with international drug trafficking, particularly where domestic prosecution was not possible

[240] See for example: Jelena Pejic, 'Accountability for International Crimes: From Conjecture to Reality' (2002) 84(845) International Review of the Red Cross 1, 15; and Ford (n 211) 2. On the ad hoc tribunals as triggering the *rebirth* and *renaissance* of ICL, see: Guilfoyle (n 194) para 3.5; Janine Natalya Clarke, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (Routledge 2014) 21; Kreß (n 192) para 48; Werle and Jessberger (n 192) 14; and David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (OUP 2014) 34.
[241] See, for example, the comments made over the course of interviews in Mégret (n 195) 1021-2.
[242] Indeed, Engle notes that developments such as the establishment of the ICTY under the Chapter VII powers of the UNSC were immediately claimed as a human rights project. See: Engle (n 226) 40. Although, of course, we should note Nesiah's caution against too uncritically buying into the transhistorical 'anti-impunity' narrative that so often enraptures international law scholars: See Vasuki Nesiah, 'Doing History with Impunity' in Karen Engle, Zinaida Miller, and D.M. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (CUP 2017).

(the 'Trinidadian Proposal' hereafter).[243] Colombian President César Gaviria Trujillo would later deliver a supporting statement for this proposal.[244] On foot of the proposal, the General Assembly requested the ILC to consider the possibility of establishing an "international criminal court or other international criminal mechanism with jurisdiction over persons alleged to have committed crimes".[245] The ILC completed a report in 1990, which was submitted to the forty-fifth session of the General Assembly, with the General Assembly encouraging the ILC to continue their work.[246] Updated texts were produced in 1993 and 1994.[247] In 1994, the commission presented a final draft to the General Assembly, who then referred it to the Ad Hoc Committee on the Establishment of an International Criminal Court. A final report was produced in 1995 after two sessions.[248] After considering this final report, the General Assembly created the Preparatory Committee on the Establishment of the International Criminal Court, which was charged with preparing a consolidated draft text.[249] And between 1996 and 1998, this was finalised over six meetings.[250] A final, consolidated draft was submitted to the Diplomatic Conference at Rome, which ran from 15 June to 17 July 1998. And finally, after a month of intense negotiations, the Rome Statute was agreed upon by a vote of one hundred and twenty in favour, seven against, and twenty-one abstentions.

Within ICL scholarship, the Trinidadian Proposal is presented as triggering a sequence of institutional developments that would lead to the eventual establishment of the ICC. [251]

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[243] UNGA 'Letter Dated 21 August 1989 from the Permanent Representative of Trinidad and Tobago to the United Nations Addressed to the Secretary-General' (21 August 1989) UN Doc A/44/195.
[244] As referenced in his inaugural address: James Brooke, 'Colombia Leader Emphasizes Anti-Terrorism' *The New York Times* (New York, 12 August 1990) <https://www.nytimes.com/1990/08/12/world/colombia-leader-emphasizes-anti-terrorism.html> accessed 1 April 2022.
[245] UNGA Res 44(39) (4 December 1989) UN Doc A/RES/44/39.
[246] Cassese (n 104) 341. See generally: ILC, 'Report of the International Law Commission on the Work of its 42nd Session' (1 May-20 July 1990) UN Doc A/45/10.
[247] ILC, 'Report of the International Law on the Work of its 46th Session' (2 May-22 July 1994) UN Doc A/49/10.
[248] Ambos (n 12) 23, notes 168 & 169.
[249] For an overview of this sequence of institutional developments, see: M. Cherif Bassiouni, *Introduction to International Criminal Law: Second Revised Edition* (Martinus Nijhoff 2014) 584-7; and M. Cherif Bassiouni and William Schabas (eds), *The Legislative History of the International Criminal Court: Second Revised and Expanded Edition, Volume 1* (Brill Nijhoff 2016) 69-70.
[250] Ambos (n 12) 23.
[251] For some examples of this, see: Cassese (n 104) 261-2; Glasius (n 220) 9-11; Ilias Bantekas and Susan Nash, *International Criminal Law* (3rd edn, Routledge 2007) 535; Benjamin Schiff, *Building the International Criminal Court* (CUP 2008) 37; Richard Goldstone, 'The 19th Annual McDonald Constitutional Lecture: The Future of International Criminal Justice ' (2009) 14(1) Review of Constitutional Studies 1, 10; David Scheffer, 'The International Criminal Court' in William A. Schabas and Nadia Bernaz (eds), *The Routledge Handbook of International Criminal Law* (Routledge, 2010) 67; Cryer et al (n 192) 145; Tracy Isaacs, 'Introduction: Accountability for Collective Wrongdoing' in Tracy Isaacs and Richard Vernon (eds), *Accountability for Collective Wrongdoing* (CUP 2011) 2-3; Werle and Jessberger (n 192) para 58; Richard Goldstone and Adam M. Smith, *International Judicial Institutions: The Architecture of International Justice at Home and Abroad* (2nd edn, Routledge 2015) 112-3; Andrew Novak, *The International Criminal Court: An Introduction* (Springer 2015) 18-19; Roger O'Keefe, *International Criminal Law* (OUP 2015) para 14.5; Andreas Zimmerman, 'Article 5' in Otto Triffeter and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*

And when combined with the successes of the ad hoc tribunals, it made the eventual establishment of the ICC in 1998 an apparent inevitability by reintroducing the proposal back onto the institutional agendas of the ILC and General Assembly. Without necessarily wanting to dispute or affirm the importance of the Trinidadian Proposal, however, we should nevertheless be cautious in how much narrative weight we place on it. To this end, we should note that whilst Trinidad introduced the idea for a PICC as a procedural matter, this is not to say that it resurrected the idea more generally—as is often implied in the accounts identified.[252] With this in mind, in the following subsections I will introduce other considerations that could be considered, and which help us to understand the broader context in which the proposal for a PICC emerged once again. They are, firstly, the previous work of Doudou Thiam for the ILC; secondly, 'perestroika' thinking and Gorbachev's proposal; and thirdly, the First Gulf War. Whilst these caveats are not cause to completely disregard the value of the Trinidadian Proposal, they are nevertheless a sign that we should perhaps reduce the narrative weight we place on it when accounting for the (re)emergence of desires for a PICC.

7.5.1 Special Rapporteur Doudou Thiam and the International Law Commission

Often omitted in the above account is the work of Senegalese Special Rapporteur Doudou Thiam in the preceding decade, which was important in setting up the institutional developments that would gain momentum following Trinidad's proposal. In 1981, the General Assembly invited the ILC to resume its work on the *Draft Code of Offences Against the Peace and Security of Mankind* with a renewed priority,[253] with the project having evolved at a glacial pace in the preceding decades due to a lack of consensus on the

(Hart 2016) 115; Bassiouni (n 249) 584; Bassiouni and Schabas (n 248) 69; Margaret M. deGuzman, 'Justifying Extraterritorial War Crimes Trials' (2018) 12 Criminal Law and Philosophy 289, 304; Dominic McGoldrick, 'Criminal Trials Before International Tribunals: Legality and Legitimacy' in Salla Huikuri (ed), *The Institutionalisation of the International Criminal Court* (Palgrave MacMillan 2019) 6; William Schabas, *An Introduction to the International Criminal Court* (6th edn, CUP 2020) 10 & 81.

[252] See for example Sadat noting that: "In 1989, the question of an international criminal jurisdiction found its way back on the UN General Assembly's agenda with the collapse of the Soviet Union and the resulting thaw in East-West relations." Leila Sadat, 'Justice without Fear or Favour? The Uncertain Future of the International Criminal Court' in Alexander Heinze and Viviane E. Dittrich (eds), *The Past, Present and Future of the International Criminal Court* (TOAEP 2021) 124.

[253] The General Assembly reaffirmed support for the ILC's work on an annual basis during the 1980s: UNGA Res 36/106 (10 December 1981); UNGA Res 37/102 (16 December 1982); UNGA Res 38/132 (19 December 1983); UNGA Res 39/80 (13 December 1984); UNGA Res 40/69 (11 December 1985); UNGA Res 41/75 (3 December 1986); UNGA Res 42/151 (7 December 1987); UNGA Res 43/164 (9 December 1988); and UNGA Res 44/32 (4 December 1989).

definition of aggression.[254] Subsequently, Thiam was charged with advancing the project at the ILC's thirty-fourth session, following his appointment as Special Rapporteur in 1982.[255] A first report was produced in 1983, after which the General Assembly invited the Commission to continue working on the *Draft Code,* as well as to explore expanding their mandate to prepare a statute for an international institution with international criminal jurisdiction.[256] Further progress was made at the thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth, and forty-first sessions.[257]

At the forty-second session, the ILC prepared a response to the General Assembly's question regarding the establishment of an international criminal court—which came on the foot of the Trinidadian proposal—and adopted articles relating to international terrorism, mercenaries, and drug trafficking.[258] A first draft of the *Draft Code of Crimes* was adopted by the ILC in 1991, which included a notably broader subject matter jurisdiction than eventually emerged in the Rome Statute negotiations.[259] These efforts were endorsed in General Assembly resolution 46/54 in 1991, which urged member state governments to submit comments and observations on the draft.[260]

Concurrently, there was also considerable academic activism pushing the project forward. Writing of the inclusion of the *Draft Code* back onto the General Assembly agenda in 1978, Bassiouni identifies it as the product of efforts by several governments and NGOs.[261] Some of this work came in the form of alternative drafts of the *Draft Code*, such as Bassiouni's work with the *International Association of Penal Law*.[262] This contribution

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[254] This matter was given a renewed priority in 1978 and 1980, particularly in light of UNGA Res 3314 (XXIX) which produced a definition of aggression, with the General Assembly directing the ILC to increase their efforts: UNGA Res 33/97 (16 December 1978); and UNGA Res 35/49 (4 December 1980).
[255] ILC, 'Report of the Commission to the General Assembly on the Work of the Thirty-Fourth Session' [1982] II(2) Yearbook of the International Law Commission 1, [252].
[256] ILC, 'First Report on the Draft Code of Offences Against the Peace and Security of Mankind by Mr. Doudou Thiam, Special Rapporteur' [1983] II(1) Yearbook of the International Law Commission 137; and ILC, 'Report of the Commission to the General Assembly on the Work of its Thirty-Fifth Session' [1983] II(2) Yearbook of the International Law Commission 10.
[257] See for example: Gudmundur Eiriksson, 'The Work of the International Law Commission at its 41st Session' (1989) 58(3-4) Nordic Journal of International Law 287, 291-94.
[258] Gudmundur Eiriksson, 'The Work of the International Law Commission at its 42nd Session' (1990) 59(2-3) Nordic Journal of International Law 204.
[259] It covered proposed crimes such as colonial domination, drugs trafficking, international terrorism, and wilful and severe environmental damage. See the: 'Report of the International Law Commission on the Work of its Forty-Third Session (29 April – 19 July 1991)' (n 153).
[260] UNGA Res 46/54 (9 December 1991) UN Doc A/RES/46(54); and also UNGA Res 47(33) (25 November 1992) UN Doc A/RES/47(33).
[261] Bassiouni (n 249) 582.
[262] See, for example: M. Cherif Bassiouni, *International Criminal Law: A Draft International Criminal Code* (1980). On this, see: Bassiouni (n 114) 345-7. Bassiouni had also been commissioned to prepare a draft statute for an international criminal tribunal to implement certain provisions of the Apartheid Convention: Bassiouni, 'Chronology of Efforts to Establish an International Criminal Court' (2015) 86(3) Revue Internationale de Droit Pénal 1163, 1167-8. The work of Ferencz was also important: Benjamin Ferencz, *An International Criminal Court: A Step Toward World Peace — A Documentary History and Analysis. Vol. I: Half a Century of Hope* (Oceana Publications 1980).

was significant not only for the production of the alternative draft, but also due to Bassiouni's proximity to A.N. Robinson, who was the Trinidad and Tobago Prime Minister who would later raise the proposal for the Court before the General Assembly in 1989. Not only had Robinson studied Bassiouni's earlier proposal,[263] he had also been an active member of the *Foundation for the Establishment of an International Criminal Court*,[264] which was an organisation coordinated by Robert Kurt Woetzel and which advocated for the establishment of such a court.[265] Interestingly, Bassiouni notes that himself, Ferencz, and Woetzel had intended the later Trinidadian proposal to act as a way of "opening the door to the UN revisiting the question after the long history of failure".[266]

In terms of what this perspective brings, we see that in contrast to the extemporaneous terms in which it is presented within ICL scholarship,[267] there were other forces at play by the time the Trinidadian Proposal emerged. Although accounts vary as to how effective Thiam's work was,[268] his efforts nevertheless kept the project alive in the preceding decades—particularly in light of the fact that the project for a PICC had early on been split into two distinct strands, with a third added later.[269]

7.5.2 Proposals for a Permanent International Criminal Court: A Product of Perestroika Thinking?

Another narrative thread we might add to the Trinidadian Proposal, and which gives us a broader sense of the building desires for a PICC in the preceding decade, comes in the vision for the international legal order set out by the then President of the Soviet Union, Mikhail Gorbachev. In a public letter addressed to the UN,[270] Gorbachev made several

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[263] Bassiouni ibid 1172.
[264] Bassiouni (n 114) 348, note 104.
[265] See for example: J. Stone and Robert K. Woetzel (Eds), T*oward a Feasible International Criminal Court* (World Peace Through Law Center 1970); and Foundation for the Establishment of an International Criminal Court, *The Establishment of an International Criminal Court: A Report on the First International Criminal Law Conference* (Foundation for the Establishment of an International Criminal Court 1971).
[266] Bassiouni (n 109) 348, note 104.
[267] See e.g. Bantekas and Nash (n 251) 535.
[268] Bassiouni paints a rather negative portrait of Thiam and the work he produced, describing him as "ill-prepared" and as having produced a "flawed text". See Bassiouni (n 114) 347.
[269] It should also be noted that the project for establishing a PICC had early on been split into two distinct but closely linked projects by the Special Rapporteur Ricardo Alfaro. Alfaro had been tasked with formulating a *Draft Statute for the Establishment of an International Criminal Court*, and following his first report to the ILC in March 1950, the two codification projects for a draft code of international crimes and a draft statute for a PICC were established and proceeded along largely compartmentalised lines from then on. This splitting itself spawned a third codification project in the attempt to settle a definition of aggression. The projects were later merged in the mid-1990s when the institutional momentum had built back within General Assembly and the ILC. See: Bassiouni (n 166) 250-6; Bassiouni and Schabas (n 249) 61.
[270] Which was published in parallel with the opening of the General Assembly in September 1987.

suggestions for reforming the organisation.[271] These included: creating a mechanism for monitoring arms limitation agreements, taking a more active role in crisis or military situations, increasing peacekeeping and military observers to contain conflict, increased use of the ICJ, and assuming an active role in tackling environmental issues, nuclear proliferation, and global economic inequality.[272] Another notable proposal was for the establishment of a tribunal under UN auspices to investigate acts of international terrorism, as well as "more coordination in the struggle against apartheid as a destabilising factor of international magnitude."[273] These proposals were envisioned to be "organically built into an all-embracing system of peace and security", where "universal law and order ensuring the primacy of international law in politics" would be central to the peace and security system.[274] The Minister of Foreign Affairs for the Union of Soviet Socialist Republics (USSR) and future President of Georgia would later support these comments, noting an imperative to create a new legal environment in international affairs where those committing international crimes could not escape punishment.[275] Gorbachev would return to this idea in a speech before the UN, which mentioned the possibility of expanding the compulsory jurisdiction of the ICJ to cover certain human rights violations and expanding the UN human rights monitoring arrangements.[276]

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[271] Mikhail Gorbachev, 'Реальность и гарантии безопасного мира' ('Reality and Guarantees of a Secure World') (17 Sept, 1987) Pravda. For an overview, see: John Quigley, 'Perestroika and International Law' (1988) 82(4) The American Journal of International Law 788, 794-5.

[272] English translation reprinted in: Mikhail Gorbachev, 'The Reality and Guarantees of a Secure World' (*Soviet News,* 23 Sept 1987) No. 6393.

[273] ibid. We should also note that the *Apartheid Convention* had made provision for the possibility of establishing an international criminal jurisdiction under Article V, and that Bassiouni had been tasked by the UN Commission on Human Rights Ad Hoc Working Group on Southern Africa to draft a statute to implement this. See: M. Cherif Bassiouni and Daniel H. Derby, 'Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments' (1981) 9(2) Hofstra Law Review 523; and M. Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Martinus Nijhoff 1987) 10-11. Bassiouni also suggests Gorbachev was likely made aware of these efforts through his advisor Professor Vladimir Kudriavtsev, who was also at the Vice-President of the International Association of Penal Law (AIDP): Bassiouni (n 262) 1170.

[274] Gorbachev (n 271).

[275] Shevardnadze noted the need to ensure: "to create as soon as possible a moral and legal environment in which anyone guilty of grave crimes against humanity, or participating in atrocities, in taking hostages, acts of terrorism or torture, and those guilty of particular ruthlessness in the use of force, could not escape punishment and would not be absolved from personal responsibility even if they acted under orders." Address by Eduard Shevardnadze to the Forty-Fifth Session of the United Nations General Assembly (25 September 1990) as quoted in 'Confrontation in the Gulf: Excerpts from Shevardnadze's U.N. Address Calling for Iraq to Quit Kuwait' *The New York Time* (New York, 26 September 1990) 10 <https://www.nytimes.com/1990/09/26/world/confrontation-gulf-excerpts-shevardnadze-s-un-address-calling-for-iraq-quit.html> accessed 1 April 2022.

[276] Gorbachev stated a desire to: "[E]xpand the Soviet Union's participation in the human rights monitoring arrangements of the United Nations and the Conference on Security and Co-Operation in Europe (CSCE). We believe that the jurisdiction of the International Court of Justice at The Hague as regards the interpretation and implementation of agreements on human rights should be binding on all states." See: 'General Assembly 43rd Session, Provisional Verbatim Record of the Seventy-Second Meeting (7 December 1988) UN Doc A/43/PV.72, 26.

Commenting on these proposals in a meeting before the *American Society of International Law* in April 1988, Soviet international lawyer and diplomat Grigori Tunkin noted the changing Soviet position on international law and organisation was characterised by "new approaches, new thinking".[277] This *new thinking* was rooted in a realisation that the "world has changed radically and that old concepts and methods in international politics must be abandoned and replaced by new ones dictated by new realities."[278] One of these new realities included the growing interrelationship and interdependence of nations, which should be supported by the creation of global systems of common security. Tunkin also noted various *collective problems* which were characterised by the need to "create effective international mechanisms for solving international problems and enforcing international law."[279] This *new thinking* emerged within the broader context of *perestroika*,[280] which was one element of the new approach to domestic and foreign policy consisting of: *glasnost* (openness), *perestroika* (restructuring), *demokratizatsiya* (democratisation), *uskoreniye* (acceleration), and a turn to common human values.[281]

This change in approach manifested in the USSR's acceptance of the compulsory jurisdiction of the ICJ under six human rights treaties in 1989,[282] which included the Genocide Convention and the Convention Against Torture, and which signalled this *new thinking*.[283] This ended over half a century of "defensive Soviet attitudes towards international judicial settlement" and implemented Gorbachev's new approach and vision.[284] It reflected an approach concerned with solving international peace and security challenges collectively and considered *universal* international law as having primacy over

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[277] Grigori Tunkin, 'Luncheon Address By: Grigori Tunkin' (1988) 82 Proceedings of the ASIL Annual Meeting 142.
[278] ibid 143.
[279] Ibid. These collective problems included: nuclear weapons, economic security, ecological security, and human rights and fundamental freedoms.
[280] Some of these thoughts were captured in Gorbachev's commercially successful book: Mikhail Gorbachev, *Perestroika: New Thinking for Our Country and the World* (Harper Collins 1987).
[281] Bill Bowring and Katharina Roswold, *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Taylor and Francis 2013) 143.
[282] The USSR Minister for Foreign Affairs Eduard Shevardnadze had informed the UN Secretary General in a February 28, 1989 letter. Unofficial translation reprinted in: 'Official Documents: Soviet Union Accepts Compulsory Jurisdiction of ICJ for Six Human Rights Conventions' (1989) 83(2) AJIL 457.
[283] The treaties the USSR dropped their reservations to the compulsory jurisdiction of the International Court of Justice included: the Convention for the Suppression and Punishment of the Crime of Genocide; the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; the Convention on the Political Rights of Women; the Convention of the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination Against Women; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See: Theodor Schweisfurth, 'The Acceptance by the Soviet Union of the Compulsory Jurisdiction of the ICJ for six Human Rights Conventions' (1990) 2 EJIL 110.
[284] Edward McWhinney, 'The "New Thinking" in Soviet International Law: Soviet Doctrines and Practice in the Post-Tunkin Era' (1990) 28 Canadian Yearbook of International Law 309, 332.

international politics.[285] Commenting on this, Gorbachev's outlook was identified as having the potential to end the Cold War and,[286] more broadly, to revive the role of the UN.[287]

In setting this out, we can see how *perestroika* and Soviet *new thinking* were creating space for the kind of international cooperation that would make later institutional developments such as the ad hoc tribunals and ICC possible. Although we should be careful to note that whilst desires for greater enforcement of certain international criminal norms did form part of this vision—in particular, terrorism and apartheid—it was ultimately a smaller part of a broader outlook. Thus whilst Christensen places considerable emphasis on Gorbachev's proposal for an international criminal court with jurisdiction over international terrorism,[288] we should note that the translation relied on in this chapter does not carry the same implication of punishment and penality as Christensen's account does.[289] The translations referenced in this chapter suggests Gorbachev's proposal was for an international tribunal that was *investigative* rather than strictly punitive in nature. Furthermore, Christensen also suggests Gorbachev's proposal in the 1987 article was repeated in his 1988 speech before the General Assembly. However, an English translation of this speech does not necessarily support this—although Gorbachev does call for a more active role for international courts in The Hague.[290]

Although Gorbachev's proposal seems somewhat watered down with these translational differences in mind,[291] this episode nevertheless provides a broader sense of the growing desires for the institutional enforcement of international criminal norms at the time. And in this regard, the same desire for the primacy of international law and institutions was present in the Gorbachevian proposal as it was in the Trinidadian one. These desires were also present in the ILC efforts during the 1980s, particularly through Yuri G. Brsegov who had built on earlier Soviet efforts and supported the universal jurisdiction of a PICC for genocide and aggression.[292] This carried through to establishing the ad hoc tribunals, with

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[285] As per Gorbachev: "We are convinced that a comprehensive system of security is at the same time a system of universal law and order ensuring the primary of international law in politics." Quoted from Gorbachev (n 266). Although some viewed it as opportunistic rather than idealistic: Coit D. Blacker, 'The New United States—Soviet Détente' (1989) 88(540) Current History 321, 357.
[286] See, for example: John Quigley, 'The Soviet "New Thinking" In International Law: An Opening to End the Cold War' (1989) 8(1) Wisconsin International Law Journal 97; and Thomas M Franck, 'U.S. Responses—New Opportunities for Reviving the United Nations System' (1989) 83(3) AJIL 531.
[287] Stephen M. Schwebel, 'Gorbachev Embraces Compulsory Jurisdiction' in Mahnoush H. Arsanjani, Jacob Cogan, Robert Sloane, and Siegfried Wiessner (eds), *Looking to the Future: Essays on international Law in Honor of W. Michael Reisman* (Brill 2010) 1085-93.
[288] Mikkel Jarle Christensen, 'The Perestroika of International Criminal Law: Soviet Reforms and the Promise of Legal primacy in International Governance' (2020) 23(2) New Criminal Law Review 236, 260.
[289] Gorbachev (n 272).
[290] ibid.
[291] Indeed, even in both the 1987 article and the 1988 speech, the *international criminal* aspects were a relatively minor part of a much broader sets of proposals.
[292] Christensen (n 288) 262.

many of the same international lawyers who had shaped Gorbachev's *perestroika* thinking on international law still present when the votes to establish them were taken.[293] In this regard, whilst the Trinidadian Proposal might have re-introduced the idea for a PICC as a procedural matter, the kind of thinking about international law that would make these institutional developments possible came from a wider variety of sources than is often noted in the *accepted account*.[294]

7.5.3 The Movement Towards a Permanent International Criminal Court and the Gulf War

Another episode we might look to as a signal of this turn towards ICL institutions from the early 1990s onwards, and which is often overlooked in the dominant accounts, relates to the Gulf War. Writing in 1992, Cavicchia identified three reasons why the 1990s were an appropriate time for a PICC: firstly, post-Cold War receptiveness to new forms of international law and governance; secondly, difficulties of securing prosecutions to manage the threat of drugs trafficking and international terrorism; and thirdly, the Gulf War.[295] Regarding the second reason, this was evidently a widely shared concern beyond Gorbachevian or Trinidadian Proposals. Notable in this regard are the various congressional moves made in the mid-1980s and early 1990s which required the US President to call for international negotiations to establish a permanent international court with jurisdiction over these crimes.[296] In addition to public statements by US politicians, these signal that between 1986 and 1991 there was a growing appetite for an international institution empowered to prosecute transnational and conventional international crimes.

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[293] ibid 263-4.

[294] Two exceptions to this are: Bryan MacPherson, 'Building an International Criminal Court for the 21st Century' (1998) 13(1) Connecticut Journal of International Law 1, 12-14; and Cenap Çakmak, *A Brief History of the International Criminal Law and International Criminal Court* (Palgrave MacMillan 2017) 103-4. Although note that Çakmak himself quotes MacPherson. This was also noted in a number of pieces produced at the time: John B Anderson, 'An International Criminal Court—An Emerging Idea' (1991) 15(2) Nova Review 433, 436; and Joel Cavicchia, 'The Prospects for an International Criminal Court in the 1990s' (1992) 10(2) Dickinson J Int'l L 223.

[295] ibid.

[296] A 1986 act provided for the President to establish a process to encourage the negotiation of an convention to address international terrorism, as well as to explore the possibility of establishing an international tribunal to prosecute terrorists: Omnibus Diplomatic Security and Terrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853, § 1201. This was followed by later moves in the US Congress to call on both the President and the Attorney General to actively pursue the establishment of a PICC with jurisdiction over terrorism, international drug trafficking, genocide, and torture: Cavicchia (n 294) 231. This was repeated in a 1990 act, which called on Congress and the Judicial Conference to pursue this project on the international stage: Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1991, Pub. L. No. 101-1513, 104 Stat. 1979, § 599E.

Additionally, the Gulf War also invigorated interest in a PICC. And following the invasion of Kuwait by Iraq and the ensuing atrocities,[297] calls were made to establish an international criminal tribunal to punish those responsible. This prompted world leaders such as President Bush and Prime Minister Thatcher to invoke the Nuremberg precedent.[298] At the same time, the Security Council had directed information gathering on any atrocities committed by Iraqi forces.[299] Calls were also made in the media to establish a tribunal.[300] One 1990 article, for example, questioned the legal and moral issues involved in killing Saddam Hussein in light of his responsibility for international crimes.[301] This was echoed within legal scholarship,[302] with Kleinberger noting that the invasion of Kuwait and later

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[297] Some of these atrocities included hostage taking, torture, rape, executions, and the murder of civilians. See: Paul G. Lauren, 'From Impunity to Accountability' in Ramesh Thakur and Peter Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (United Nations University Press 2004) 30-1.

[298] Regarding Prime Minister Thatcher, see for example: Geoffrey Marston (eds), "United Kingdom Materials on International Law 1990" (1990) BYBIL 463, 602. For President Bush's comments to this effect, see: Harry Rhea, 'The United States and International Criminal Tribunals' (PhD Thesis, National University of Ireland, Galway August 2012) 125; and President George Bush, 'Iraqi Atrocities in Kuwait' (22 October 1990) 1(8) US Department of State Dispatch 205. When asked whether he thought that if war crimes had occurred, criminal punishment was the appropriate course, President Bush replied: "[D]o I think he's guilty of war crimes, the environmental terror, the rape and pillage of Kuwait, what he's done to his own people? I would think there'd be plenty of grounds under which he could be prosecuted for war crimes." See: "AFTER THE WAR: The White House; Excerpts From Bush's News Conference on Postwar Plans" (*New York Times,* 2 March 1991) <https://www.nytimes.com/1991/03/02/world/after-war-white-house-excerpts-bush-s-conference-postwar-plans.html> accessed 24 Aug 2021. The German Prime Minister Hans-Dietrich Genscher made similar comments at the time: Kathryn Sikkink, *Justice Cascade: How Human Rights Prosecutions Are Changing the World* (Norton & Co. 2011) 115. The Council of Ministers of the European Communities also sent a formal letter to the UN Secretary General raising the possibility of a trial before an international court: Lauren, ibid 31.

[299] UNSC Res 674 (1990) (29 October 1990) UN Doc S/RES/674(1990).

[300] See for example: Patrick E. Tyler, 'Desert Trial for the Laws of War' (*Financial Times*, 3 September 1990) 1; Marc Weller, 'When Saddam Is Brought to Court' (*The Times*, 3 Sept 1990); G.F. Gerald, 'bush Hints US to Seek War Crime Trial of Iraq's Leaders for Actions in Kuwait' (*Wall Street Journal*, 16 October 1990); Linda P. Campbell, 'Hussein Could Be Tried for War Crimes, Experts Say' (*Chicago Tribune*, 22 January 1991) 7; 'To the Victors Go the Trials' (*Newsweek*, 4 February 1991) <https://www.newsweek.com/victors-go-trials-205292> accessed 23 Aug 2021; and Jill Smolowe, 'Prisoners of War: Iraq's Horror Picture Show' (*Time*, 4 February 1991) <http://content.time.com/time/subscriber/article/0,33009,972262,00.html> accessed 23 Aug 2021.

[301] Robert F. Turner, 'Killing Saddam Would It Be A Crime?' (*Washington Post*, 7 October 1990) <https://www.washingtonpost.com/archive/opinions/1990/10/07/killing-saddam-would-it-be-a-crime/15218188-a2d1-40e6-8f8d-199ba4a2c5b9/> accessed 24 Aug 2021.

[302] See for example: Capt. R. Peter Masterson, 'The Persian Gulf War Crimes Trials' (1991) 6 The Army Lawyer 7; Louis Rene Beres, 'Towards a Prosecution of Iraqi Crimes Under International Law: Jurisprudential Foundations and Jurisdictional Choices' (1991) 22(1) California Western International Law Journal 127; Stuart H. Deming, 'International Criminal Law' (1991) 25(4) The International Lawyer 105; Michael P. Scharf, 'The Jury is Still Out On the Need for An International Criminal Court' (1991) 1(1) Duke Journal of Comparative & International Law 135, 136-7; Michael D Greenberg, 'Creating an International Criminal Court' (1992) 10(1) Boston University International Law Journal 119, 126; Louis Rene Beres, 'Prosecuting Iraqi Crimes: Fulfilling the Expectations of International Law After the Gulf War' (1992) 10(3) Dickinson Journal of international Law 425; Cavicchia (n 294); Benjamin Ferencz, 'The Nuremberg Principles and the Gulf War' (1992) 66(3) St. Johns Law Review 711; Adam Roberts, 'The Laws of War in the 1990-91 Gulf Conflict' (1993-4) 18(3) international Security 134; and Timothy L.H. McCormack and Gerry Simpson, 'The ,International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions' (1994) 5(1) Criminal Law Forum 1, 6.

moves by Coalition forces back into Iraq resurrected the spectre of illegal war, as well as various ICL issues and the need for a PICC.[303]

Of the Coalition forces uniting under Security Council Resolution 678,[304] the US took the strongest actions towards pursuing prosecutions. And soon after the Coalition had formed, the Pentagon assembled a team of lawyers to address the legal issues raised in the conflict.[305] To this end, in August 1990, the Office of the Judge Advocate General of the US Army initiated an investigation into whether the Department of Defense could look into possible war crimes that had been committed by Iraqi forces—including Saddam Hussein.[306] A formal investigation was launched in December 1990 by the Secretary of Defense to collect evidence to facilitate the preparation of criminal cases before a war crimes tribunal.[307] Further action was taken in April 1991 when the Senate Foreign Relations Committee convened to discuss the Gulf War—which had formally ended—and alleged war crimes by Iraqi forces.[308] The US Senate then approved a bill which included a provision requesting President Bush to propose an international criminal tribunal to prosecute Iraqis who had committed war crimes.[309] Additionally, the Foreign Relations Authorization Act contained a clause calling on the President to propose a war crimes tribunal to try Saddam Hussein.[310]

At the international level however, interest in this project quickly waned, which Bassiouni suggests was due to the conflicting economic interests of certain UN Security Council powers within Iraq.[311] This provides a sharp contrast with the support the Security Council was expressing for the ICTY around the same time, particularly in light of how the Gulf War and knowledge of Iraqi atrocities had raised both the spectre of Nuremberg, as well as the possibility of new forms of collective action in a post-Cold War world. However, this context is rarely referenced within contemporary ICL scholarship either in general terms or to the extent it contributed to the *renaissance* ICL was undergoing at the time. We thus

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[303] Thomas R. Kleinberger, 'The Iraqi Conflict: An Assessment of Possible War Crimes and the call for Adoption of an International Criminal Code and Permanent International Criminal Tribunal' (1993) 14(1) NYLS Journal of International and Comparative Law 69, 69-70 & 72-7.
[304] UNSC Res 678 (29 November 1990) UN Doc S/RES/678.
[305] Kleinberger (n 203) 77.
[306] Rhea (n 298) 124.
[307] ibid.
[308] As recorded in: United States Congress Senate Committee on Foreign Relations, *Persian Gulf: The Question of War Crimes, Hearing Before the Committee on Foreign Relations, United States Senate, 102nd Congress, 1st Session, 9 April 1991* (U.S. Government Printing Office 1991).
[309] Richard L. Berke, 'After The War: Senate Urges War-Crimes Trials' *The New York Times* (New York, 19 April 1991) 8 <https://www.nytimes.com/1991/04/19/world/after-the-war-senate-urges-war-crimes-trials.html> accessed 3 February 2022.
[310] Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Pub. L. No. 102-138, 105 Stat. 647, **§** 301.
[311] M. Cherif Bassiouni, 'Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal' (2005) 38(2) Cornell International Law Journal 327, 339.

get a sense that the growing desires for international criminal justice institutions were more diffuse in origin than is generally alluded to within ICL scholarship.

7.6 Conclusion

Although the *renaissance* of ICL said to have occurred from the 1990s onward is often linked to a specific set of causal factors—which, as identified above, is typically the changing political landscape of the post-Cold War world and the successes of the ad hoc tribunals this allowed for—as we have seen there was much at play in what Stahn refers to as ICL in its "heroic phase".[312] To this end, I identified several factors we might consider when trying to understand the re-emergence of certain institutional forms of international criminal justice in the 1990s. Firstly, I looked to the domestic context to evidence the evolution of ICL in a period typically characterised as stagnant or lacking development. In particular, I argued that both the high profile prosecutions for historic atrocities committed during WW2 and the spread of domestic atrocity laws which enabled them, speak to the gradual diffusion of international criminal justice norms and, in this sense, of the consolidation of the Nuremberg precedent. Secondly, and seeking to further push back against the *historiography of hiatus*, I then identified the various ways that ICL underwent doctrinal development during the Cold War decades. I argued that not only did this period produce developments that have shaped contemporary ICL, but also that these developments were uniquely reflective of the dual contexts of the Cold War and decolonisation in which they emerged.

The third and fourth limbs of the argument forwarded in this chapter focused more directly on the *renaissance* narrative present within mainstream accounts of the field. This account typically relies on two key plots points in accounting for the sudden revival of interest in and institutional development of ICL from the early 1990s onward; the proposal by Trinidad and Tobago which reintroduced the idea for a PICC and the successes of the ad hoc tribunals which provided the empirical proof needed to justify the project. To this end, I firstly argued that this accepted account overlooks a more broadly punitive turn occurring within the international human rights movement and also noted that recent experiences with transitional justice mechanisms influenced the motivations of certain states participating in the Rome Statute negotiations. These factors, I argued, should also be taken into account when seeking to understand the sudden re-emergence of desires for

[312] Stahn (n 91) 98 & 165.

a PICC in the 1990s. And finally, I then looked to counterbalance the narrative tendency present within ICL scholarship to identify Trinidad and Tobago's proposal for a PICC as triggering a sequence of developments that would eventually lead to the establishment of the ICC within a decade. To do so, I identified the work occurring in the preceding decade by the ILC that would prime the institutional mechanisms of the UN when the Trinidadian Proposal did emerge, in addition to identifying other factors we might consider as reflective of the building desires for such a court—namely, *perestroika* thinking and the Gorbachevian proposal, as well as events in the Gulf War.

With these factors in mind, my aim in this chapter has been to unsettle the certainty with which the standard account of ICL's history is told. And by decreasing the reliance on the standard plot points in this way, I have pointed to the possibilities of ICL's histories that lie beyond the historiographical terrain ICL scholarship typically sticks to. In this regard, the present chapter has worked towards achieving the dual aims of disruption and reimagining identified in the introductory chapter to the thesis. If as Trouillot argues, *history* is a narrative about the past shaped by *silences*, by identifying what otherwise might have been included in our disciplinary histories, we get a sense of these possibilities.

It is notable, in this regard, that whilst ICL scholars tend to stick to the familiar disciplinary narrative identified in Chapter 6 and as outlined at the beginning of this chapter, those writing from other disciplinary perspectives capture a broader understanding of the context within which the development of ICL was occurring.[313] By broadening our perspective we might thus be able to avoid the narrative pitfalls of the more reductive accounts which tend to marginalise the political, normative, and moral shifts that made these developments possible. In the chapter that follows, I will attempt such a reimagining by retrieving an episode overlooked within mainstream accounts of the field and which signals the possibility of an account not so reliant on institutions to convey its narrative.

[313] See for example the accounts by: Eric K. Leonard, *The Onset of Global Governance: International Relations Theory and the International Criminal Court* (Routledge 2005); Glasius (n 220) which refers to the ICC as a product of an evolving civil society; Dawn Rothe and Christopher Mullins, *Symbolic Gestures and the Generation of Global Social Control: The International Criminal Court* (Lexington Books 2006), which views the ICC as part of a project to control crime by states and state leaders; Schiff, (n 251) 27-29, which argues that ICC emerged from the convergence of various *streams* and *cascades* into a *river of justice*; and Steven C. Roach (ed), *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (OUP 2009), which places the ICC within a broader global governance project.

Chapter 8: Vietnam, The Anti-War Movement, and International Criminal Law: A Non-Institutional History of International Criminal Justice?

8.1 Introduction

As we saw in Chapter 6, within ICL scholarship the Cold War era is typically presented as an era of disciplinary hiatus where the prevailing political conditions stymied the operation and substantive development of international criminal justice. In the present Chapter, I will move beyond this *historiography of hiatus* by focusing on how the anti-war movement during the Vietnam War drew on international criminal justice norms as a way of articulating their criticisms of and resistance to the war. In particular, I will argue that the language of international criminal law (ICL) provided a way for the morality of the way to be reconstituted as *criminal*. Although the anti-war movement grew to become a broad and far-reaching movement within American society at the time, I will focus on specific areas of activism, including the conscientious objection movement, as well as the so-called 'Russell Tribunal' and the various commissions of inquiry it inspired. This will be preceded by an exploration of how the illegality of the War was being written about amongst legal scholars.

With this in mind, the present Chapter makes a number of key contributions. Firstly, given that the Vietnam War has only been scarcely engaged with by international law and ICL scholars, the research in this Chapter shines a historiographical light on what has otherwise been a persistently overlooked episode in the history of the field. Whilst certain recent international law works have focused scholarly attention on the War in recent years,[1] others have engaged with it on fairly minimalist terms.[2] This has also generally proved true of ICL scholarship, although recent works looking at the development of international

[1] See for example the re-publication of Falk's older work on the War: Stefan Andersson (ed), *Revisiting the Vietnam War and International Law: Views and Interpretations of Richard Falk* (CUP 2017).
[2] Hagopian, for example, has engaged with the War as part of an exploration of the tensions between international law and US sovereignty in the context of immunity for war crimes. See: Patrick Hagopian, *American Immunity: War Crimes and the Limits of International Law* (University of Massachusetts Press 2013).

humanitarian law (IHL),[3] the proposed crime of 'ecocide',[4] and the 'Russell Tribunal'[5] have all prompted a return to the Vietnam War as an area of scholarly interest. Of these, recent work by Samuel Moyn stands in relative isolation as one of the few to grapple with the War in a broader or more substantive sense.[6]

With this in mind, a second contribution this Chapter looks to make is to move beyond a view of the Cold War as *stagnant* and instead to view it as *generative*. To this end, I will argue that the Vietnam War, and the Cold War more generally, hold much value for understanding the development of ICL. And much like Chapter 5, it provides an insight into how ICL norms diffused and were drawn on outside the institutional settings we typically focus on within ICL scholarship.

8.2 War in Vietnam

Before setting out how ICL norms figured in academic and popular discourses about the War, we should first set out some basic details about the conflict and the atrocities it encompassed. When I refer to the 'Vietnam War', I am referring to the military conflict between North Vietnam and their Allies—particularly the Viet Cong—and South Vietnam and their Allies—of whom the United States (US) was the largest. It might also be referred to as the 'Second Indochina War'.[7] Amongst Vietnamese peoples, it is also referred to as the 'American War' and the 'War of National Salvation Against America.[8] Notwithstanding these terminological distinctions, I will refer to it as the 'Vietnam War' as I am interested primarily in the American responses to the conflict.

Although US involvement stretched from 1955 to 1975, my interest lies in the period when active US military involvement was at its height between 1964 and 1975, which

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[3] Amanda Alexander, 'International Humanitarian Law, Postcolonialism and the 1977 Geneva Protocol I' (2016) 17(1) Melbourne Journal of International Law 1; and Keiichiro Okimoto, 'The Vietnam War and the Development of International Humanitarian Law' in Suzannah Linton, Tim McCormack, and Sandesh Sivakumaran (eds), *Asia-Pacific Perspectives on International Humanitarian Law* (CUP 2019).
[4] The Vietnam War is relevant in this instance as the term 'ecocide' was originally coined to capture the environmental destruction caused by US military strategy. See: David Ziegler, *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changes the Way We Think About the Environment* (University of Georgia Press 2011); Eliana Cusato, 'From Ecocide to Voluntary Remediation Projects: Legal Responses to "Environmental Warfare" in Vietnam and the Spectre of Colonialism' (2018) 19(2) Melbourne Journal of International Law 495; and Anastacia Greene, 'The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?' (2019) 30(3) Fordham Environmental Law Review 1.
[5] As we will see in s.8.6.2 below.
[6] See most recently: Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (Farrar, Straus and Giroux 2021) ch 5.
[7] To signify that it followed the First Indochina War, which was fought in the context of the French colonial possession of Vietnam and to capture how the conflict eventually spread into Cambodia and Laos.
[8] See: Jonathan Neale, *The American War, Vietnam 1960-75* (Bookmark Publications 2001).

roughly covers the conflict between the Gulf of Tonkin Resolution and the 'Fall of Saigon'.[9] This period of the conflict followed years of the gradually increasing presence of the US military South Vietnam (Republic of Vietnam) through the deployment of military advisors who had been sent in lieu of combat troops to assist the South Vietnamese government in resisting the unification efforts of North Vietnam (Democratic Republic of Vietnam) in conjunction with the National Liberation Front (NLF or Viet Cong).

Between 1964 and 1975, the US deployed 2,709,918 uniformed troops to Vietnam, with 543,000 deployed at its peak in 1969. The military strategy heavily relied on aerial weaponry,[10] with an estimated 8,000,000 tonnes of bombs, 8,000,000 tonnes of other ordinance,[11] 20,000,000 gallons of chemical defoliants,[12] and 400,000 tonnes of napalm unleashed between 1964 and 1975.[13] In addition to aerial bombardment, the military also relied on tactics such as the so-called "free-fire zones" where anyone found within a designated zone was considered a combatant, search and destroy missions, as well as forced displacements of civilians.[14] As a result of these tactics, it is alleged that the US engaged in wide-ranging breaches of IHL in both North and South Vietnam.[15] The Underlying these tactics was a focus on body counts of enemy dead as the metric by which

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[9] The Gulf of Tonkin Resolution was passed by the US congress in response to the reported attack of US naval destroyers by North Vietnamese torpedo boats, whilst the Fall of Saigon marked the capture of Saigon—the capital of South Vietnam—by North Vietnamese and Viet Cong forces. Excluded from this chapter is the multi-decade, if not multi-century, build up to US involvement in Vietnam. Lipmann provides a good high-level overview of this in: Matthew Lippman, 'Vietnam: A Twenty-Year Retrospective' (1993) 11(2) Dickinson Journal of International Law 325, 325-344.

[10] For a visualisation based on data released by the United States Department of Defense, see: Thomas Cooper, 'Bombing missions of the Vietnam War: A Visual Record of the Largest Aerial Bombardment in History' (ESRI StoryMaps) <https://storymaps.arcgis.com/stories/2eae918ca40a4bd7a55390bba4735cdb> accessed 2 December 2021.

[11] S. Brian Wilson, 'Bob Kerrey's Atrocity, the Crime of Vietnam and the Historic Pattern of US Imperialism' in Adam Jones (ed), *Genocide, War Crimes & The West: History and Complicity* (Zed Books 2004) 168.

[12] ibid.

[13] Adam Jones, *Genocide: A Comprehensive Introduction* (2nd edn, Routledge 2011) 74.

[14] Howard Zinn, *A People's History of the United States, 1492-Present* (Harper 2005) 477.

[15] As Lippman notes, the US and both North and South Vietnam were subject to the requirements of international humanitarian law, both as a matter of treaty law under the Geneva Conventions of 1949 and as a matter of customary international law—although, of course, given that both North and South contested the 'international' nature of the War, the North argued they were not so bound. In terms of the potential breaches of IHL committed by the US, Lippman gives an overview. In South Vietnam this included, in particular, forcible transfers of rural Vietnamese populations to deny guerrilla fighters a base of support, including the destruction of crops, livestock, and property as part of this (the so-called, strategic hamlet program); the creation of "free fire zones" in these vacated areas where no distinctions were made between civilians and combatants, as well as a scorched earth policy as part of the "search and destroy" missions; and the use of potentially prohibited weapons, such as cluster bombs, napalm, chemical herbicides, and other chemical weapons. As part of the extensive bombing campaigns in North Vietnam, there were also potential breaches of IHL in relation to the targeting of hospitals, schools, churches, dikes and damns, water supply, and various other non-military targets. There were also potential breaches as part of the CIA's involvement in targeted assassinations and arrests undertaken as part of the Operation Phoenix Progam, which often involved the illegal arrest, abuse, torture, and murder of prisoners. See Lippman (n 9) 377-389.

to measure success in the War.[16] The human cost of these tactics left approximately 58,220 US soldiers dead by the end of the war,[17] with the estimates of civilian and military Vietnamese deaths ranging from between 1,500,000 to 3,800,000.[18]

8.3 Early Scholarly Responses to the Vietnam War

US military presence in Vietnam evolved in distinct phases, with the volume of active combat troops increasing at a rapid pace from the Gulf of Tonkin incident onwards. Concomitantly, there was also an increasing concern for whether these actions were in breach of international law. And whilst the presence of US military advisors had certainly been viewed in these terms, it was only after the Gulf of Tonkin incident that the *illegality* and *criminality* of US actions were spoken of in a broader sense.[19] Whilst this framing did became pervasive within American legal academia, we should note the registers on which the 'illegality' and 'criminality' of the War was understood. There was, firstly, the question of whether it constituted a war of aggression,[20] and secondly, the conduct of the military

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[16] This is said to have not only lead to the overinflation of this metric by soldiers on the ground and the military higher ups, but also to have created the conditions in which atrocities could become widespread. As the war-time correspondent Philip Caputo noted in his best-selling memoir: "General Westmoreland's strategy of attrition also had an important effect on our behavior. Our mission was not to win terrain or seize positions, but simply to kill: to kill communists and as many of them as possible. Stack 'em like cordwood. Victory was a high body-count, defeat a low kill-ratio, war a matter of arithmetic. The pressure on unit commanders to produce enemy corpses was intense, and they in turn communicated it to their troops…It is not surprising, therefore, that some men acquired a contempt for human life and predilection for taking it." See: Philip Caputo, 'A Rumour of War (1977)' in Stewart O'Nan (ed), *The Vietnam Reader: The Definitive Collection of American Fiction and NonFiction on the War* (Anchor Books 2011). On body counts and military strategy in Vietnam more generally, see: Marilyn B. Young, 'Counting Bodies in Vietnam' in Emily S. Rosenberg and Shanon Fitzpatrick (eds), *Body and Nation: The Global Realm of U.S. Body Politics in the Twentieth Century* (Duke University Press 2014).

[17] See: 'Vietnam War U.S. Military Fatal Casualty Statistics' (*National Archives: Military Records*) <https://www.archives.gov/research/military/vietnam-war/casualty-statistics> accessed 2 December 2021.

[18] Writing in 1978, Lewy estimated the total war deaths for both North and South Vietnam to be 1,353,000. See: Guenter Lewy, *America in Vietnam: Illusion, Myth and Reality* (OUP 1978) 442-453. A demographic study in 1995 provided an estimate of 1,100,000, which was significantly lower than the 3,000,000 million figure that had been recently been officially released by the Vietnamese government. See: Charles Hirschman, Samuel Preston, and Vu Many Loi, 'Vietnamese Casualties During the American War: A New Estimate' (1995) 21(4) Population and Development Review 783. A study in the *British Medical Journal* provided perhaps the largest estimate, which estimated approximately 3,800,000 deaths connected to the war between 1955 and 1975. See: Ziad Obermeyer, Christopher J.L. Murray, and Emmanuela Gakidou, 'Fifty Years of Violent War Deaths from Vietnam to Bosnia: Analysis of Data from the World Health Survey Programme' (2008) 336(7659) BMJ 1482.

[19] See for example: Brian Landsberg, 'The United States in Vietnam: A Case Study in the Law of Intervention' (1962) 50(3) California Law Review 515.

[20] The nub of the purported legality/illegality of intervention essentially hinged on the effects of the Geneva Accords of 1954—which had brought an end to Ho Chi Minh's struggle for independence from France and created a negotiated division between North and South Vietnam—and whether this created two separate states. If not, the conflict between North and South was a civil war, which would limit the ability of third states to intervene and to provide assistance. There were also issues related to regional security treaties the US had entered into with other third states involved in the War, such as New Zealand and Australia. On this, see: Madelaine Chiam, *International Law in Public Debate* (CUP 2021) 89-90.

during the War itself. For Taylor, this second register consisted of three categories of acts: the operational practices and tactics laid down by military command; those "sporadic departures from proper behaviour" such as the Mỹ Lai massacre and the "seemingly punitive use of air bombardment and artillery firepower".[21] Although not referencing this categorisation, Moyn has argued that American legal scholarship shifted from a focus on the first to the second register over the course of the War,[22] which he takes as reflective of a broader shift from *aggression* to *atrocity.*[23] Moyn appears to be drawing on Scheffer's categorisation of "atrocity crimes", which encompasses genocide, serious war crimes, and crimes against humanity.[24]

Some of the earliest responses to the War came through the *Lawyers Committee Concerning American Policy in Vietnam* (LCCAPV), which came together following the Gulf of Tonkin but before the anti-war movement fully coalesced on college campuses. LCCAPV adopted an "elite model of agitation, directed toward highbrow readers and governmental policymakers",[25] which included holding conferences, publishing academic work, and acting in selective service cases. Their work also helped to frame the illegality of the War in its early stages, initially focusing on the constitutional dimensions. [26] Their critiques were distinctly legalistic,[27] with a particular concern for how international law could constrain US aggression in Vietnam.[28]

Richard Falk was closely associated with the LCCAPV and would became a leading voice in the anti-war movement within American legal Academia. Some of his earlier writings drew him into heated scholarly exchanges,[29] particularly when support for

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[21] Telford Taylor, 'Vietnam and the Nuremberg Principles: A Colloquy of War Crimes' (1973) 5(1) Rutgers-Cambridge Law Journal1, 1-2 & 3-6.
[22] This argument is developed in: Samuel Moyn, 'From Antiwar Politics to Antitorture Politics' in Austin Sarat, Lawrence Douglas, & Martha Merrill Umphrey (eds), *Law and War* (SUP 2014); and Moyn (n 6) ch 7.
[23] Moyn develops this argument further to make a broader disciplinary claim about the move from an *aggression* to an *atrocity* paradigm in the theory and practice of ICL: Samuel Moyn, 'From Aggression to Atrocity: Rethinking the History of International Criminal Law' in Kevin Heller, Frédéric Mégret, Sarah Nouwen, Jens Ohlin, and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (OUP 2020).
[24] David Scheffer, 'Genocide and Atrocity Crimes' (2006) 1(3) Genocide Studies and Prevention 229; and Scheffer, 'Atrocity Crimes Framing the Responsibility to Protect' in Richard H. Cooper and Juliette Voïnov Kohler (eds), *Responsibility to Protect: The Global Moral Compact for the 21st Century* (Springer 2009). This categorisation of 'atrocity crimes' has since been repeated: Robert I. Rothberg (ed), *Mass Atrocity Crimes: Preventing Future Outrages* (Brookings Institution Press 2010); Kirsten Ainsley, 'From Atrocity Crimes to Human Rights: Expanding the Focus of the Responsibility to Protect' (2017) 9(3) Global Responsibility to Protect 243; and Barbora Holá, Hollie Nyseth Brehm, and Maartje Weerdesteijn (eds), *The Oxford Handbook of Atrocity Crimes* (Forthcoming, OUP 2022).
[25] Moyn (n 6) 238.
[26] ibid.
[27] Moyn (n 22) 170.
[28] As in: Consultative Council of the Lawyers Committee on American Policy Towards Vietnam, *Vietnam and International Law: An Analysis of the Legality of the U.S. Military Involvement* (O'Hare Books 1967).
[29] See for example the back and forth between Falk and Moore: John Norton Moore, 'International Law and the United States Role in Viet Nam: A Reply' (1967) 76(6) Yale Law Journal 1051; and Richard Falk,

intervention in Vietnam was higher.[30] His primary concern at this stage was for the underlying illegality of the War and whether the Nuremberg precedent might be applied.[31] His later work shows a marked shift, which displayed an increasing focus on the atrocities committed in furtherance of it.[32] This was partly influenced by a visit to Vietnam and his interactions with the North Vietnamese, as well as the changing tide of the War itself.[33] We can note this in his 1971 co-edited collection which looked at the *crimes of war* in Vietnam,[34] particularly in light of the Mỹ Lai revelations.[35] Falk also provided the introduction to the edited proceedings of the *Commission of Enquiry into United States Crimes in Indochina* held in 1971, where war crimes and atrocities assumed a central position.[36] However, early writings also show this concern for *atrocity* crimes, with Falk even suggesting in concurrence with the conclusions of the Russell Tribunal that there was evidence of a "prima facie" case of genocide and crimes against humanity.[37]

Beyond Falk, the War proved a popular topic amongst American legal academics. This work tended to focus on the underlying legality of the intervention, with Lippman noting that in the early years of the War the majority of the legal academic community viewed it as

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'International Law and the United States Role in Viet Nam: A Response to Professor Moore' (1967) 76(6) 1095.

[30] This was at a time when there were academic voices actively supporting the Administration's military strategy and broader policy in the region. See in particular: John Norton Moore, 'The Lawfulness of Military Assistance to the Republic of Viet-Nam' (1967) 61(1) AJIL 1; Moore, 'Law and Politics in the Vietnamese War: A Response to Professor Friedmann' (1967) 61(4) AJIL 1039; and Moore, *Law and the Into-China War* (Princeton University Press, 1972). Also see: Eberhard P. Deutsch, 'The Legality of the United States Position in Vietnam' (1966) 52(5) American Bar Association Journal 436.

[31] These writings must also be understood within the context of his broader scholarship, particularly as it expressed a commitment to a rules-based international order and his proximity to the *New Haven School*. See: Stefan Anderson, 'Preface' in Stefan Anderson (ed), *Revisiting the Vietnam War and International Law: Views and Interpretations of Richard Falk* (CUP 2017) xxi.

[32] See: Richard A. Falk, 'International Law and the United States Role in the Viet Nam War' (1966) 75(7) The Yale Law Journal 1122. Compared with his later work: Falk, *The Six Legal Dimensions of the Vietnam War* (Princeton University Centre of International Studies 1968). This shift is particularly notable across the four volumes of collected material on the Vietnam War Falk edited: Falk (ed), *The Vietnam War and International Law, Volume 1* (Princeton University Press 1968); Falk (ed), *The Vietnam War and International Law, Volume 2* (Princeton University Press 1969); Falk (ed), *The Vietnam War and International Law, Volume 3: The Widening Context* (Princeton University Press 1972); and Falk (ed), *The Vietnam War and International Law, Volume 4: The Concluding Phase* (Princeton University Press 1976).

[33] Although Moyn argues that Falk's switch in focus from 'aggression' to 'atrocity' was not quite as obvious here as it was in response to later revelations such as the My Lai massacre: Moyn (n 22) 173-4; and Moyn (n 6) 243.

[34] Richard Falk, Gabriel Kolko, and Robert Jay Lifton (eds), *Crimes of War: A Legal, Political-Documentary, and Psychological Inquiry into the Responsibility of Leaders, Citizens, and Soldiers for Criminal Acts in War* (Random House 1971)

[35] Moyn (n 22) 174.

[36] Frank Browning and Dorothy Forman (eds), *The Wasted Nations: Report of the International Commission of Enquiry into United States Crimes in Indochina, June 20-25, 1971* (Harper & Row 1972).

[37] Richard Falk, 'The Six Legal Dimensions of the Vietnam War' in Stefan Andersson (ed), *Revisiting the Vietnam War and International Law: Views and Interpretations of Richard Falk* (CUP 2018) 168-169, note 51.

legal,[38] as well as issues related to the draft and other objections to military service.[39] When atrocities did come up, the focus was often on whether they constituted contraventions of the Geneva Conventions or discrete incidences of war crimes, with the illegality of the war considered as a primary matter.[40] Moyn argues these works illustrate the beginning of a broader shift from the "jus ad bellum justification in international law rather than the jus in bello validity of its means and methods."[41]

8.4 The Vietnam War as Atrocity: Looking Beyond the Legal Academy

Outside the legal academy, however, the illegality of the War was not considered on quite the same terms. Not long after the increases of active combat troops from 1965 onward, the War had already become associated with atrocities in the context of domestic activism against the use of napalm, phosphorous, and chemical defoliants. The protests against Dow Chemicals were some of the earliest instances of domestic anti-war activism, with protests and sit-ins held on university campuses across America.[42] That the issue of war time atrocity had been raised by a student protest movement—in this case, the *Students for a Democratic Society*—is illustrative of how the illegality of the war was engaged with outside legal academia. In particular, it shows the willingness of left-wing movements to view the war through the lens of atrocity.[43] As we will see later, it is also notable that this

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[38] Lippman (n 9) 346-7. For examples of this commentary, see: Deutsch (n 28); Quincy Wright, 'Legal Aspects of the Viet-Nam Situation' (1966) 60(4) AJIL 750; Daniel Partan, 'Legal Aspects of the Vietnam Conflict' (1966) 46(4) BU Law Review 281; William L. Standard, 'United States Intervention in Vietnam is Not Legal' (1966) 52(7) American Bar Association Journal 627; John Messing, 'American Actions in Vietnam: Justifiable in International Law?' (1967) 19(6) Stanford Law Review 1307; David W. Robertson, 'The Debate Among American International Lawyers About the Vietnam War' (1968) 46(6) Texas Law Review 898; Joseph K. Andonian, 'Law and Vietnam' (1968) 54(5) American Bar Association Law Journal 457; Roger Hull and John C. Novgorod, *Law and Vietnam* (Oceana Publications 1968); and William N. Lobel, 'The Legality of the United States' Involvement in Vietnam—A Pragmatic Approach' (1969) 23(4) University of Miami Law Review 792.
[39] Norman Dorsen and David Rudovsky, 'Some Thoughts on Dissent, Personal Liberty and War' (1968) 54(8) ABA Journal 752; Louis Loeb, 'The Courts and Vietnam' (1969) 18(2) American University Law Review 376; and Tom J. Farrer and Lawrence C. Petrowski, 'The Nuremberg Trials and Objection to Service in the Viet-Nam War' (1969) 63 Proceedings of the American Society of International Law 140.
[40] See for example: Benjamin B. Ferencz, 'War Crimes Law and the Vietnam War' (1968) 17(3) American University Law Review 403; and Harvard Law Review Association, 'The Geneva Convention and the Treatment of Prisoners in Vietnam' (1967) 80(4) Harvard Law Review 851.
[41] Moyn (n 22) 155-157.
[42] Dow Chemicals had been responsible for developing napalm for the US military. On the Dow Chemical protest movement, see: Patrick D. Kennedy, 'Reactions against the Vietnam War and Military-Related Targets on Campus: The University of Illinois as a Case Study, 1965-1972' (1991) 84(2) Illinois Historical Journal 101; and Michael V. Metz, *Radicals in the Heartland: The 1960s Protest Movement at the University of Illinois* (University of Illinois Press, 2019) 124-130.
[43] Moyn (n 22) 177.

precise manner of framing appeared to come much earlier than amongst legal academics. Although this is not to say the underlying illegality of the War was of no concern.[44]

Also influencing how the War was interpreted were particular "visions of domestic and international transformation"—as we see in how student protest, Civil Rights, Black Power, Marxist, and anti-colonial movements mobilised against the war.[45] This was also linked to a global anti-war movement combining mass demonstrations with publications and other forms of activism drawing on "long-standing critiques of capitalist imperialism" and moral equivalences between the Holocaust and the Vietnam War.[46] We see this in, for example, commentary by Bertrand Russell who in 1966 accused the Johnson administration of committing war crimes, crimes against humanity, and crimes against peace in pursuit of "economic exploitation and military domination of subject peoples by US industrial magnates and their military arm."[47] Similar language of *crime* and *atrocity* was employed by Ralph Schoenman, Noam Chomsky, and other commentators.[48]

The precise terms used also often had politicised undertones. For example, Russell and Sartre had early on characterised the War as *genocidal* in nature. Sartre viewed it as an "imperialist geocide" where—much like the Holocaust—Vietnamese peoples were killed for being *Vietnamese*.[49] Russell characterised it similarly, arguing that *genocide* was the only term that could capture the enormity of the atrocities committed in Vietnam.[50] Herman and Du Boff had earlier also characterised military policy as genocide, particularly the failure to differentiate guerrilla combatants from non-combatants which created the conditions for a "war of extermination".[51] Groups associated with the Black Power movement also drew on the language of genocide to frame the War, which as we saw earlier had a history of

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[44] Howard Zinn, for example, called for a withdrawal on the basis that US military presence was illegal: Howard Zinn, *Vietnam: The Logic of Withdrawal* (Beacon Press 1967).
[45] Moyn (n 22) 156.
[46] A. Dirk Moses, *The Problems of Genocide: Permanent Security and the Language of Transgression* (CUP 2021) 418-419.
[47] Bertrand Russell, 'Appeal to American Conscience' in Russell (ed), *War Crimes in Vietnam* (Allen & Unwin 1967) 121.
[48] Ralph Schoenman, *A Glimpse of American Crimes in Vietnam* (Goodwin Press 1966); and Noam Chomsky, *At War With Asia: Essays on Indochina* (Pantheon Books 1969) 223. Chomsky's frequent collaborator Herman, along with Du Boff, had characterised US military policy as genocidal. See: Edward S. Herman and Richard B. Du Boff, *America's Vietnam Policy: The Strategy of Deception* (Public Affairs Press 1966); and Herman, *Atrocities in Vietnam: Myths and Realities* (Pilgrim Press, 1970). See also: Clergy and Laymen Concerned About Vietnam, *In the Name of America: The Conduct of the War in Vietnam by the Armed Forces of the United States as Shown by Published Reports, Compared with the Laws of War Binding on the United States Government and on its Citizens* (Turnpike Press 1968).
[49] Jean Paul Sartre and Arlette El Kaïm-Sartre (eds), *On Genocide* (Beacon Press 1968) 3; and Sartre, 'Genocide' (1968) 1(48) New Left Review 13, 24.
[50] Bertrand Russell, 'Closing Address to the Stockholm Session' John Duffet (ed), *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal* (O'Hare Books 1968) 653.
[51] Herman and Du Boff (n 48) 114 & 116.

characterising racial violence and injustice in this manner.[52] This intensified as the disproportionate impact of the military draft on racial minorities became apparent. In this regard, as in Chapter 5, we get a sense of how particular ICL norms were providing a way of framing domestic political issues. Others, however, were more hesitant in characterising it as genocidal, however, particularly given the constraints of the Holocaust archetype it was associated with.[53]

Interestingly, the War had early on also been characterised as *genocidal* by the Soviets, which itself reflected a broader strategy of labelling domestic political issues in America in this way. The Soviets thus found genocide in "each and every manifestation of racial intolerance in the United States."[54] In this regard, and much like in the *We Charge Genocide* petition episode, we can see how the rhetorical dimensions of 'genocide' were animating Cold War politics and which similarly shaped Soviet responses to the Vietnam War.[55]

Despite frequently being invoked in anti-war demonstrations, protests, and writings, the genocide issue received scant scholarly analysis in debates over the legality of the War.[56] And although against characterising the War in this way, primarily due to the absence of genocidal intent, Bedau nevertheless recognised its "rhetorical appropriateness".[57] Looking beyond genocide, however, the language of atrocity and criminality more generally was readily applied to the War. This was understandably true of the Vietnamese revolutionary movement,[58] with this language present in several translated publications.[59] Furthermore,

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[52] Within the Black Power movement—which viewed the African American community as an internal colony—the Vietnam War was viewed as a revolutionary struggle for self-determination against an imperial power that also had links to domestic racism and repression. See: Simon Hall, 'Black Power and the Anti-Vietnam War Movement' in Christian P. Peterson, William M. Knoblauch, and Michael Loadenthal (eds), *The Routledge History of World Peace Since 1750* (Routledge 2019) 138-9.

[53] So, for instance, in his now famous article that was deeply critical of US military policy, Sheehan argued that: "Even under the most critical scrutiny, nothing the United States has perpetrated approaches the satanic evil of Hitler and his followers. The Nazis were in a class in themselves…" See: Neil Sheehan, 'Should We Have War Crimes Trials?' (*The New York Times*, 28 March 1971) 1 <https://www.nytimes.com/1971/03/28/archives/should-we-have-war-crime-trials-war-crime-trials.html> accessed 21 November 2021. Bedau was similarly reluctant, despite his belief that the military had committed mass, coordinated atrocities: Hugo Adam Bedau, 'Genocide in Vietnam?' (1973) 53(2) Boston University Law Review 574, 577.

[54] Anton Weiss-Wendt, *A Rhetorical Crime: Genocide in the Geopolitical Discourse of the Cold War* (Rutgers University Press, 2018) 108.

[55] ibid 102-105.

[56] Bedau (n 53) 577.

[57] ibid 620. On the tendency of legal scholars to reject the genocide label as applied to the Vietnam War due to a lack of specific intent, see: Jeffrey S. Bachman, *The United States and Genocide: (Re)Defining the Relationship* (Routledge 2018) 160-1.

[58] Nick Turse, *Kill Anything That Moves* (Metropolitan Books 2013) 10, note 14; and Weiss-Wendt (n 54) 104.

[59] See for example the pamphlets produced by the *Committee for the Denunciation of War Crimes Committed by the US Imperialists' and Their Henchmen in South Vietnam*: *'US Imperialists' "Burn All, Destroy All, Kill All" Policy in South Vietnam'* (Giai Phong Publishing House 1967); *The Biggest War Criminals of our Times: They Are Even More Ruthless Than Hitler!, Volume 1* (Giai Phong Publishing House 1967); *The Biggest War Criminals of our Times: They Are Even More Ruthless Than Hitler!, Volume 2* (Giai Phong Publishing House 1967); and *The American Crime of Genocide in South Viet Nam* (Giai Phong Publishing House 1968). Note also those published by: *Commission for Investigation of the American Imperialists' War Crimes in Vietnam*:

as early as 1966 North Vietnam had hinted at the possibility of holding war crimes trials for captured pilots,[60] even establishing an official committee to investigate the possibility of doing so.[61]

In light of this, we get a sense that whilst Moyn rightly identifies a shift in focus from *aggression* to *atrocity* within American legal scholarship,[62] outside the legal academy the language of atrocity had been much earlier drawn on to frame the War. Within mainstream American media, however, there was relatively little interest in wartime atrocities. This would change in response to specific events during the War, which I will now focus on.

8.5 The Shifting Moral Sensibility of the Vietnam War

As noted above, there were two primary dimensions to how the illegality and criminality of the Vietnam War was understood; firstly, in terms of its underlying justifications, and secondly, in terms of the conduct of the military in fighting it.[63] This second register captured the violence committed against Vietnamese combatants and non-combatants as a direct, and often intentional, consequence of fighting a counterinsurgent war. It included atrocities committed during so-called 'search and destroy' missions, the focus on body count as the primary metric, the use of 'free-fire' and 'free-strike' zones resulting in civilian casualties and forced displacement, the extensive use of aerial and chemical weapons, and other breaches of the *jus in bello*.[64] This second register thus captures systematic atrocities committed during the War and those more sporadic episodes of violence arising as a by-product of these strategies. This was the case in the Mỹ Lai episode, which, as I will argue, played a role in shifting both legal-academic and public discourses about the War towards this second register of illegality.

8.5.1 What Happened at Mỹ Lai?

T*he U.S. War of Aggression in Vietnam: A Crime Against the Vietnamese People, Against Peace and Humanity* (Democratic Republic of Vietnam Commission for Investigation on the American Imperialists' War Crimes in Vietnam 1966); and *American Crimes in Vietnam* (Democratic Republic of Vietnam Commission for Investigation on the American Imperialists' War Crimes in Vietnam 1966).

[60] 'Hanoi Parades U.S. Airmen Hints of War Crimes Trials' (*Evening Star*, 7 July 1965) <https://www.loc.gov/item/powmia/pwmaster_122179/> accessed 14 December 2021.

[61] 'Hanoi Appoints Panel to Study U.S. "War Crimes"' (*The New York Times,* 24 July 1966) 1 & 8 <https://nyti.ms/3yrCxxn> accessed 14 December 2021.

[62] Moyn (n 23) 343 & 356.

[63] Taylor (n 21) 1-2 & 3-6.

[64] Moyn (n 6) 225-9; and Moyn (n 22) 164.

Now immortalised by the infamous photos taken by Army photographer Ronald L. Haeberle,[65] the Mỹ Lai massacre forms a core part of the disturbing legacy of the Vietnam War. This chilling episode took place in two hamlets—Mỹ Lai and Mỹ Khê—in the Sơn Mỹ village of Quảng Ngãi Province when,[66] on 16 March 1968, soldiers from two infantry platoon descended on Sơn Mỹ and systematically murdered, maimed, tortured, and raped between 300-500 civilians residing in the Village.[67] The soldiers engaged in what Fuji later characterised as forms of "extra-lethal violence",[68] with the massacre itself taking place over the course of four hours.[69] Formally referred to as the *'Mỹ Lai* incident', informally as the 'Pinkville Massacre',[70] and amongst the Vietnamese as the 'Sơn Mỹ Massacre', the events that transpired have been described as the "most shocking episode in the Vietnam War".[71] Although successfully covered up by the military for a time,[72] details emerged when journalist Seymour Hersh exposed the cover-up in November 1969.[73]

Hersh was aided by Vietnam veteran Ron Ridenhour who had dedicated himself to exposing the massacre and spurred the federal investigation into it.[74] A US Army board subsequently conducted a sixteen month-long investigation of the incident and cover-up, following which fourteen officers were found to be complicit in the cover-up, with thirteen soldiers charged with major crimes related to the massacre.[75] Of these thirteen, all except

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[65] Particularly those printed in the *Life Magazine* story about the massacre: Hal Wingo, 'The Massacre at My Lai—Exclusive Pictures and Eyewitness Accounts Confirm the Story of American Atrocities in a Vietnamese Village, Photos by Ronald L. Haeberle' (5 December 1969) 67(22) Life Magazine 36. For a contemporary reprinting of and commentary on these photos, see: Ben Cosgrove, 'American Atrocity: Remembering My Lai' (*Life Magazine*) <https://www.life.com/history/american-atrocity-remembering-my-lai/> accessed 21 November 2021.

[66] For the full official report—Known as the 'Peers Inquiry'—compiled at the direction of Secretary of the Army Stanley R. Resor and General William C. Westmoreland: *Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident, Volumes I-IV* (United States Department of the Army 1970) <https://www.loc.gov/rr/frd/Military_Law/Peers_inquiry.html> accessed 21 November 2021.

[67] George Donelson Moss, *Vietnam: An American Ordeal* (7th edn, Routledge 2020) 333.

[68] Fuji has characterised it as "extra-lethal violence" which entailed performative acts of physical violence that transgressed "shared norms and beliefs about the appropriate treatment of the living as well as the dead". See: Lee Ann Fuji, 'The Puzzle of Extra-Lethal Violence' (2013) 11(2) Perspectives on Politics 410, 411.

[69] Turse (n 58) 8.

[70] Chomsky (n 47) 61.

[71] Bernd Greiner, *War Without Fronts: The USA in Vietnam* (Anne Wyburd with Victoria Fern trs, Yale University Press 2010).

[72] Although it was covered in communications, radio reports, and other accounts released in both Vietnamese and English by the Vietnamese revolutionary forces: Turse (n 58) 10.

[73] Hersh, who would go on to be awarded a Pulitzer Prize for his investigative work, would later publish his account in book length form: Seymour M. Hersh, *Cover-Up* (Random House 1972). The story was originally broken in: Seymour Hersh, 'Lieutenant Accused of Murdering 109 Civilians' *St. Louis Dispatch* (St. Louis, 13 November 1969) 1 & 19. For recent reflections on how the story came to light and broke, see: Seymour Hersh, 'The Scene of the Crime: A reporter's journey to My Lai and the secrets of the past' (*The New Yorker*, 23 March 2015) <https://www.newyorker.com/magazine/2015/03/30/the-scene-of-the-crime?intcid=mod-yml> accessed 9 February 2022.

[74] Turse (n 58) 10. Ridenhour detailed this experience in: Ron Ridenhour, 'Jesus Was a Gook, Part 1' and 'Jesus Was a Gook, Part 2' in Kali Tal (ed), *Nobody Get off the Bus: Viet Nam Generation Big Book* (Burning Cities Press 1994).

[75] Moss (n 67) 334; and Kendrick Oliver, 'Atrocity, Authenticity and American Exceptionalism: (Ir)rationalising the Massacre at My Lai' (2003) 37 Journal of American Studies 247, 248.

Lieutenant William Calley had their charges dropped or acquitted, with Calley later convicted by a court-martial for his actions as a platoon leader. Although disputing his legal responsibility on the basis he had followed orders and thus lacked the requisite *malice*,[76] Calley was convicted of murdering twenty-two villagers for which he received a life sentence with hard labour in March 1971. This was commuted to twenty years, then ten years, and he was eventually granted parole following a further commutation to three years by President Nixon.[77] This seemed to split public opinion between those viewing Calley as a scapegoat and those considering him as being punished for following orders in line with his military duty.[78]

Although the official report into the massacre had identified its immediate cause as Captain Ernest Medina's assurance that there would only be combatants in Sơn Mỹ,[79] it was ultimately a product of the conditions of the War itself. Some of the causal factors at play include: frustrations at the recent Tet Offensive and the War more broadly; the focus on body counts; the realities of insurgent combat; mounting frustrations at fighting a hidden enemy in dense forest; lack of training; and pervasive racism.[80] In this sense, it was the inevitable consequence of fighting a "guerrilla war without fronts" where the "entire Vietnamese population became an object of fear and hatred."[81] What transpired at Sơn Mỹ was thus a product of what Appy has characterised as a "doctrine of atrocity" pursued by the US military command, where the focus on body count to measure and reward progress, and the loose application of the rules of engagement, saw troops often destroying villages and indiscriminately firing at the Vietnamese.[82]

A task force called the *Vietnam War Crimes Working Group* (VWCWG) had been set up following the massacre to determine the validity of claims of similar atrocities by US soldiers.[83] And over several years, hundreds of other similar incidents were investigated, recorded, and substantiated.[84] This included 320 confirmed atrocities and over 500

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[76] *Calley v. Callaway,* 519 F.2d 184, 193 (5th Cir. 1975).
[77] Oliver (n 75) 248.
[78] Moss (n 66) 357; and Mitchell K. Hall, *The Vietnam War* (3rd edn, Routledge 2018) 72.
[79] As per: *Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident, Volume I: Report of the Investigation* (United States Department of the Army 1970) ch 12, s.12.39-12.31 <https://www.loc.gov/rr/frd/Military_Law/pdf/RDAR-Vol-I.pdf> accessed 21 November 2021.
[80] Moss (n 67) 334.
[81] Lewy (n 17) 309.
[82] Christian Appy, *Working-Class War: American Combat Soldiers and Vietnam* (The University of North Carolina Press 1993) 201.
[83] Moss (n 67) 334-5.
[84] The work of Nick Turse and Deborah Nelson was pivotal in shining a light on this previously hidden and then overlooked archive of materials. Although the files were declassified in the mid-1990s, it was not until Turse and Nelson came across them that they were put under any serious scrutiny. This formed the basis of Turse (n 58); and Deborah Nelson, *The War Behind Me: Vietnam Veterans Confront the Truth About U.S. War Crimes* (Basic Books 2008).

unconfirmed allegations in addition to Mỹ Lai, with seven distinct massacres in which 137 civilians died being officially recorded.[85] Additionally, details of 78 other attacks on non-combatants were recorded, which resulted in 57 deaths, 56 wounded, and 15 sexual assaults. It also contained evidence of 141 instances of US soldiers torturing or mistreating civilians and non-combatants. Of those recorded, investigators determined formal charges were warranted against 203 soldiers, of which 57 resulted in a court-martial and 23 convictions. Turse and Nelson's work in uncovering the VWCWG archive contrasts with the appraisal given by Lewy decades earlier, which argued that despite the pervasiveness of rumours regarding Mỹ Lai-like atrocities, the media perpetuated "sensationalist accounts" and "unsubstantiated charges" in what he characterised as the "war crimes industry".[86] Although Turse's account has not avoided critique.[87]

The Mỹ Lai revelations and subsequent trial of Calley were highly publicised in the American media and profoundly impacted the discourse about the War.[88] This was surprising in one sense, given that previous similar incidents had received varying degrees of traction within American media.[89] Jonathan Schnell, for example, had published accounts of his experiences in Vietnam, including *The Village of Ben Suc,* which detailed the displacement of Vietnamese civilians and the destruction of their village,[90] as well as a later account detailing brutal bombing campaigns and ground operations in South Vietnam.[91] Similarly, Daniel Lang had published an account of the brutal kidnapping, rape, and murder

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[85] Nick Turse and Deborah Nelson, 'Civilian Killings Went Unpunished' (*LA Times*, 6 August 2006) <https://www.latimes.com/news/la-na-vietnam6aug06-story.html> accessed 21 November 2021.

[86] Lewy also noted: "a tendency on the part of all too many newspaper and television reporters and editors was to see the war in Vietnam as an atrocity writ large, and specific incidents reported therefore were widely accepted as true." See: Lewy (n 18) 311 & 321.

[87] In addition to critiques of his understanding of the War and its historiography, Turse's work has been criticised for lacking methodological rigour to deal with atrocity claims. Although Zinoman and Kulk's critique ultimately devolves into attacking Turse's perceived political affiliations. See: Peter Zinoman and Gary Kulk, 'Misrepresenting Atrocities: "Kill Anything that Moves" and the Continuing Distortions of the War in Vietnam' (2014) 12 Cross-Currents: East Asian History and Culture Review <http://cross-currents.berkeley.edu/e-journal/issue-12> accessed 12 December 2021.

[88] Michal R. Belknap, *The Vietnam War on Trial: The My Lai Massacre and the Court-Martial of Lieutenant Calley* (University Press of Kansas 2002); and Oliver (n 75) 247, 248.

[89] The trial and conviction of First Lieutenant James Brian Duffy, for example, received relatively minor attention. Duffy had been convicted of premeditated murder for ordering the execution of an unarmed Vietnamese civilian, which was later reduced to involuntary manslaughter on appeal. Interestingly, Duffy's defence counsel had argued that his actions were a direct consequence of the military command's focus on the "body count philosophy". See: Philip Shabecoff, 'Officer is Guilty in Vietnam Death' (*The New York Times*, 30 March 1970) 1 <https://www.nytimes.com/1970/03/30/archives/officer-is-guilty-in-vietnam-death-but-army-panel-is-loath-to.html> accessed 9 February 2022; and Philip Shabecoff, 'Murder Verdict Eased in Vietnam' (The New York Times, 31 March 1971) 1 <https://www.nytimes.com/1970/03/31/archives/murder-verdict-eased-in-vietnam-army-court-finds-officer-guilty-of.html> accessed 9 February 2022.

[90] Jonathan Schnell, 'The Village of Ben Suc: A Tragedy in Vietnam' (*The New Yorker,* 8 July 1967) <https://www.newyorker.com/magazine/1967/07/15/the-village-of-ben-suc> accessed 9 February 2022. This was later published in print form as: Schnell, *The Village of Ben Such* (Knopf 1967).

[91] Jonathan Schnell, *The Military Half: An Account of Destruction in Quang Ngai and Quang Tin* (Vintage Books 1968).

of a young Vietnamese woman by US soldiers in Cat Tuong village. Although the military command initially hesitated to take action, it resulted in three murder convictions that were eventually heavily reduced on appeal.[92] As we will see, however, these incidents did not seem to have the same impact as Mỹ Lai did.[93]

8.5.2 Mỹ Lai as a Discursive Turning Point?

Whilst reports regarding the human cost of the War, the use of chemical weapons, and the extensive bombing campaigns were common, Mỹ Lai "brought many over a critical threshold" in terms of their understanding of the War and how it was talked about.[94] Importantly, it created an awareness that such stories were not anti-war propaganda,[95] which meant atrocity stories were no longer dismissed with the same ease they previously were.[96] Adding to this was diminishing public support for the War, particularly following the Tet Offensive and President Johnson's decision not to seek re-election. Beyond generally turning opinion against the War, Mỹ Lai also marked a point at which the *atrocity framing* became more mainstream—if only for a short time.[97] In this regard, it triggered a discursive shift from the *first* to *second* register of illegality identified above.

This was true of Falk, who noted in 1971 that: "[t]he disclosures of Son My sharpened my attitudes on these matters to a large extent. I became convinced that it was essential to expose the criminal essence of the Vietnam War as it was being waged by the United States Government."[98] In particular, it forced him to reappraise and re-characterise the military endeavour as a whole and raised a "serious basis for inquiry into the military and civilian command structure that was in charge of battlefield behaviour at the time", with the implication that "[i]t would, therefore, be misleading to isolate Song My [sic] from the overall

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[92] Daniel Lang, 'Casualties of War' (*The New Yorker*, 18 October 1969) <https://www.newyorker.com/magazine/1969/10/18/casualties-of-war> accessed 9 February 2022. And later: Lang, *Casualties of War* (Pocket Books 1969).
[93] It should also be noted that US military servicemen were not the only ones to perpetrate atrocities against Vietnamese civilians. With this in mind, Kwon has attempted to retell the story of the equally brutal massacre committed by South Korean soldiers in the village of Ha My. See: Heonik Kwon, *After the Massacre: Commemoration and Consolation in Ha My and My Lai* (California University Press 2006).
[94] Moyn (n 22) 166.
[95] ibid.
[96] Turse (n 58) 5.
[97] Moyn (n 22); and Moyn (n 6) 233.
[98] Richard Falk, 'The Question of War Crimes' in Richard Falk, Gabriel Kolko, and Robert Jay Lifton (eds), *Crimes of War: A Legal, Political-Documentary, and Psychological Inquiry into the Responsibility of Leaders, Citizens, and Soldiers for Criminal Acts in War* (Random House 1971) 5. Furthermore, the editors of this text noted that they were compelled to put the collection together following the Mỹ Lai revelations: Falk, Kolko, and Lifton, 'Editor's statement' in Falk, Kolko, and Lifton (eds), *Crimes of War: A Legal, Political-Documentary, and Psychological Inquiry into the Responsibility of Leaders, Citizens, and Soldiers for Criminal Acts in War* (Random House 1971) xi.

conduct of the war."[99] For Falk, framing the wartime conduct as *criminal* was to "draw an outer boundary around what is permissible".[100] The purpose of establishing criminality under ICL norms was also viewed in consequentialist terms, with the punishment of war crimes "related to the development of a realistic political consciousness…not to provide a foundation for punishment and retribution."[101] The result of this thinking was that his engagement and activism was now "reoriented around war crimes".[102]

Telford Taylor was similarly emblematic of this discursive shift,[103] who also brought with him the prestige and moral import of having served as assistant counsel and prosecutor during the Nuremberg IMT and subsequent Nuremberg Military Trials. Following this, Taylor had a successful academic career at Columbia Law School. Before the release of the bestselling *Nuremberg and Vietnam: An American Tragedy* in late 1970,[104] Taylor's engagement with the War had been relatively minimal and focused primarily on the issue of conscientious objection.[105] Following Mỹ Lai, however, Taylor became more vocal about the moral and legal quandaries at play.[106] This helped to popularise and make respectable a "concern with atrocity [that] was absent among elites and the public and first stressed by the international far left."[107]

Taylor's contribution to the debate was not only to bring the weight of his doctrinal rigour as regards the law of war crimes. It was also to introduce into the discussion a sense of moral patriotism, with *Nuremberg and Vietnam* reading as an attempt to try and reclaim the moral sensibility championed and exemplified by the US at Nuremberg, but which he considered they had strayed from. In this regard, we can note a contrast between Falk and

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[99] Richard Falk, 'The Circle of Responsibility' (*The Nation,* 26 January 1970). Reprinted: Falk, 'The Circle of Responsibility' (*The Nation,* 13 June 2006) <https://www.thenation.com/article/archive/circle-responsibility/> accessed 21 November 2021.
[100] Falk (n 98) 9.
[101] ibid 10.
[102] Moyn (n 6) 245-6. See in particular: Richard Falk, 'Son My: War Crimes and Individual Criminal Responsibility' (1971) 3(1) University of Toledo Law Review 21; and Falk, 'SongMy: War Crimes and Individual Responsibility, A Legal Memorandum' (1970) 7(3) Trans-Actions 33.
[103] Although Moyn views Taylor as instrumental in bringing about this post-Mỹ Lai shift, describing him as a "harbinger" of it: Moyn (n 6) 220.
[104] Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Quadrangle Books 1971).
[105] Telford Taylor, 'The Nuremberg Trials and Conscientious Objection to War: Justiciability Under United States Municipal Law—Comments by Telford Taylor' (1969) 63 *Proceedings of the American Society of International Law at Its Annual Meeting* (1921-1969) 165.
[106] Interestingly, the critically acclaimed documentary filmmaker Marcel Ophuls was inspired by *Nuremberg and Vietnam* to revisit the subject of the possibility of judgment for wartime atrocities, with Taylor interviewed as part of this. One of primary themes in this documentary is the tension between the possibility of judgment and the necessity for it, and how, if at all, the legacy of Nuremberg has persisted, particularly in light of the war in Vietnam. See: Marcel Ophuls (dir), *The Memory of Justice* (Paramount Pictures 1976).
[107] Moyn (n 6) 248; and Moyn (n 22) 177. Indeed, in reviewing Taylor's work, Falk stated that it: "helped greatly to move the issue of war crimes and individual responsibility towards the centre of public consciousness." See: Richard Falk, 'Nuremberg: Past, Present, and Future' (1971) 80(7) The Yale Law Journal 1501.

Taylor, with Falk dedicating his work to Vietnamese victims of the War,[108] whilst Taylor dedicated his to the "the flag, and the liberty and justice for which it stands."[109] In this way, Taylor drew on the *legal* and *moral* precedent of Nuremberg to make moral sense of the War.[110] Writing on this tendency in 1971, Wasserstrom characterised this as the 'defensive' use of Nuremberg, as contrasted with how it had previously been used 'offensively' by the US to hold others to account.[111] Taylor thus helped to make "respectable" a view of the War that was only a few years previously viewed as fringe.[112] Taylor was evidently not the only scholar for whom Vietnam was prompting a return to this moment in history. And interestingly, one of the few English language scholarly accounts of the Tokyo Tribunal—published before the more recent revival of interest—was produced in direct response to it. In this work, Minear revisits the Tokyo Tribunal expressly through the lens of Vietnam, although in contrast to Taylor, recent conduct in Vietnam pushed him to question the legal precedent that Nuremberg and Tokyo represented, rather than calling for a return to it in the strict sense.[113]

In terms of how this shaped his analysis, whilst Taylor certainly cast a critical eye on possible breaches of *jus in bello*,[114] he never seriously condemned the intervention itself.[115] Moyn thus argues Taylor side-lined the *aggression* paradigm in favour of the *atrocity* paradigm—where international law primarily exists to act as a constraint on the brutality of war, rather than seeking to outlaw it to begin with.[116] Although conservative in his legal analysis and reluctant to support an international inquiry into US military conduct, Falk believed Taylor was nevertheless "radical in his conclusions".[117] And despite his hesitancy

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[108] Falk, Kolko, and Jay Lifton (n 34).
[109] This was printed on the inside leaf to the 1971 edition.
[110] Although Taylor was not alone in this, with Falk making similar use of Nuremberg in his review and critique of *Nuremberg and Vietnam*. See: Falk (n 107) 1525-1258.
[111] Richard Wasserstrom 'The Relevance of Nuremberg' (1971) 1(1) Philosophy & Public Affairs 22, 43.
[112] As will be seen in s.8.6.1 below, conscientious objectors and other anti-war activists had earlier tried to make use of Nuremberg is this *defensive* manner. On Taylor as making this view "respectable", see: Richard Wasserstrom, 'Criminal Behaviour' (1971) 16(10) *The New York Review*.
[113] Richard Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton University Press 1971). Some of the more recent publications which have sought to revisit the Tokyo Tribunal have done so in an attempt to revisit Minear's conclusion that Tokyo represented a highly politicised display of *victor's justice*. See for example: Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008) 1; and Yuki Tanaka, Timothy L.H. McCormack, and Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff 2011).
[114] Such as, for example, incidents such as Mỹ Lai, the bombing campaigns, the handling of prisoners of war, and the displacement and destruction of civilians caused by free-fire zones, amongst other transgressions.
[115] Taylor explores the various potential breaches of the law of war crimes in Taylor (n 104) ch 6. Wasserstrom makes this criticism in Wasserstrom (n 110).
[116] Moyn (n 6) 185-86.
[117] As per Falk's laudatory, but no less critical, review of Taylor's work: Richard Falk, 'Nuremberg and Vietnam' (*The New York Times*, 27 December 1970) 165 <https://www.nytimes.com/1970/12/27/archives/nuremberg-and-vietnam-nuremberg-and-vietnam.html> accessed 21 November 2021. Chomsky makes a similar comment, noting: "Though conservative in assumptions and narrow in compass—overly so, in my opinion— Taylor's investigation leads to strong

in calling for criminal accountability before an international tribunal, he nevertheless believed that criminal responsibility could go all the way up the chain of command. Taylor took this "radical" conclusion mainstream when he appeared on *The Dick Cavett Show* on the 8th of January 1971 and opined that criminal responsibility could attach to General Westmoreland and possibly even former President Lyndon Johnson.[118] Whilst Taylor's book had been widely read in the legal academy,[119] he was also evidently helping to take the issue of individual criminal responsibility as it related to Vietnam mainstream to an extent not previously seen.

We certainly get this sense from Neil Sheehan's article in *The New York Times*,[120] which explored this question of individual criminal responsibility,[121] and which is emblematic of the post-Mỹ Lai context where many Americans realised "we may have taken life, not merely as cruel and stubborn warriors, but as criminals".[122] Sheehan's realisation was partially a reflection on his own experiences as a Vietnam War correspondent where he had failed to consider that the horrors he witnessed might have been *criminal*. Sheehan thus concluded: "[i]f Congress fails to undertake an inquiry that carries the authority of the nation, then hypocrisy will be added to our sins."[123] Sheehan's public consideration of this question thus amplified existing calls for individual criminal responsibility,[124] as well as to make them more

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conclusions": Noam Chomsky, 'The Rule of Force in International Affairs' (1971) 80(7) The Yale Law Journal 1456, 1456.

[118] Lawrence P. Rockwood, 'The Lesson Avoided: The Official Legacy of the My Lai Massacre' in Th. A. van Baarda and D.E.M Verweij (eds), *The Moral Dimension of Asymmetrical Warfare: Counter-Terrorism, Democratic Values and Military Ethics* (Martinus Nijhoff 2009) 192-3.

[119] For a more laudatory review see: Joseph W. Bishop, '[Book Review] Nuremberg and Vietnam: An American Tragedy' (1971) 119 University of Pennsylvania Law Review 900. For more critical engagements see: Marshall Cohen, 'Taylor's Conception of the Laws of War' (1971) 80(7) The Yale Law Journal 1492; and Franklin A. Hart, 'Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised' (1972) 25(7) Naval War College Review 19. Ferencz was critical of Taylor's analogising of US military conduct with Nazi barbarities, although agreeing with much of his analysis: Benjamin Ferencz, 'Review: Nuremberg & Vietnam: An American Tragedy. By Telford Taylor. Chicago: Quadrangle Books, 1970. pp.224. $5.95, cloth; $19.5, paper.' (1971) 65(3) AJIL 640. Solf offered perhaps the harshest critique, arguing that it contained multiple contradictions, inaccuracies, and assumptions, with his "statements of law…selected to support the legal results which ought to follow upon his view of the fact": Waldemar Solf, 'A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy' (1972) 5(1) Akron Law Review 43.

[120] Following the appearance on *The Dick Cavett* show and on the foot of Taylor's stark conclusions, Sheehan interviewed Taylor: Neil Sheehan, 'Taylor Says by Yamashita Ruling Westmoreland May Be Guilty' (*The New York Times*, 9 January 1971) 3 <https://www.nytimes.com/1971/01/09/archives/taylor-says-by-yamashita-ruling-westmoreland-may-be-guilty.html> accessed 21 November 2021. On this, see also Uhl's account of Sheehan getting tipped-off about the interview: Michael Uhl, *Vietnam Awakening: My Journey from Combat to the Citizens' Commission of Inquiry on U.S. War Crimes in Vietnam* (McFarland 2014) 183-4.

[121] Neil Sheehan, 'Should We Have War Crimes Trials?' (*The New York Times*, 28 March 1971) 1 <https://www.nytimes.com/1971/03/28/archives/should-we-have-war-crime-trials-war-crime-trials.html> accessed 21 November 2021. Sheehan would later go on to write a Pulitzer Prize winning book on the war: Neil Sheehan, *A Bright Shining Lie: John Paul Vann and America in Vietnam* (Random House 1988).

[122] ibid.

[123] ibid.

[124] Richard Falk, 'Song My: War Crimes and Individual Responsibility, A Legal Memorandum' (1970) 7(3) Trans-Action 33; and Kent A. Russell, 'My Lai Massacre: The Need for an International Investigation' (1970) 58 California Law Review 703.

mainstream.[125] And whilst revelations about incidents such as Mỹ Lai did not necessarily lead to broad acceptance of this idea, Turse argues that following it the reality of the situation was increasingly difficult to ignore.[126] This was reflected in the increasing volume of publications looking at atrocities and criminality committed in Vietnam.[127]

8.5.3 The Limits of Mỹ Lai as a Turning Point

Although Mỹ Lai did evidently mark a discursive turning point for the perception of the War amongst certain Americans, we should be mindful to not place too much weight on it. Indeed, a nationwide survey conducted after the Calley trial noted that 79% of those surveyed disapproved of the decision to find Calley guilty of premeditated murder, with 83% supporting Nixon's decision to release Calley pending further appeal. Furthermore, 71% of those surveyed agreed that others shared responsibility, with 69% believing Calley had been made a scapegoat.[128] In response to the trial and sentence, many citizens embarked on a letter-writing campaign in a bid for leniency in sentencing and a presidential pardon.[129] Equally as telling, of the one-hundred or so songs released between 1969 and 1973 which referenced Calley or the massacre, the majority expressed support for Calley, with the remainder expressing an anti-war stance.[130]

These examples speak to the complexity of how the Calley trial—as distinct from the massacre itself—was received. And whilst Mỹ Lai did prove a moral turning point for figures such as Telford Taylor, it was only when the soldiers responsible were held to account that public opinion began to react and change. Turse argues that in one sense, the scale of Mỹ Lai worked against any impact it might have had by making other allegations surfacing

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[125] Indeed, reflecting on events such as the Russell Tribunal, Sheehan conceded that: "The proceedings were widely dismissed in 1967 as a combination of kookery and leftist propaganda. They should not have been. Although the proceedings were one-sided, the perspective was there." See: Sheehan (n 119).
[126] Turse (n 58) 205.
[127] See for example: Richard Hammer, *One Morning in the War: The Tragedy at Son My* (Hart Davis 1970); Seymour Hersh, *My Lai 4: A Report on the Massacre and Its Aftermath* (Random House 1970); Mark Lane, *Conversations with Americans: Testimony from 32 Vietnam Veterans* (Simon and Schuster 1970); John Sack, *Lieutenant Calley/His Own Story* (The Viking Press 1970); James Simon Kunen, *Standard Operating Procedure: Notes of a Draft-Age American* (Avon Books 1971); Martin Gershen, *Destroy or Die: The True Story of My Lai* (Arlington House 1971); Wayne Greenshaw, *The Making of a Hero: The Story of Lieut.William Calley Jr* (Touchstone Publishing Company 1971); Jay Baird (ed), *From Nuremberg to My Lai* (Heath & Co 1972); Peter A. French (ed), *Individual and Collective Responsibility: Massacre at My Lai* (Schenkman Publishing Company 1972); Seymour Hersh, *Cover-Up: The Army's Secret Investigation of the Massacre at My Lai 4* (New York 1972); and Mary McCarthy, *Medina* (Harcourt 1972).
[128] 'Gallup Finds 79% Disapprove of Verdict' (*The New York Times*, 4 April 1971) 56 <https://www.nytimes.com/1971/04/04/archives/gallup-finds-79-disapprove-of-verdict.html> accessed 21 November 2021.
[129] Hagopian (n 2) 2-3.
[130] As identified by Brummer as part of the *Vietnam War Song Project*: Justin Brummer, 'The Vietnam War: A History in Song' (*History Today,* 25 September 2018) <https://www.historytoday.com/miscellanies/vietnam-war-history-song> accessed 21 November 2021.

seem small or less newsworthy by comparison. As Turse notes: "[i]t was almost as if America's leading media outlets had gone straight from ignoring atrocities to treating them as old news, with just a brief flurry of interest in between."[131]

Important to this was the US military's ability to control the flow of information about any atrocities—although as the Mỹ Lai disclosures show, this was not entirely sealed off. These cover-ups allowed the military to diffuse attention from other equally brutal operations, with Turse pointing to 'Operation Speedy Express' as illustrative of this. This campaign was conducted in the Mekong Delta region between December 1968 and May 1969, which consisted of a large-scale infantry campaign supported by extensive bombing. The official estimated body count was 10,899 with 267 American lives lost. However, an anonymous letter sent by a concerned soldier to General Westmoreland suggested that even on a conservative estimate based on his experience, a "My Lay each month for over a year" in civilian casualties was being committed.[132] Another official thus suggested that as many as 5,000 of the 10,899 deaths recorded in the operation were civilians.[133] It is an understanding of these kinds of routine atrocities committed as part of the military strategy in Vietnam that leads Turse to quote Ron Ridenhour approvingly; that Mỹ Lai was "an operation, not an aberration."[134]

In addition to officially sanctioned cover-ups, other factors shaped responses to Mỹ Lai. Most immediately, the Tet Offensive brought about profound changes in how the War was presented in the media. This occurred towards the end of January 1968 when North Vietnamese and Viet Cong forces launched a surprise attack during the Tết holiday.[135] Although the numerous attacks launched across South Vietnam—particularly the intense battle in Huế —proved unsuccessful, the pictures of brutal, close-quarters fighting flooded American television screens. This provided a stark contrast with the previously positive reporting on the War that presented the image of a fading enemy.[136] Walter Cronkite's famous February 1968 broadcast on the Tet Offensive in which he described the War as mired in a stalemate was emblematic of this changing perception.[137]

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[131] Turse (n 58) 291.
[132] See: Nick Turse, 'A My Lai A Month' (*The Nation,* 1 December 2008) <https://www.thenation.com/article/archive/my-lai-month/> accessed 9 February 2022. For an in-depth overview of this, see: Nelson (n 84) ch 3.
[133] ibid.
[134] Ron Ridenhour quoted in David L. Anderson (ed), *Facing My Lai: Moving Beyond the Massacre* (University Press of Kansas 1998) 56. See also Turse (n 58) 5.
[135] Hall (n 78) 54.
[136] ibid 57.
[137] Cronkite concluded that evenings' reporting with the following passage: "To say that we are closer to victory today is to believe, in the face of the evidence, the optimists who have been wrong in the past. To suggest we are on the edge of defeat is to yield to unreasonable pessimism. To say that we are mired in stalemate seems the only realistic, yet unsatisfactory, conclusion." Walter Cronkite, 'Editorial Comment on the

This brought the true costs of the War into sharp relief and disrupted the "discursive framework" about it.[138] Oliver thus argues that had it not been for the changing conditions following the Tet Offensive, Mỹ Lai might have been more easily categorised as *exceptional* or *aberrant* had the war itself not become "ever more irreconcilable with the calculus of a just war".[139] And whilst we should be careful not to repeat a misunderstanding that the media *lost* the War,[140] both the Tet Offensive and the Mỹ Lai massacre did mark moments where the media shifted from more deferential reporting conventions and instead embraced a more critical view of the War.[141] As such, from late 1969 onward a vision of Vietnamese suffering was more forcefully communicated by the media.[142] Other factors compounded this, including Johnson's decision not to seek re-election in March 1968, as well as the anti-war movement gradually gaining more widespread acceptance.[143] Additionally, with a Republican President and Democratic Congress, the anti-war movement also now had access to institutional resources which could be mobilised to constrain the policy options available to the executive after 1969.[144] The leaking of the so-called *Pentagon Papers* in summer 1971 would also help to turn the tide of anti-war sentiment.[145]

We thus get a sense that whilst the Mỹ Lai revelations and subsequent prosecution of Calley did impact how the War was perceived, there were also other factors at play in translating this into a broader anti-war sentiment. In any event, in the longer course of history, American soldiers themselves came to be viewed as the primary victims of the War.[146] In this sense, the criminality of Mỹ Lai flashed up in an instant before attention

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Tet Offensive, 27 February 1968' reprinted in Michael H. Hunt, *A Vietnam War Reader: A Documentary History from American and Vietnamese Perspectives* (The University of North Carolina Press 2010) 172.

[138] Oliver (n 75) 255.

[139] ibid.

[140] This was the view shared and espoused by President Johnson, President Nixon, and General Westmoreland: Douglas Porch, '"No Bad Stories": The American Media-Military Relationship' (2006) 55(1) Naval War College Review 85, 91.

[141] Daniel C Hallin, 'The "Living-Room War": Media and Public Opinion in a Limited War' in Andrew Wiest (ed), *Rolling Thunder in a Gentle Land: The Vietnam War Revisited* (Osprey publishing 2006) 286. Although Hess also notes that much of the reporting on Mỹ Lai was cautious at first, tending not to present it as an entirely unjustified killing: Gary R. Hess, *Vietnam: Explaining America's Lost War* (2nd edn, Wiley Blackwell 2015) 148, 152, & 287.

[142] Oliver (n 75) 256.

[143] Hall (n 78) 52 & 57-60; and Hallin (n 141) 278.

[144] George Vickers, 'The Vietnam Antiwar Movement in Perspective' (1989) 21-2 Bulletin of Concerned Asian Scholars 100, 108.

[145] Officially titled Report of the Office of the Secretary of Defense Vietnam Task Force, the Pentagon Papers were leaks of a highly classified historical analysis of American involvement in Vietnam that had been commissioned by the then Secretary of Defense Robert McNamara, which revealed the extent to which both the public and Congress had been misled about the situation and strategy in Vietnam. The publication of excerpts from the Pentagon Papers gave rise to a landmark US Supreme Court case, following President Nixon's attempt to suppress publication: *New York Times Co. v. United States*, 403 U.S. 713 (1971).

[146] Oliver broadly makes this point in: Kendrick Oliver, *The My Lai Massacre in American History and Memory* (Manchester University Press 2006); Oliver (n 75); and Oliver, 'Coming to terms with the past: My Lai' (2006) 56(2) History Today 37.

shifted to the more pressing matters of de-escalation and bringing troops home. This was also facilitated by the suppression of information regarding the extent of the atrocities committed by the military in Vietnam.[147]

We should also note that how Mỹ Lai is understood and placed within the broader history of the War is shaped by an underlying perception of how endemic this kind of violence was. Thus whilst some have viewed it as either an inevitable consequence of certain conditions present in the War,[148] or as characteristic of it from its inception,[149] other accounts view it as one issue amongst many others to be considered. Indeed, in certain accounts Mỹ Lai is given a relatively minor role in the history of the War as a whole, often placed as one element amongst many contributing to a growing anti-war sentiment.[150] Thus Sheehan has identified Mỹ Lai as distinguishable only insofar as it consisted of atrocities committed by troops with their personal weapons, rather than with artillery or aerial bombardment.[151]

A further body of work tends to downplay the broader issue of American atrocities committed during the War on more wholesale terms. This latter view is present in classic works such as that by Lewy, which typically concede that where incidents like Mỹ Lai did occur, they were exceptional and reflected the acts of *bad apples*.[152] However, these kinds of accounts have themselves been identified as reflective a historiographical impulse that emerged to towards the end of the War and which spread more widely in the 1980s and 1990s by conservative politicians, historians, and veterans to reclaim the legacy of the Vietnam War.[153] This revisionist impulse is exemplified by President Reagan's "stab in the back" account of the War, which sought to rehabilitate the reasons for US military defeat in Vietnam.[154] In this regard, we must caution our treatment of Mỹ Lai and American atrocities with the caveat that the responses and counter-responses to them often served some kind of therapeutic function in how the War and its legacy were absorbed in American society at

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[147] As Turse argues, the issue of war crimes became an image management problem for the Vietnam War Crimes Working Group: Turse (n 58) 204.
[148] Turse for examples views it as an inevitable consequence of waging a war of attrition, pervasive racism, and poor training amongst other factors: Turse (n 58) 25-7.
[149] Kolko argued that the "wholesale destruction of villages and innocent people had been characteristic of the war from the inception". See: Gabriel Kolko, *Vietnam: Anatomy of a War, 1940-1975* (Allen & Unwin 1986) 345.
[150] See for example James S. Olson and Randy Roberts, *Where the Domino Fell: America and Vietnam, 1965-1995* (Brandywine Press 1999) 224-226; and Stanley Karnow, *Vietnam a History* (Penguin 1997) 30 & 482.
[151] Sheehan, *A Bright Shining Lie* (n 121) 688-90.
[152] Lewy (n 18) 307-373. See also similarly: Robert J. Lifton, *Home from the War: Vietnam Veterans: Neither Victims nor Executioners* (Simon & Schuster 1973) 16.
[153] Turse (n 58) 6.
[154] Jeffrey P. Kimbell, 'The Stab-in-the-Back Legend and the Vietnam War' (1988) 14(3) Armed Forces & Society 433.

the political and cultural level.[155] This, of course, is not to downplay the atrocities themselves. Rather, it is to show how particular incidents or an understanding of them more generally came to serve a discursive, and eventually political, function in the anti-war movement.

8.6 The Anti-War Movement and the Language of International Criminal Justice

With the impact of Mỹ Lai on the framing of the war in mind, the present section will focus on how the language of *international criminality* animated the strategies of certain groups within the anti-war movement. My focus thus broadens beyond how the illegality of the War was perceived within legal academic commentary, towards other spaces where ICL norms were drawn on to make moral and political sense of the War. I will initially focus on how ICL norms emanating from Nuremberg were drawn on in conscientious objection cases, after which I will focus on the so-called 'Russell Tribunal' in 1967 and the commissions of inquiry it inspired. These events are worthy of our attention as they give us a sense of how the morality and legality of the War was reconstituted using the language and aesthetics of *international criminal justice.*

8.6.1 Conscientious Objection, Selective Service, and the Nuremberg Precedent: Reconstituting the Morality of the Vietnam War?

One area where the legality of the War was challenged directly was in the context of conscientious objection to military service. Following the authorisation of military force under the Gulf of Tonkin Resolution,[156] those not volunteering for service were typically conscripted under the Selective Service Act of 1948,[157] and later under the revised Military Service Acts of 1967 and 1971.[158] Provided they met the physical and legal requirements,

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[155] Appy makes this point in a review essay looking at various works dealing with post-Vietnam experiences, noting "just how self-absorbed our response to Vietnam has been." See: Christian Appy, 'The Muffling of Public Memory in Post-Vietnam America' (The Chronicle, 12 February 1999) <https://www.chronicle.com/article/the-muffling-of-public-memory-in-post-vietnam-americabooks-cited-in-this-essay-16954/> accessed 11 February 2022.

[156] The Vietnam War had not been authorised under the President's constitutional powers for declaring war, as per U.S. Const. art I, § 8. Rather, military force had authorised by joint Congressional resolution under the 'Gulf of Tonkin Resolution' or 'Southeast Asia Resolution', which game in response to the Gulf of Tonkin incidents: Joint Resolution To Promote the Maintenance of International Peace and Security in Southeast Asia, H.J. Res 1145, 88th Cong. (1964).

[157] Selective Service Act of 1948, 62 Stat. 604 Chpt. 625 (1948).

[158] Military Selective Service Act of 1967, Pub.L. 90-40, 81 Stat. 100 (enacted June 30, 1967); and Military Selective Service Act, Pub.L. 92-129, 85 Stat. 348 (enacted September 28, 1971).

conscripts were required to perform combatant or non-combatant service in the military. Exceptions were made for certain occupations, those with dependents, students, and anyone rejected for physical, mental, or moral reasons.[159] Opposition to the draft was fuelled by the widespread perception of its unfairness, as well as a rejection of the War itself.[160] And whilst evading the draft by migrating, enrolling in education, and relying on spurious ailments were some of the available options, others actively opposed the system.[161] Conscientious objection was one means of doing this, which had been provided for in all conscription acts passed since 1864.[162] In the Selective Training and Service Act of 1940, this covered anyone "who, by reason of religious training and belief, is conscientiously opposed to war in any form",[163] with the subsequent statutes providing for a similar provision.[164]

This mechanism was frequently relied on during the Vietnam War,[165] with over 170,000 men classified as conscientious objectors, which even outnumber military conscripts in the final year of the draft.[166] Raley argues the Supreme Court's gradual expansion of conscientious objection during the War helped to "collapse" the Selective Service System.[167] A first step occurred in *Seger v United States* when the Supreme Court broadened the scope of what beliefs could qualify under the conscientious objection exemption contained in s 6(j) of the Universal Military Training and Service Act. After *Seger*, the appropriate test was whether they held a sincere and meaningful belief occupying in their life a place parallel to that filled by the God of those admittedly qualified for the

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[159] Perhaps most controversially, this included for a time gay men, although this restriction was later loosened up. On this, see: Justin David Suran, 'Coming Out Against the War: Antimilitarism and the Politicisation of Homosexuality in the Era of Vietnam' (2001) 53(3) American Quarterly 452.
[160] Particularly as the burden of service disproportionately fell on the socio-economically disadvantaged and racial minorities: David Cortright, *Peace: A History of Movements and Ideas* (CUP 2008) 164.
[161] ibid 164.
[162] Hugh C. MacGill, 'Selective Conscientious Objection: Divine Will and Legislative Grace' (1968) 54(7) Virginia Law Review 1355, 1356.
[163] Selective Training and Service Act of 1940, Pub.L. 76-783, 54 Stat. 885, § 5(g).
[164] For example, the Military Selective Service Act of 1967, § 6(j): "Nothing contained in this title…shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."
[165] Szmedra provides a useful overview of what the administrative process of making a declaration of conscientious objector status entailed, as well as the administrative burden it created for local draft boards: Philip Szmedra, 'Vietnam and the Conscientious Objector Experience' in Andrew Wiest, Mary Kathryn Barbier, and Glenn Robins (eds), *America and the Vietnam War: Re-Examining the Culture and History of a Generation* (Routledge 2010) 151-154.
[166] Cortright (n 160) 167; and Szmedra, ibid 144.
[167] Bill Raley, 'How Conscientious Objectors Killed the Draft: The Collapse of the Selective Service During the Vietnam War' (2020) 68(2) Cleveland State Law Review 151.

exemption, provided it was not essentially a political, sociological, or philosophical view or merely a personal code.[168]

This was further shaped in *Welsh v United States,* where the Supreme Court held this exemption also extended to ”all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.”[169] Although it perhaps met its outer limits in *Gillette v United States* when conscientious objection was not found to extend to an objection—even a religiously rooted one—to a particular war, rather than war in general.[170] Perhaps most famously, Muhammad Ali had refused to serve in Vietnam based on religious belief.[171]

Although the conscription acts exempted individuals professing an objection to all wars based on religious belief, a growing number of individuals sought to resist service in the Vietnam War based on objections that were not religiously rooted. These individuals represented a new class of *selective* conscientious objectors,[172] which consisted of both draftees and serving members of the military who rejected either the War in Vietnam as a whole or some specific aspect of it.[173] Selective conscientious objectors pointed to what they perceived as the inhumanity and illegality of the War as justification for defying orders, with the duty of resistance now seen as their patriotic duty.[174] As part of this, they increasingly looked to specific international legal norms as a way of articulating their moral objection to the war. In particular, service was refused because it constituted a war of aggression or would require them to commit or assist in committing war crimes and crimes against humanity.[175]

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[168] Although the three cases of conscientious objection dealt with in *Seeger* did not occur in the context of the Vietnam War, it nevertheless proved important to future cases: *United States v. Seeger,* 380 U.S. 163 (1965). On this decision, see: Walter S. Griggs, ‘The Selective Conscientious Objector: A Vietnam Legacy’ (1979) 21(1) Journal of Church and State 91, 100-101.
[169] *Welsh v. United States*, 398 U.S. 333, 344 (1970).
[170] In this case, one of the petitioners had sought conscientious objection based on a his perceived duty as a faithful Catholic to distinguish between just and unjust wars. See: *Gillette v. United States,* 401 U.S. 437 (1971). On this decision, see: Megan Threlkeld, ‘”The War Power is Not a Blank Check”: The Supreme Court and Conscientious Objection’ (2019) 31(3) Journal of Policy History 303, 318. In an earlier case by the US Court of Appeals for the Third Circuit, the defendant had similarly sought to rely on a theory of just war: *United States v. Spiro*, 384 F.2d 159 (3d Cir. 1967).
[171] Samuel O. Regalado, ‘Clay, aka Ali v US (1971): Muhammed Ali, Precedent, and the Burger Court’ in Samuel O. Renaldo and Sarah K. Fields (eds), *Sport and the Law: Historical and Cultural Intersections* (University of Arkansas Press 2014) 3-18.
[172] Griggs (n 168).
[173] David Maxwell, ‘“These Are the Things You Gain If You Make Our Country Your Country”: U.S.–Vietnam War Draft Resisters and Military Deserters and the Meaning of Citizenship in North America in the 1970s’ (2015) 40(4) Peace and Change 437, 439.
[174] Michael S. Foley, *Confronting the War Machine: Draft Resistance during the Vietnam War* (University of North Carolina Press 2003) 94–95, 100, & 170.
[175] William V. O’Brien, ‘Selective Conscientious Objection and International Law’ (1968) 56(6) Georgetown Law Journal 1080.

An early example occurred in November in 1965 when Lieutenant Henry Howe was court-martialled and sentenced to two years hard labour for carrying a placard calling for an end to Johnson's war of "Fascist Aggression" at a protest in Texas.[176] As the War ramped up, so too did the willingness of draftees and service members to point to the illegality of the war under international law as justification for resisting service—although the Courts scarcely proved receptive. For example, in *Mitchell v United States*, the Supreme Court denied certiorari where the defendant had wilfully failed to report for their induction having been drafted.[177] Mitchell sought to introduce evidence that the Vietnam War violated international law as justification for his refusal. And whilst his petition for certiorari was rejected, Justice William O. Douglas issued a dissent arguing the matter should be considered, particularly given this was a recurring issue in Selective Service cases before the Court.[178] In doing so, Justice Douglas specifically referred to the existence of a body of opinion that viewed the War as illegal under international law, the international crimes contained in the Treaty of London, and the work of Justice Robert Jackson at the IMT.[179]

In *Mora v McNamara*,[180] three draftees refused deployment to Vietnam and, in doing so, sought to rely on similar grounds as Mitchell had.[181] Two sets of proceedings arose from this case. And in both the Federal suit they had brought and in their court-martial proceedings, they all claimed the war was illegal and immoral, and thus sought to rely on the Nuremberg precedent. Private Samas, for example, argued that Nuremberg stood as precedent that soldiers must use their conscience when following orders.[182] In their Federal suit seeking an injunction to prevent their deployment, they referenced the Kellogg-Briand Pact of 1925, the UN Charter, the Geneva Agreements of 1954, and the trial and judgment

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[176] David Cortright, *Soldiers in Revolt: GI Resistance During the Vietnam War* (Haymarket Books 2005) 52; and Jeremy S. Weber, 'The Curious Court-Martial of Henry Howe' (2019) 55(1) Tulsa Law Review 109.
[177] *Mitchell v. United States*, 369 F. 2d 329 (2d Cir. 1966) cert denied, 386 U.S. 972 (1967).
[178] Although the Supreme Court largely remained silent when it came to determining the legality of the War, Justice Douglas was notable in being outspoken against it, having previously visited Vietnam and met with both North and South Vietnamese political leaders before his service on the court: James L. Moses, 'William O. Douglas and the Vietnam War: Civil Liberties, Presidential Authority, and the "Political Question"' (1996) 26(4) Presidential Studies Quarterly 1019, 1019-1022. Douglas would later issue an in-chambers decision which ordered the US military to halt a bombing campaign in Cambodia, although this was later overturned. See: *Holtzman v. Schlesinger*, 414 U.S. 1316 (1973) (Douglas, J., in chambers). On the 'silence' of the Supreme Court, see: Rodric B. Schoen, 'A Strange Silence: Vietnam and the Supreme Court' (1994) 33 Washburn Law Journal 275.
[179] 386 U.S. 972, 973-4 (1967).
[180] *Mora v. McNamara*, 128 U.S.App.D.C. 297, 387 F.2d 862, cert. denied, 389 U.S. 934 (1967).
[181] Martin Arnold, '3 Soldiers Hold News Conference to Announce They Won't Go to Vietnam' (*The New York Times*, 1 July 1966) <https://www.nytimes.com/1966/07/01/archives/3-soldiers-hold-news-conference-to-announce-they-wont-go-to-vietnam.html> accessed11 February 2022.
[182] Samas of the 'Fort Hood Three': '3rd Soldier Opposed to War in Vietnam Convicted' (*The New York Times*, 10 September 1966) 4 <https://nyti.ms/3l96EV8> accessed 11 February 2022.

of Nuremberg.[183] Although the Supreme Court eventually denied certiorari, Justice Douglas and Justice Potter Stewart issued a dissent from this denial, once again arguing it should be considered.[184]

Perhaps the most high-profile refusal of service case was that of Dr. Howard Levy who attempted to "put the Vietnam war on trial" when he refused to provide medical training to US special forces soldiers preparing for deployment to Vietnam.[185] In an unprecedented move, Levy was permitted to raise a "Nuremberg defense" in which military service was refused because it was illegal, immoral, and US troops were actively committing war crimes.[186] Importantly, the military trial judge allowed Levy to raise the defence provided it could be substantiated, which was a first in a military or civilian court.[187] This allowed Levy to introduce to the Court, several years before the Mỹ Lai revelations emerged, evidence that US military forces were committing war crimes and other atrocities in Vietnam. [188] The limitation was that Levy had to prove that atrocities were occurring as a general pattern of practice and that the individuals he was required to train would likely have committed such acts.[189]

Although not successful in raising the defence,[190] it has nevertheless been described as a "precedent-making" decision where "Nuremberg war crime rationales" were placed before the courts.[191] And thus for a "brief moment in history" the possibility of a Nuremberg defence was opened up where military service could be refused if it entailed potential complicity in war crimes.[192] This approach saw perhaps its most significant success in *United States v Sisson*, where the appellant sought to rely on a belief that US military involvement in Vietnam was illegal under international and domestic law following his indictment on criminal charges for failing to report to an army induction as ordered by his

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[183] The Fort Hood Three Defense Committee, *The Fort Hood Three: The Case of the Three G.I.'s Who Said "No" to the War in Vietnam* (Ford Hood Three Defense Committee, 1966) <https://content.wisconsinhistory.org/digital/collection/p15932coll8/id/54463> accessed 11 February 2022.
[184] *Mora v. McNamara*, 389 U.S. 934 (1967).
[185] Robert N. Strassfeld, 'The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy' (1994) 4 Wisconsin Law Review 839, 840.
[186] Homer Bigart, 'Levy Pleads the "Nuremberg Defense"' (*The New York Times*, 21 May 1967) 279 <https://nyti.ms/3cOj2oW> accessed 11 February 2022.
[187] ibid.
[188] This included evidence regarding: the mutilation of the dead, bounties placed on enemy soldiers, assassinations, the use of chemical weapons causing unnecessary suffering, the forcible removal of civilians and the destruction of civilian property, execution and torture. See: Marjorie Cohn and Kathleen Gilbert, *Rules of Disengagement* (NYU Press 2009) 20-1; and A.N. Kurtha, 'The Court-Martial of Captain Levy' (1968) 17(1) The International and Comparative Law Quarterly 206, 207.
[189] Interestingly, to assist in the preparation of his defence, Levy had been sent materials and other data collected by the Russell Tribunal: 'Russell 'War Crimes' Data Sent to Captain on Trial' (*The New York Times*, 22 May 1967) 13 <https://nyti.ms/3m29PhG> accessed 13 December 2021.
[190] Levy proved similarly unsuccessful before the Supreme Court: *Parker v Levy* 417, U.S. 733 (1974).
[191] Dorsen and Rudovsky (n 39).
[192] Robert N. Strassfeld, 'The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy' (1994) 4 Wisconsin Law Review 839, 843. Also see Kurtha (n 188) 207.

local draft board.[193] Although the Court never considered the merits of his conscientious objection in this successful appeal,[194] it is nevertheless notable as an instance where service in a specific war was refused as it would "violate the spirit and the letter of the Nuremberg Charter".[195]

Those seeking to resist military service were also assisted by political activists who similarly drew on the language of international law to articulate their rejection of the war. Perhaps most memorably, Dr. Benjamin McLane Spock—a paediatrician and best-selling author of baby and childcare books—took an increasingly active and radical role in encouraging draft resistance. In early January 1968, Dr. Spock and four others were indicted on federal charges of conspiring to aid, abet, and counsel individuals to violate conscription laws by refusing military service.[196] In justifying his acts, Dr. Spock referenced the "Nuremberg Laws", arguing it made disobeying government orders to serve in Vietnam morally necessary when "your government is up to crimes against humanity."[197]

Although they hoped to put the War itself on trial, the hearing ultimately centred on contesting the conspiracy charges as Judge Ford had early on closed off the possibility of raising this defence.[198] Dr. Spock and three of his co-conspirators were found guilty,[199] however this was overturned on appeal as Judge Ford had submitted prejudicial questions to the jury.[200] And although the *Nuremberg defence* had been closed off, the celebrity status of Dr. Spock brought considerable public awareness.[201] This helped to disseminate a new way of framing the perceived immorality of the War through the language of international criminal justice.

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[193] *United States v. Sisson*, 339 U.S. 267 (1970).
[194] Indeed, although it was the first case won by a selective conscientious objector, it was not necessarily won *because* the appellant objected as such: David Malament, 'Selective Conscientious Objection and the Gillette Decision' in Marshall Cohen, Thomas Nagel, & Thomas Scanlon (eds), *War and Moral Responsibility: A Philosophy & Public Affairs Reader* (Princeton University Press 1974) 167.
[195] *United States v. Sisson*, 339 U.S. 267, 271 (1970). For an overview, see: Joseph E. Capizzi, 'Conscientious Objection in the United States' (1996) 38(2) Journal of Church and State 339, 347-348.
[196] Fred P. Graham, 'Spock and Coffin Indicted for Activity Against Draft' (*The New York Times*, 6 January 1968) <https://archive.nytimes.com/www.nytimes.com/books/98/05/17/specials/spock-indicted.html> accessed 27 November 2021.
[197] Edward C. Burks, 'Spock Hopes 500,000 Will Refuse to Be Drafted' (*The New York Times*, 6 January 1968) <https://archive.nytimes.com/www.nytimes.com/books/98/05/17/specials/spock-refuse.html> accessed 27 November 2021.
[198] Michael S. Foley (ed), *Dear Dr. Spock: Letters About the Vietnam War to America's Favourite Baby Doctor* (NYU Press 2005) 191.
[199] John H Fenton, 'Dr Spock Guilty With 3 Other Men in Antidraft plot' (*The New York Times*, 15 June 1968) <https://archive.nytimes.com/www.nytimes.com/books/98/05/17/specials/spock-guilty.html> accessed 27 November 2021.
[200] *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).
[201] On the impact of the Dr Spock trial—also referred to as the trial of the 'Boston Five'—see: Foley (n 174) 282-95; Foley (n 198) 191-214.

Although just a snapshot of the many cases where it was raised,[202] we nevertheless get an insight into what *Nuremberg* as a legal and moral precedent meant to certain anti-war activists and how it was put to use in resisting the War. Writing in 1968 Dorsen and Rudovsky opined that in this context it meant individuals had a duty to determine for themselves the morality and legality of their country's actions and that they must refuse orders where it would involve "complicity in war crimes, crimes against peace, or crimes against humanity."[203] As per Falk, it pointed to the development of the "wider logic of Nuremberg".[204] It thus also contributed to one of the most overtly politicised movements within the active ranks of the US military, with serving troops and draftees alike mobilising against the War.[205]

Despite arguments that the *Nuremberg defence* should be seriously considered,[206] it ultimately saw little success before the Courts.[207] Interestingly, despite having worked at both the IMT and the subsequent trials, Telford Taylor did not agree that the Nuremberg precedent conferred a positive duty on soldiers to assure themselves of the legality of orders or to defy anything they deemed in breach of international law.[208] Further, Taylor also disagreed that domestic courts were the appropriate forum scrutinising the legality of the War.[209] This provided a marked contrast to those arguing that conscientious objection could serve as a "political check on the arbitrary use of governmental power."[210] Nevertheless, despite their limited success,[211] these attempts to establish a *Nuremberg defence* give us a sense of the increasingly legalistic dimensions anti-war resistance took on—as Kurtha noted in the wake of the Levy judgment.[212] More generally, this episode also provides an insight into how ICL norms were diffusing within the anti-war movement and shaping a moral sensibility in response. In particular, it provided individuals and groups

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[202] For a fuller overview of the corpus of jurisprudence on this, see: Robert L. Rabin, 'Do You Believe in a Supreme Being—The Administration of the Conscientious Objector Exemption' (1967) 3 Wisconsin Law Review 642; O'Brien (n 175); and Capizzi (n 195). It should be noted that these particular conscientious objection cases came as part of a broader effort to challenge the legality of the War through the Courts using various constitutionally grounded arguments, which the judiciary proved largely unreceptive to. For a brief overview, see Lippman (n 9) 371-377.
[203] Dorsen and Rudovsky (n 39) 757. See also: Griggs (n 168) 101.
[204] Falk (n 37) 167.
[205] Cortright (n 176) 153.
[206] Anthony D'Amato, Harvey L. Gould, and Larry D. Woods, 'War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Register' (1969) 57(5) California Law Review 1055.
[207] Griggs (n 168) 102.
[208] Taylor (n 104) 120.
[209] ibid 116.
[210] Dorsen and Rudovsky (n 39).
[211] As Norton Moore—a noted supporter of the Vietnam War—identified when surveying many of these cases, this was typically because the Courts viewed it as entering into the territory of a non-justiciable political question: John Norton Moore, *Law and the Indo-China War* (Princeton University Press 1972) ch 13. Although Falk was critical of this approach: Richard Falk, 'The Nuremberg Defense in the Pentagon Papers Case' (1974) 13(2) Columbia Journal of Transnational Law 214.
[212] Kurtha (n 188) 209.

opposing the War a way of framing it, grounding their dissent, and a language that could help mobilise resistance against it. Stewart thus argues the moral and legal precedent of Nuremberg helped create a new category of war resister and coalesce a "war crimes movement from below".[213]

8.6.2 The Russell Tribunal

Given the prominence of conscientious objectors, it is perhaps little surprise that the organisers of the so-called 'Russell Tribunal' hoped their efforts would aid prospective draft resisters. And by holding an inquiry to establish the *guilt* of the US for their actions in Vietnam, this would "allow all the young who are combatting Johnson's policy to involve, not only the laws of Nurenberg [sic] but also the judgment of a number free men who do not represent any power, or any party".[214] As a form of "grassroots international adjudication",[215] the *International War Crimes Tribunal* (Russell Tribunal) organised principally by Bertrand Russell—although as his health declined, others took a more active role—was inspired by conscientious objectors, as well as other radical intellectuals such as Ralph Miliband and Ralph Schoenman.[216]

The War had early on caught Russell's attention. And since at least 1963 he had publicly written about the "war of annihilation" taking place in Vietnam.[217] Russell's concern intensified as the War raged on, particularly as he received reports of atrocities from Schoenman.[218] Russell thus published *Appeal to the American Conscience* in June 1966,[219] having just issued letters to potential participants setting out his intention to hold a tribunal.[220] In this 'appeal', Russell announced he had approached "eminent jurists, literary figures and men of public affairs" to form the Tribunal to provide an "exhaustive portrayal of what has happened to the people of Vietnam",[221] and to hold the likes of Johnson, Rusk, McNamara, Westmoreland and their "fellow criminals" to a "wider justice than they

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[213] Luke J. Stewart, '"A New Kind of War": The Vietnam War and the Nuremberg Principles, 1964-1968' (PhD thesis, University of Waterloo 2014).
[214] Sartre referred to the actions of David Mitchell and other draft resisters as providing the inspiration for holding the tribunal: Jean-Paul Sartre, 'Imperialist Morality' (1967) 41(1) New Left Review 3, 10.
[215] Marcus Zuninio, 'Russell Tribunal' (*Max Planck Encyclopedia of International Law*, April 2019) <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3205.013.3205/law-mpeipro-e3205> accessed 27 November 2021.
[216] Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens' Tribunals: Mobilising Public Opinion to Advance Human Rights* (Palgrave 2002) 106.
[217] Russell (n 47) 31.
[218] Bertrand Russell, *Autobiography* (Routledge 2010) 642.
[219] First published in pamphlet form and then later reprinted as part of a collection: Bertrand Russell, *An Appeal to the American Conscience* (Bertrand Russell Peace Foundation 1966); and Russell (n 46).
[220] Klinghoffer Klinghoffer (n 216) 106.
[221] Russell (n 47) 31.

recognise and a more profound condemnation than they are equipped to understand."[222] A preliminary meeting was held in November 1966 where Russell stated his aim to use the Tribunal to investigate and assess the character of the War.[223] Although organised through the *Bertrand Russell Peace Foundation* (BRPF), assistance also came from North Vietnam directly in the form of financial support and help arranging visas for witnesses and investigators.[224]

In terms of format, the Tribunal occupied a middle position between a trial and commission of inquiry.[225] And although lacking formal legal standing, it was couched in pseudo-legal language, with the panel of judges—who consisted of political activists and prominent intellectuals—assisted by individuals with legal training. The Tribunal also lacked a balanced adversarial procedure, with the accused's lack of participation inevitably skewing proceedings. Instead, judges would conduct inquiries and then formulate conclusions on the charges. However, regardless of the precise legal form it took, Russell's intention was to hold a "commission of inquiry" where evidence and witness testimony could be submitted to "verifiable scrutiny".[226]

Opposition came early on, with the US Government mobilising the State Department to undermine it soon after the Tribunal was announced. In this regard, there are notable similarities between the response to the Russell Tribunal and the *We Charge Genocide* petition.[227] This included encouraging newspapers to run stories criticising the organisers, dissuading officials due to attend from supporting it, and emphasising the communist affiliations of the Tribunal and its organising committee.[228] Some of the abandoned efforts at countering the Tribunal included a defamation suit and holding a rival trial.[229]

Opposition also manifested in the difficulties the organisers encountered in finding a host for the Tribunal. Paris had been identified as a possible location, however President Charles de Gaulle objected, critiquing the tribunal because in seeking to do *justice* it

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[222] ibid 124.
[223] Bertrand Russell, 'Speech to the First Meeting of the War Crimes Tribunal, London, 13 November 1966' in Peter Limqueco, Peter Weiss, and Ken Coates (eds), *Prevent the Crime of Silence: Reports from the Sessions of the International War Crimes Tribunal founded by Bertrand Russell* (Allen Lane 1971).
[224] Harish C. Mehta, 'North Vietnam's Informal Diplomacy with Bertrand Russell: Peace Activism and the International War Crimes Tribunal' (2012) 37(1) Peace & Change 64, 87.
[225] For an overview of how the Tribunal came to take the shape it did, see: Klinghoffer and Klinghoffer (n 216) 113-115
[226] Bertrand Russell, 'Postscript: The International War Crimes Tribunal' in Russell (n 47) 127.
[227] See Chapter 5, s.5.5.2.
[228] As we see in the public rejection of the Tribunal by the then President of Tanzania. In this piece by *The New York Times* written in advance of the Tribunal, the paper described it as a "grotesque plan" that was running into well deserved "heavy weather": 'That "War Crimes Tribunal"' (*The New York Times*, 21 November 1966) 44 <https://nyti.ms/3pXfWoP> accessed 13 December 2021. See also Mehta (n 222) 81-83.
[229] ibid 79.

usurped the source from which it emanates in the State.[230] Although Mehta argues the true source of this resistance was an unwillingness to potentially deteriorate Franco-US relations.[231] Nevertheless, the organisers eventually settled on Sweden, with the Prime Minister playing a notably reluctant host.[232] The choice of location also shaped the proceedings themselves, with Sweden acceding to the request only if the principles of objectivity would be adhered to and that no individual US officials would be singled out for judgment.[233]

The organisers had attempted to involve US officials such as Johnson, Rusk, and McNamara, although not unsurprisingly these requests did not receive an official response.[234] The involvement of Vietnamese individuals invited to the Tribunal to deliver evidence was particularly notable, although interested experts provided the majority of testimony delivered across the two sessions. Vietnamese experiences were most visible in the medical examinations provided during the tribunal, which sought to establish and display before the world media the horrific injuries sustained by civilians as a result of the US bombing campaigns.[235]

In terms of the judgment due to be rendered, as the Tribunal was set up to establish whether aggression, war crimes and other violations of IHL, and genocide had occurred, it was couched in legalistic terms.[236] This was evident in Sartre's statements as Executive President at both sessions, with the opening statements referring to the categories of criminality they were concerned with.[237] The verdicts rendered by the panel of judges also referenced the sources of law under which responsibility was established.[238] However, a notable limitation was that in establishing responsibility for these crimes, the tribunal was constrained by Swedish defamation law, which meant that individuals could not be identified

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[230] See the exchange between Sartre and de Gaulle: 'Text of de Gaulle's Letter Banning War Crimes Tribunal' (1967) 5(19) World Outlook 483; and 'Jean-Paul Sartre's Answer to de Gaulle' (1967) 5(19) World Outlook 484.
[231] Mehta (n 224) 82.
[232] Although the Swedish Prime Minister went to considerable effort to prevent the Tribunal being held in Stockholm, he ultimately lacked the legal power to do so: L.J. Stewart, 'Too loud to rise above the silence: the United States vs. the International War Crimes Tribunal, 1966–1967' (2018) 11(1) The Sixties: A Journal of History, Politics, and Culture 17, 27-28.
[233] ibid 28.
[234] See the letters of request sent by Bertrand Russell and Jean-Paul Sartre, respectively: John Duffett (ed), *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal* (O'Hare Books 1968) 18-20 & 25-26.
[235] See: 'Testimony and Medical Report of Vietnamese Victims' in Duffett (n 234) 215-220; and Henrik Forss, 'Examinations of the Wounded from U.S. Bombing Testimony' in Duffett (n 234) 221-223.
[236] 'Aims and Objectives of the International War Crimes Tribunal' in Duffett (n 234) 15-16.
[237] Jean-Paul Sartre, 'Inaugural Statement to the Tribunal' in Duffett (n 234).
[238] This included: the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1864, 1906, 1929, and 1949, the judgments of the Nuremberg IMT and the Tokyo IMFTE, the Universal Declaration of Human Rights, the Genocide Convention, the Kellog-Briand Pact of 1928, the United Nations Charter, and the Nuremberg Charter, amongst others. See: 'Verdict of the Stockholm Session' and 'Summary and Verdict of the Second Session' in Duffett (n 234) 302-310 & 643-650.

as bearing criminal responsibility.[239] Responsibility thus had to be formulated in more general terms at the level of state or administrative responsibility, rather than individual responsibility.

The proceedings were split into two sessions; one held in Stockholm in early May 1967 and a second in late November in Denmark. The Tribunal was convened to answer the following five questions, with the first session focused on answering the first three and the second session the latter two:[240]

1) Has the United States Government (and the Governments of Australia, New Zealand and South Korea) committed acts of aggression according to international law?
2) Has the American Army made use of or experimented with new weapons or weapons forbidden by the laws of war?
3) Has there been bombardment of targets of a purely civilian character, for example hospitals, schools, sanatoria, dams, etc., and on what scale has this occurred?
4) Have Vietnamese prisoners been subjected to inhuman treatment forbidden by the laws of war and, in particular, to torture or mutilation? Have there been unjustified reprisals against the civilian population, in particular, execution of hostages?
5) Have forced labour camps been created, has there been deportation of the population or other acts tending to the extermination of the population and which can be characterised juridically as acts of genocide?

The Tribunal's analysis of and answer to these questions was based on a combination of evidence and witness testimony delivered to the Tribunal in-person, as well as information from fact-finding missions that had been conducted in advance of the hearings.[241] The verdict produced by the Tribunal was largely unanimous, with Questions 1-3 answered affirmatively at the first session, and Questions 4-5 at the second.

In his closing statement, Russell commented that only "genocide" could capture the enormity of the crimes committed in Vietnam.[242] And this latter charge of genocide produced perhaps the most radical analysis put forward by the Tribunal. Sartre identified the *genocidal* conduct that the tribunal had received evidence of as an "expression of the economic infrastructure of [US] power, its political objectives and the contradictions of its

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[239] Klinghoffer and Klinghoffer (n 216) 124-5; and Marcos Zunino, 'Subversive Justice: The Russell War Crimes Tribunal and Transitional Justice' (2016) 10 International Journal of Transitional Justice 211, 214.
[240] 'Aims and Objectives of the Tribunal' in Duffett (n 234) 14.
[241] In particular, as carried out by Schoenman and Daly: Ralph Schoenman, 'Report on American Bombing in North Vietnam' and Lawrence Daly, 'Investigations of US War Crimes in North Vietnam' in Duffett (n 234) 201 & 196.
[242] Bertrand Russell, 'Closing Address to the Stockholm Session' in Duffet (n 234) 653.

present situation."[243] Genocide was thus viewed as a consequence of the imperialistic tendencies of the American pursuit of economic dominance.[244] With regard to Chapter 5, we can note similarities between the understanding of genocide developed by Sartre and that contained in the *We Charge Genocide* petition, which similarly identified an economic logic and motive to the *genocidal* acts it argued were being committed against African Americans.[245] Although both relied on a similar understanding of genocide, there is an interesting contrast between the two in terms of how they understood the source of the US's obligations in relation to genocide. Whilst the CRC petitioners argued the US was bound by the Genocide Convention absent ratification, Sartre and the Tribunal simply noted that responsibility arose under customary international law.[246]

Although receiving support amongst more radical members of the anti-war movement, the Russell Tribunal went largely unnoticed amongst the broader American public.[247] Commenting on the close of the Tribunal, the CIA reported to President Johnson that it had been a failure.[248] Scholarly opinion was similarly mixed. D'Amato, for example, recognised that whilst it performed an important function in publicising emerging details about the brutality of the War, it "got carried away" in trying to appear as capable of rendering proper legal judgment and, in doing so, revealed its biases.[249] Similarly, Falk characterised it as a "juridical farce" that was nevertheless important insofar as it "bears witness to the general perception of the war".[250] It was criticised for a lack of impartiality, given the Tribunal did not investigate allegations of atrocities by the Viet Cong or the North Vietnamese military.[251] A particularly interesting response came from a conservative youth activist movement—*Young Americans for Freedom*—who sponsored a "trial" in which they "indicted" several communist countries for crimes against humanity.[252]

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[243] Jean-Paul Sarte, 'On Genocide' in Duffet (n 234) 612 & 622.
[244] This is repeated in Basso's summary of the charge, which stated: "[t]his war of extermination is the natural fruit and necessity of American imperialism." See: Lelio Basso, 'Summation on Genocide' in in Duffet (n 234) 627.
[245] Chapter 5, s.5.10.2.
[246] Sarte (n 49) 51. Basso concludes similarly in his summing up: Basso (n 244) 633.
[247] Indeed, commenting on the Tribunal in a 1968 edition of *Playboy* magazine, Kenneth Tynan noted that it received scant coverage in the *Western* press. See: Kenneth Tynan, 'Open Letter to an American Liberal' (1968) 15(3) Playboy 83, 135 <https://archive.org/details/USPlayboy196803/page/n140/mode/1up> accessed 2 December 2021.
[248] Stewart (n 232) 35.
[249] Anthony D'Amato, 'Book Reviews' (1969) 57(4) California Law Review 1033, 1035-1036.
[250] Falk (n 29) 1101. Writing in 1968, Falk also characterised it as a: "one-sided adjudicative machinery and procedure, [that] nevertheless it did turn up a good deal of evidence about the manner in which the war was conducted and developed persuasively some of the legal implications it seems reasonable to draw for that war." Quoted in Falk (n 37) 169.
[251] This criticism was made, for example, by Staughton Lynd, the high-profile conscientious objector and anti-war activist: Staughton Lynd, 'The War Crimes Tribunal: A Dissent' (Dec. 1967-Jan.1968) 12(9-10) Liberation 79.
[252] "Right Wing Responds to Bertrand Russell" (*Liberation News Service,* 5 February 1968) <https://www.jstor.org/stable/community.28039368> accessed 2 December 2021.

Whilst the Tribunal might have fallen short in terms of shaping broader public opinion about the War,[253] much like the *We Charge Genocide* petition before it, it ultimately received a warmer reception outside the US.[254] To this end, Mohandesi argues that the tribunal and the organisational network built up around it helped formalise cross-border contacts in opposing the War.[255] Indeed, the Tribunal had early on been intended to cultivate transnational resistance to the War, with a Tokyo session of the Russell Tribunal organised through the Japanese chapter of the BRPF, which had been set up in October 1966.[256]

The Tribunal was also successful to the extent that it publicised information about the brutality of the War and provided a repository for witness testimony about it—which, as we will see in the coming section, preceded later commissions of inquiry that would help to further publicise these atrocities. Krever provides a relatively generous assessment, arguing it played a central role in associating international law and the idea of *war crimes* with the war in Vietnam.[257] However, we should temper this appraisal with an understanding that by the time the Tribunal rendered judgment, the anti-war movement was still relatively unpopular amongst the broader American public,[258] with the Mỹ Lai revelations not yet thrusting the spectre of criminality and atrocity into the mainstream. Nevertheless, as I will argue in the following sections, the Russell Tribunal is useful as an episode that illustrates how international criminal norms were diffusing during this period, as well as how they were

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[253] This was largely a product both of the general lack of public receptiveness to anti-war campaigns at that time, as well as the efforts of the US State Department in actively opposing it through diplomatic contacts. See Stewart (n 232) 34-5.

[254] Salar Mohandesi, 'From Anti-Imperialism to Human Rights: The Vietnam War and Radical Internationalism in the 1960s and 1970s' (PhD Thesis, University of Pennsylvania 2017) 97.

[255] ibid 98.

[256] The Japanese session held in August 1967 focused primarily on Japanese involvement in the War and the nature of their assistance of the American military, with the Tribunal ultimately finding Japan guilty of aggression and for being an accomplice to US aggression. It was organised with the support of the Japanese Communist Party and together they formed the Japan *Committee for Investigation of U.S. War Crimes in Vietnam*. The Japanese session received little coverage in the American media and had only a temporary impact on the wider anti-war movement in Japan. Indeed, it was mentioned only once by *The New York Times*, despite the considerable amount of attention given to the Stockholm and Copenhagen sessions of the Russell Tribunal: 'Russell's Tokyo 'Tribunal' Rules U.S. Guilty in Vietnam' (*The New York Times,* 31 August 1967) 2 <https://nyti.ms/3m2YA8U> accessed 14 December 2021. The *Japan Committee for Investigation of U.S. War Crimes in Vietnam* produced a documentary of the tribunal and its findings, which was later submitted to the Stockholm session of the Russell Tribunal. See: 'Testimony of Truth' (*Japan Committee for Investigation of U.S. War Crimes,* 1967) <https://www.c-span.org/video/?462782-1/testimony-truth> accessed 14 December 2021. Summaries of the Tokyo session were published in: 'No Hiroshimas or Nagasakis in Vietnam!' (1967) 14(7) Japan Council Against A & H Bombs <https://www.afb.org/HelenKellerArchive?a=d&d=A-HK01-07-B205-F06-009&e=-------en-20--1--txt--------3-7-6-5-3----------0-1> accessed 14 December 2021. For an overview see Klinghoffer and Klinghoffer (n 214) 149-152.

[257] Tor Krever, 'Remembering the Russell Tribunal' (2017) 5(3) London Review of International law 483, 488-9.

[258] Particularly given the far-left and counter-cultural associations it still had: Simon Hall, *Rethinking the American Anti-War Movement* (Routledge 2012) 132 & 142.

animating the politics of grassroots activist movements. This is particularly insightful given our tendency to view these decades as a period of disciplinary *hiatus* and *hibernation.*

8.6.3 Anti-War Commissions of Inquiry and the Legacy of the Russell Tribunal

One of the more immediate legacies of the Russell Tribunal was how it came to influence subsequent commissions of inquiry on the Vietnam War, which came to play an important role in the later stages of the anti-war movement.[259] The organisational link between the Russell Tribunal and these commissions of inquiry came through Ralph Schoenman. Schoenman had previously worked as a director of the BRPF and personal secretary to Bertrand Russell, and had undertaken investigatory work for the Russell Tribunal which was delivered before the Tribunal. In 1969, Schoenman set up the *National Committee for a Citizens Commission of Inquiry on U.S. War Crimes* (CCI) at least initially under the auspices of the BRPF. Although having parted ways with Russell on acrimonious terms,[260] it eventually fell under the renamed branch of the BRPF—*The American Foundation for Social Justice.*[261] Interestingly, emerging details about Mỹ Lai played a role in forming the CCI. And when asked about his plans to establish a commission, Schoenman expressed a desire not to allow Lieutenant Calley to "be used as a scapegoat" where the orders to commit the atrocities had come from "those higher up".[262]

Schoenman linked up with two prominent anti-war activists, Tod Ensign and Jeremy Rifkin, who themselves felt compelled to meet with Schoenman after the Mỹ Lai story

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[259] One such commission of inquiry which has been excluded from any substantive analysis here, was the *International Commission of Enquiry into United States Crimes in Indochina*. It was held in 1971 in Oslo and looked at US military conduct in the wider Indochina region. Although it had no direct organisational link to the Russell Tribunal and made a minimal contribution to the anti-war movement—and for these reasons I have excluded it from substantive consideration—it was clearly inspired by its legacy. To this end, it adopted a broadly similar format and considered a familiar array of evidence, including witness testimony, expert testimony, and reports compiled by investigators in North Vietnam. At the end of the second session in 1971—of which a number were held in subsequent years—it concluded that US military conduct in Indochina could be properly characterised as war crimes and crimes against humanity according to the Nuremberg principles, having also considered genocide. See: Frank Browning and Dorothy Forman (eds), *The Wasted Nations: Report of the International Commission of Enquiry into United States Crimes in Indochina, June 20-25, 1971* (Harper & Row 1972).

[260] 'RUSSELL DISAVOWS AMERICAN EX-AIDE' (*The New York Times,* 10 December 1969) 3 <https://www.nytimes.com/1969/12/10/archives/russell-disavows-american-exaide.html> accessed 13 December 2021; and 'Russell Clarifies Position' (*The New York Times*, 13 January 1970) 37 <https://www.nytimes.com/1970/01/13/archives/russell-clarifies-position.html> accessed 13 December 2021.

[261] For an overview, see: Stefan Andersson, 'The Legacy of the Russell Tribunal [Review of Michael Uhl, Vietnam Awakening: My Journey from Combat to the Citizens' Commission of Inquiry on U.S. War Crimes in Vietnam]' (2014) 34(2) Russell 183, 184-186.

[262] Ralph Schoenman quoted in: "Peace Group to Set Up Panels on Atrocity Charges" (*The New York Times,* 30 November 1969) <https://nyti.ms/3D7sjTE> accessed 29 November 2021.

broke.[263] Press conferences were held in major North American cities in March, April,[264] and May of 1970,[265] with activist Michael Uhl also conducting PR abroad.[266] At these sessions, military Veterans came forward and spoke of their experiences to the media, including incidences of torture and other military tactics such as search and destroy missions, free-fire zones, saturation bombing, and forced displacement of civilians.[267] There was a particular emphasis on illustrating that these were intentional military strategies rather than isolated incidents. The CCI also extended its influence through associations to other groups such as the *Concerned Officers Movement* (COM) who would have a prominent role in the veteran's anti-war movement.[268] The CCI sponsored COM press conferences held in January 1971, in which they called for formal war crimes inquiries.[269]

The influence of the CCI on the growing anti-war movement also came through the *Vietnam Veterans Against the War* (VVAW) movement.[270] The two groups worked together to prepare for the *Winter Soldier Investigation* (WSI) held in 1971. However accounts vary as to how harmonious this relationship was given they eventually parted ways.[271] Nevertheless, the WSI was an important moment in this phase of the anti-war movement. Perhaps most memorably, it saw future Senator and Presidential hopeful John Kerry deliver shocking testimony before the commission and world media. And although less legalistic in form and procedure than the Russell Tribunal, the WSI was nevertheless similar in acting as a way of collecting and publicising veterans' experiences of the alleged atrocities committed as part of US military strategy.[272]

At the WSI, over one hundred veterans and other individuals with direct experience or expertise delivered accounts attesting to the pervasive and systematic nature of the atrocities committed during the war, including torture, wanton beatings, rape, murder, and

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[263] Uhl (n 220) 215. See also: Tod Ensign, 'Organising Veterans Through War Crimes Documentation' in Tal Kali (ed), *Nobody Gets Off the Bus: The Viet Nam Generation Big Book* (Burning Cities Press 1994).
[264] 'Ex-Pilot Alleges Slayings: Tells Citizens Inquiry 33 Were Killed by a Major' (*The New York Times*, 7 April 1970) <https://nyti.ms/3ERScbH> accessed 13 December 2021.
[265] The March 1970 hearing was the only one Schoenman had been actively involved in, after which he largely parted ways with the endeavour and handed it off to Ensign and Rufkin. See: Andersson (n 259) 186.
[266] Uhl (n 220) 130.
[267] Andrew E. Hunt, *The Turning: A History of Vietnam Veterans Against the War* (New York University Press 1999) 45.
[268] Cortright (n 176) 108-110.
[269] Neil Sheehan, 'Five Officers Say They Seek Formal War Crimes Inquiries' (*The New York Times*, 13 January 1971) 7 <https://nyti.ms/3rkhg7j> accessed 29 November 2021.
[270] The VVAW had been active since forming in 1967: John Prados, 'The Veterans Antiwar Movement in Fact and Memory' in Marilyn B. Young and Robert Buzzanco (eds), *A Companion to the Vietnam War* (Blackwell 2002) 404.
[271] Hunt cites personality clashes, as well as political divergences as the source of this: Hunt (n 267) 54 & 57-66.
[272] Indeed, Uhl would later credit the CCI with helping to establish the presence and credibility of Veteran's voices and experiences in the anti-war movement: Uhl (n 220) 164.

pillaging.[273] Understandably, this meant the language of international criminal law and atrocity was present during proceedings, as we see in the opening statement to the event provided by Second Lieutenant William Crandell:

> "We went to defend the Vietnamese people and our testimony will show that we are committing genocide against them. We went to fight for freedom and our testimony will show that we have turned Vietnam into a series of concentration camps…We intend to tell who it was that gave us those orders; that created that policy; tat set that standard of war bordering on full and final genocide."[274]

Although accounts vary as to how impactful the WSI was as part of the broader anti-war movement,[275] Hunt characterises it as an important beginning in "rousing America's conscience" by publicising the war's brutality.[276] In any event, it was an important part of the growing veterans' anti-war movement,[277] with the veterans' movement itself having a profound impact on bringing the War to a close.[278]

8.7 The Russell Tribunal, Commissions of Inquiry, and the Language and Aesthetics of International Criminal Justice

These grassroots movements, which were mirrored by more formal political inquiries,[279] provide an insight into how the language of international criminal law and atrocity shaped

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[273] The full account and testimony of proceedings was later published in full, as well as being turned into a documentary: Vietnam Veterans Against the War, *The Winter Soldier Investigation: An Inquiry into American War Crimes* (Beacon Press 1972).
[274] ibid 1-2.
[275] Moser perhaps gives the most positive account: Richard Moser, *The New Winter Soldiers: GI and Veteran Dissent During the Vietnam Era* (Rutgers University Press 1996) 111-112. Prados similarly views it as having positive and negative outcomes, with the press giving it little coverage and where it did receive attention, they tended to downplay the accounts of atrocities: Prados (n 270) 408.
[276] Hunt (n 267) 55, 73-4, & 199.
[277] Which really began to pick up steam in terms of the impact of its activism following 'Operation Dewey Canyon III' which was the anti-war protest taking place in Washington D.C. in April 1971. On this, see: ibid ch 5.
[278] On this point, as well as a broader review of the historiography on the Veterans movement, see: David Cortright, 'The Winter Soldiers Movement: GIs and Veterans Against the Vietnam War' (2002) 27(1) Peace & Change 118, 123. We should also note that whilst the anti-war movement was important, we should similarly refrain from placing too much weight on it. Indeed, as Powers argues: "In the end the government abandoned its policy because its domestic cost was too high, its chance of success in Vietnam too slim. There was little reason to fight on, every reason to find a way out. The opposition was not alone responsible for this shift in policy, but if there had been no opposition, the shift would not have happened when or the way it did." See: Thomas Powers, *The War at Home: Vietnam and the American People, 1964-1968* (Grossman 1973) 319; and Barbara Tischler, 'The Antiwar Movement' in Marilyn B. Young and Robert Buzzanco (eds), *A Companion to the Vietnam War* (Blackwell 2002) 400.
[279] The Congressman Ronald Dellums, for example, organised a public hearing and exhibit in coordination with the CCI: Ronald V. Dellums, *The Dellums Committee Hearings on War Crimes in Vietnam: An Inquiry Into Command Responsibility in Southeast Asia* (Vintage Books 1972). Also see the published proceedings of

the politics of the anti-war movement. They served to "give the process of delegitimization new momentum" by exposing the War as "immoral and criminal", which over time helped to turn public opinion against it.[280] They also helped to accelerate the shift from the *aggression* to *atrocity* framing of the War.[281] And whilst differing from the Russell Tribunal in how legalistic they were, they nevertheless adopted a similar performative and rhetorical strategy when drawing on the language of law in pursuit of their respective political aims. The language of international criminality and atrocity was used to reconstitute the morality of the War. And although Lewy's early appraisal suggests they contributed to the spread of misinformation about the War,[282] they were nevertheless important in shaping how it came to be understood and remembered.[283]

Whilst the Nuremberg IMT was constituted by the victorious powers following WW2, concerned citizens constituted the Russell Tribunal in the absence of any such political will. For some, this provided a point of critique. Charles de Gaulle thus rejected it as it "would be acting against the very thing which it is seeking to uphold" as "justice of any sort, in principle as in execution, emanates from the State".[284] This reflects a common critique directed at "unofficial truth projects" such as the Russell Tribunal.[285] For Russell and Sartre, however, it was precisely the absence of formal institutional authority that was a source of strength given that the Tribunal's legitimacy was "derive[d] equally from its total powerlessness, and from its universality."[286]

The inspiration for this performance of international criminal justice emanated from the ethos of Nuremberg itself,[287] which provided the standard by which US conduct would be assessed and condemned.[288] Whilst Russell located the purpose of the Tribunal in *preventing the crime of silence* by recording evidence of the atrocities committed in Vietnam,[289] the descriptive and discursive dimension seemed to be of equal, if not greater,

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the *Congressional Conference on War and National Responsibility* (1970): Erwin Knoll and Judith Nies McFadden (eds), *War Crimes And the American Conscience* (Holt, Rinehart and Winston 1970).

[280] Elliot L. Meyrowitz and Kenneth J. Campbell, 'Vietnam Veterans and War Crimes Hearings' in Melvin Small and William Hoover (eds), *Give Peace a Chance: Exploring the Vietnam Antiwar Movement* (Syracuse University Press, 1992) 137-138.

[281] ibid 138.

[282] Although as noted earlier, given later revelations about the War and, in particular, the *Vietnam War Crimes Working Group*, Lewy's appraisal is contestable: Lewy (n 18) 311 & 321.

[283] Indeed, Meyrowitz and Campbell argue that the Vietnam War cannot be understood without reference to the war crimes issue: Meyrowitz and Campbell (n 280) 130.

[284] Charles De Gaulle, 'Letter from DeGaulle to Sartre, April 19, 1967' in Duffet (n 234) 28.

[285] Here borrowing the term as Bickford uses it to characterise peoples tribunals and other similar projects: Louis Bickford, 'Unofficial Truth Projects' (2007) 29(4) Human Rights Quarterly 994, 1004.

[286] Jean Paul Sartre, 'Inaugural Statement' in Duffet (n 234) 43. See similarly: Bertrand Russell, 'Opening Statement to the First Tribunal Session' in Duffet (n 234) 51.

[287] Bertrand Russell, 'Introduction' in Duffet (n 234) 5; and Sartre (n 237) 40 & 42-3.

[288] Moses (n 46) 420.

[289] Russell (n 223).

importance to Sartre. It was the possibility that the conduct could be framed as not just *evil*—which it intuitively was—but as *criminal* that justified it.[290] It was thus not simply an attempt to render moral judgment detached from the law, but to use legality itself to frame and critique it,[291] and to do so within the "compass of international law on war crimes".[292] In this sense, the language of international criminal law and justice presented a way of rendering moral judgment.

Sartre, and the tribunal more broadly, thus engaged a kind of radical positivism to condemn US conduct in Vietnam.[293] Hints of legalism are present in Sartre's assertion that due to the political domination of international institutions by the imperialist and capitalist powers,[294] the principles of Nuremberg could not be properly applied.[295] Legalism is also present in Sartre's stated belief that the Tribunal sought to go beyond mere moral condemnation,[296] with the judgment a genuine attempt to adjudicate by established standards of international law.[297] This is characteristic of people's tribunals, which deploy law both to critique the actions of a particular power and to expose the inadequacies of law and legal institutions—albeit it from a subversive perspective.[298] And whilst Zunino characterises it as *rejecting* legalism,[299] we see that it was a radical embrace of legalism

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[290] As Sartre noted: "This was is certainly contrary to the interests of the vast majority of people, but is it legally criminal? That is what we will try to determine." See: Jean-Paul Sartre, 'Imperialist Morality: Interview with Jean-Paul Sartre on the War Crimes Tribunal' (1967) 1(41) New Left Review 3.
[291] The aim was to determine whether "imperialist policies infringe laws formulated by imperialism itself." See Sartre (n 214) 6.
[292] ibid.
[293] As per Sartre: "The question in this case is not one of condemning a policy in the name of history, of judging whether it is or is not contrary to the interests of humanity; it is rather a question of saying if it infringes existing laws." See Sartre, ibid. Simm and Gabrielle have noted a similar tendency by people's tribunals more generally, which are distinguished by the "deliberative process of evaluation of evidence in the light of law" they engage in: Gabrielle Simm and Andrew Byrnes, 'International Peoples' Tribunals in Asia: Political Theatre, Judicial Farce, or Meaningful Intervention' (2014) 4(1) Asian Journal of International Law 103, 105.
[294] Understanding 'legalism' as per Shklar's definition as: "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules." See: Judith Shklar, *Legalism: An Essay on Law, Morals and Politics* (HUP 1964) 1.
[295] Jean-Paul Sartre, 'Letter to the Tribunal' in Duffet (n 234) 39.
[296] Although it should be noted that Tariq Ali, the political activist and public intellectual, who participated in the Tribunal later characterised it as a *moral* rather than *legal* process, which was aimed at publicising the atrocities being committed in Vietnam: Tariq Ali, 'Anatomy of a War: Video of a Forgotten Tribunal Against U.S. Crimes in Vietnam' (*Jacobin*, 23 September 2017) <https://www.jacobinmag.com/2014/08/anatomy-of-a-war> accessed 2 December 2021. See also for similar comments: Tor Krever, '50 Years After Russell: An Interview With Tariq Ali' (2017) 5(3) London Review of International Law 493, 499.
[297] Sartre (n 214) 3-10. As also is also evident in Sartre's and Russell's opening statements to the Tribunal.
[298] Simm and Byrnes (n 293) 122.
[299] Zunino (n 239).

that gave the Tribunal much of its rhetorical force.[300] Indeed, as Sartre noted of his intentions for the Tribunal, it was "by means of legalism…that their eyes can be opened."[301]

The intervention the Tribunal sought to make was thus to draw on the moral power and legitimacy of law and to reconstitute the language and aesthetics of international criminal justice in the absence of an official intervention by either the State or the international community.[302] By calling itself the *International War Crimes Tribunal* and making ample references to Nuremberg, it sought to position itself within this institutional and moral legacy. This was affirmed by the legal analysis produced, as well as the other legalistic references and performative displays—such as the references to testimony, evidence, depositions, witnesses, charges, and the verdict. Arjomand thus places the Tribunal within a history of political trials which play on the juridical form and the aesthetics of legal judgment.[303] Similarly, Manfredi identifies the ritualistic nature of the political practice it engaged in, where the supremacy of International law was performed and reaffirmed.[304]

Read against the *silence* of the Cold War, this episode thus stands out as a moment when anti-war activists—in a variety of forums and forms—seized upon the "discursive and performative elements of the legal" in an attempt to intervene in and delegitimise the War and thus to legally reconstitute it.[305] And this was equally as true of the Russell Tribunal as it was of the conscientious objectors who came before them and the commissions of inquiry that came after.[306] This was a "war crimes movement from below" where political activists were mobilised using the language of international law and human rights.[307] In this regard, the present chapter provides a complement, if not a counterbalance, to a recent article by Knox which focuses on how ideas about the legality/illegality of the Iraq War mobilised popular resistance against it, with the *motif* of illegal war able to assume an "unprecedented

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[300] Otto makes a similar point regarding people's tribunals more generally. That they engage in a performative and transformative legalism. See: Dianne Otto, 'Beyond Legal Justice: Some Personal Reflections on People's Tribunals, Listening and Responsibility' (2017) 5(2) London Review of International Law 225, 239-240. Also see Byrnes and Simm noting that legalistic framing is part of where the attraction of people's tribunals lie: Andrew Byrnes and Gabrielle Simm, 'People's Tribunals, International Law, and the Use of Force' (2013) 36(2) UNSW Law Journal 711, 743.
[301] Sartre (n 214) 7.
[302] For Borowiak, this is characteristic of people's tribunals: Craig Borowiak, 'The World Tribunal on Iraq: Citizens' Tribunals and the Struggle for Accountability;' (2008) 30 New Political Science 161, 162-3 & 165. See also Simm and Byrne (n 298) 105.
[303] Minou Arjomand, *Staged: Show Trials, Political Theater, and the Aesthetics of Judgment* (Columbia University Press 2018) 142-5.
[304] Zachary Manfredi, 'Sharpening the Vigilance of the World: Reconsidering the Russell Tribunal as Ritual' (2018) 9(1) Humanity 75, 76 & 80.
[305] David Delaney, 'What is Law (Good) For? Tactical Manoeuvres of the Legal War at Home' (2009) 5(3) Law, Culture and the Humanities 337, 338 & 350. On people's tribunals as performative, also see Otto (n 299) 230.
[306] Delaney (n 305) 342-6.
[307] Stewart (n 213); and Cody J. Foster, 'To "Reawaken the Conscience of Mankind": The International War Crimes Tribunal and Transnational Human Rights Activism During the Vietnam War, 1966-1967' (PhD thesis, University of Kentucky 2021).

mobilising power". As we see in the various episodes outlined here, however, given how prominently ideas about the illegality and criminality of the Vietnam War figured in popular resistance against it, 2003 does not appear quite so *unprecedented*.[308]

The Tribunal was also distinctly radical in how it reconstituted the legality of the War. And given that it was held over a year before the Mỹ Lai revelations started to shift wider perceptions of it, it appears remarkably prescient. A distinctly radical sensibility can also be noted in the conclusion that US actions were *genocidal* in nature,[309] with Sartre, Russell, and Basso all concluding as such.[310] Sartre, in particular, drew on a markedly radical understanding of genocide, which viewed these atrocities as an expression of the economic logic of power.[311] Similarly, Russell framed the War as part of a struggle against imperialism. And although this radicalism evidently had its limits, with James Baldwin later critiquing the spectacle of "Europeans condemning a war which America inherited from Europe" and a failure to fully grapple with the racial underpinnings of the War,[312] it nevertheless stands as a moment when activists seized a radical interpretation of the memory and ethos of Nuremberg.[313] In this regard, the Russell Tribunal carried forward many of the same radical impulses that animated the *We Charge Genocide* petition, which similarly looked to the language of international criminal law and justice in pursuit of their political aims.

8.8 Conclusion: The Vietnam War, *Silence*, and the History of International Criminal Law

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[308] Robert Knox, 'International Law, Politics and Opposition to the Iraq War' (2021) 9(2) London Review of International Law 169. Interestingly, Chiam has recently conducted a similar study to Knox's, which looks at public debate about the legality of both the Iraq War and the Vietnam War in Australia: Madelaine Chiam, *International Law in Public Debate* (CUP 2021) ch 4.

[309] Although later writings critiqued the legal analysis and conclusions drawn by the panel of judges: Bedau (n 53); and Lawrence J. LeBlanc, 'The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding' (1984) 78(2) AJIL 381, 381.

[310] Jean-Paul Sartre, 'On Genocide', Lelio Basso, 'Summation On Genocide', and Bertrand Russell, 'Final Address to the Tribunal, Copenhagen December 1967' in Duffet (n 234).

[311] Sartre viewed it as the "only possible relationship between an over industrialised country and an underdeveloped country, that is to say, a genocidal relationship implemented through racism." See: Jean-Paul Sartre, 'On Genocide' in Sartre and Arlette El Kaïm-Sartre (eds), *On Genocide* (Beacon Press 1968) 82; and Jean-Paul Sartre, 'On Genocide' in Duffet (n 234).

[312] Baldwin had been invited to the Tribunal but ended up not attending and was particularly critical of the narrow focus of the tribunal, especially given that similar tribunals had not been suggested by the organisers in respect of Algeria, South Africa, Rhodesia, Angola, or any of the other locales where the West was responsible for ongoing racist atrocities. See: James Baldwin, 'The War Crimes Tribunal' (1967) 7(3) Freedomways 244, 244-2.

[313] Berthold Molden, 'Vietnam, the New Left, and the Holocaust: How the Cold War Changed Genocide' in Aleida Assmann and Asbastian Conrad (eds), *Memory in a Global Age* (Palgrave MacMillan 2010).

Located at 28 Vo Van in District 3, the *War Remnants Museum* is one of the most popular tourist destinations in Ho Chi Minh City. First opened in 1975, not long after the Fall of Saigon, it was initially called the *Exhibition House for US and Puppet Crimes*, before undergoing a name change in 1990 to *Exhibition House for Crimes of War and Aggression*. Following the normalisation of diplomatic relations between the US and Vietnam it underwent a further name change in 1995 when it assumed its current name; the *War Remnants Museum*.[314] Despite name changes, however, its pedagogical function has remained largely the same. And it continues to serve as a reminder of the many atrocities inflicted on the Vietnamese people during the War. Additionally, it also serves a therapeutic function.[315] And by conveying historical truths about the War through self-representation—particularly in circumstances where the history of the Vietnam War is most often told through the lens of American experience—it acts as a site for the construction of postcolonial national identity.[316]

Located in what was once the U.S. Information Service building in South Vietnam, the *War Remnants Museum* documents the war crimes committed as a consequence of the war of aggression unleashed on Vietnam.[317] Given this subject matter, it is perhaps little surprise that the language of ICL is found throughout, with the exhibits detailing events such as Mỹ Lai, the extensive bombing campaigns, and the after-effects of the various chemical weapons and defoliants used. In the concluding panel to the exhibit on the first floor, a quote from the Nuremberg IMT is prominently displayed in Vietnamese and English, which reads: "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evils of the whole."[318] Similarly, the second floor contains a room titled "War Crimes Aggression", which is filled with a mixture of weapons and other munitions artefacts, as well as photographs documenting atrocities committed by US soldiers.[319] Other exhibits around the exterior of the museum building detail acts committed

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[314] Christina Schwenkel, *The American War in Contemporary War in Vietnam: Transnational Remembrance and Representation* (Indiana University Press 2009) 163-4. Note the account provided on the official website for the *War Remnants Museum*: <http://warremnantsmuseum.com/posts/introduction-general> accessed 29 November 2021.

[315] Although Dickey has questioned the audiences to whom the therapeutic and educative dimensions of these historical sites are directed, given the overwhelming presence of foreign tourists at them: Jennifer Dickey, 'Remembering the American War in Vietnam' in Konrad H. Jarausch, Christian F. Ostermann, and Andreas Etges (eds), *The Cold War: Historiography, Memory, Representation* (De Gruyter 2017) 191-2.

[316] Kim Hong Nguyen, 'A Postcolonial Museum of War Curating War and Colonialism at Vietnam's War Remnants Museum' (2017) 19(3) Interventions 301, 302-3; and Schwenkel (n 314) 163-4.

[317] Jennifer Dickey, 'Reunification Palace, Ho Chi Minh City, Vietnam. Bui Duc Huy, director. War Remnants Museum, Ho Chi Minh City, Vietnam. Huynh Ngo Van, director' (2011) 33(2) The Public Historian 152.

[318] Jamie Gillen, 'Tourism and Nation Building at the War Remnants Museum in Ho Chi Minh City, Vietnam' (2014) 104(6) Annals of the Association of American Geographers 1307, 1316.

[319] Nguyen (n 316) 314-5.

at Phuo Quoc Prison—a former French colonial prison repurposed during the War to detain and torture captured Vietcong and North Vietnamese soldiers—which similarly describes these as "aggressive war crimes".[320]

Framing these atrocities as 'aggressive war crimes' or as a by-product of a 'war of aggression' is particularly interesting given Moyn's argument that there was a discursive and broader disciplinary shift from *aggression* to *atrocity* as the predominant framing of the War.[321] Whilst this at once illustrates the limits of Moyn's account insofar as the *aggression* paradigm evidently continues to influence how the War is memorialised in this part of Vietnam, it also gives us a sense of how the language of ICL continues to shape the memory of the War in more general terms. Despite the language of ICL figuring prominently in contemporary and historical discourses about it, however, the War has thus far avoided any serious scrutiny or sustained engagement within modern ICL scholarship—save for those works identified at the beginning of the Chapter. A question thus arises as to why it has been *silenced* when we account for the development of the international criminal justice project.

With the previous two chapters in mind, two historiographic tendencies might explain this. There is, firstly, the tendency to present the Cold War as an era of *hibernation* and thus as a period not warranting immediate scholarly attention. As argued, a *historiography of hiatus* shapes our accounts of the development of ICL, with the project of international criminal justice having *fallen silent* or *stagnated*—as evidenced by the lack of doctrinal or institutional development.[322] As we have seen in the present chapter, however, the language of international criminal justice played an important role in animating popular resistance to the Vietnam War—with the War itself a product of the Cold War said to have stymied the development of ICL.[323]

For conscientious objectors resisting military service, the legal precedent of Nuremberg provided a way of articulating their moral objection to the War through attempted legal arguments. This was also true of those grassroots political activists mobilising against the War where this was translated into a performative act of resistance, with the language of ICL used to reconstitute an *immoral* war as *illegal* and *criminal*. In light of this, it seems difficult to sustain Kreß's argument that the principles of Nuremberg "remained without

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[320] Stefania M. Maci, '"Good Morning, Vietnam!" The Discursive Construction of Nationhood in the War Remnant Museum Wall-Texts' (2018) 26 Lingue e Linguaggi 259.
[321] Moyn (n 23).
[322] For references to these with ICL scholarship, see Chapter 6, s.6.2.
[323] On the Vietnam War as a product of the Cold War, see: Robert A. Divine, 'Vietnam: An Episode in the Cold War' in Lloyd Gardner and Ted Gittinger (eds), *Vietnam: The Early Decisions* (University of Texas Press, 1997); and Andrew Wiest, 'Introduction: An American War?' in Andrew Wiest (ed), *Rolling Thunder in a Gentle Land: The Vietnam War Revisited* (Osprey 2006) 11-13.

resonance" in this period,[324] particularly given the language of ICL was evidently opening up new avenues to critique the actions of the State. This was also a political context where ICL norms were *radically* generative, as we see in how the Russell Tribunal participants used these norms to mount a radical critique of the imperialistic nature of the War in Vietnam.[325]

A second historiographical tendency that might explain the *silence* of the Vietnam War within ICL scholarship is the institutional focus we typically adopt, which shapes the 'accepted account' of the field where institutions appear as the primary drivers of disciplinary change. This institutional focus leads us to treat this period as one of 'hiatus' insofar as there is a perceived lack of institutional or doctrinal development and to overlook the sorts of non-institutional developments identified in this chapter. By focusing on how the language and norms of ICL were drawn on to animate the politics of the anti-war movement, however, we get a sense of how they diffused and gained resonance outside the familiar institutional settings we typically focus on. As we saw, the morality of the war was challenged and reconstituted by viewing it as not just *illegal* but as *criminal.* And whilst we should be careful not to place too much weight on how this helped to mobilise grassroots and academic activism against the war,[326] we can nevertheless see that it did have a tangible impact. In this way, by expanding our interest beyond the familiar institutional settings we look to for signs of the progressive development of ICL, we can perhaps reclaim these *silences* and gain a different view of its evolution.

In terms of what is gained by reclaiming this *silence*, when read against the dominant account of the development of ICL in this period, by broadening our focus from specific doctrinal or institutional developments to how anti-war activists drew on ICL norms in this period, we get a sense not of the *hibernation* of ICL but of its potency. And as we see in the conscientious objection cases as well as the Russell Tribunal and the commissions of inquiry it inspired, the language of ICL was opening up new imaginative spaces where radical anti-war politics could be mobilised. If ICL consists of a set of global concepts and norms in search of *local resonance*,[327] paying attention to this episode reveals a moment when this *resonance* was struck.

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[324] Claus Kreß, 'International Criminal Law' in R. Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2009) para [48].
[325] On the radical and Marxist qualities of the Tribunal's reasoning, see: Molden (n 313) 82; and Mehta (n 224) 85-6.
[326] Indeed, as we saw, equally important was the domestic politics of the day, as well as a more general war-weariness which made it increasingly politically unviable, as well as the strength and resilience of the North Vietnamese and Vietcong military forces.
[327] Solomon characterises the crime of genocide in this way: Daniel E Solomon, 'The Black Freedom Movement and the Politics of the Anti-Genocide Norm in the United States, 1951-1967' (2019) 13(1) Genocide Studies and Prevention: An International Journal 130, 130-1.

This has both specific and more general implications for how we might (re)tell the history of ICL. With regard to the former, it illustrates the value found in paying greater attention to these moments of *silence* within our scholarship. In particular, it stands as a call to reengage with the Cold War and the Vietnam War as areas that might hold value for contemporary understandings of ICL. With regard to the latter, it perhaps signals a new direction ICL scholarship might take. And by identifying how ICL was drawn on in these contexts, we get a sense of how international criminal justice norms can animate a particular political movement. Most importantly, this pushes us beyond the familiar institutional terrain we typically explore when engaging with the history of ICL. While recent projects have made initial forays into intellectual history by exploring the histories of the ideas and concepts the field is structured around,[328] this does not necessarily bring us very far beyond these institutional settings. Indeed, this is perhaps one of the limitations of Moyn's work on the presence of ICL norms in the Vietnam War, which, by taking an intellectual history approach,[329] focuses on how these ideas were developing within an elite circle of thinkers and thus marginalises the broader setting of the popular anti-war movement.

[328] Frédéric Mégret and Immi Tallgren (eds), *The Dawn of a Discipline: International Criminal Justice and its Early Exponents* (CUp 2020). Also see: Morten Bergsmo and Emiliano J. Buis (eds), *The Philosophical Foundations of International Criminal Law: Foundational Concepts* (TOAEP 2019); Morten Bergsmo and Emiliano J. Buis (eds), *The Philosophical Foundations of International Criminal Law: Correlating Thinkers* (TOAEP 2018); and Mortem Bergsmo, CHEAH Wui Ling, SONG Tianying, and YI Ping (eds), *Historical Origins of International Criminal Law: Vols 1-5* (TOAEP 2014-2017).

[329] Indeed, Moyn has previously undertaken work on intellectual history approaches to the history of international law: Samuel Moyn and Andrew Sartori (eds), *Global Intellectual History* (Columbia University Press 2013); and Moyn, 'Imaginary Intellectual History' in Darrin M. McMahon and Samuel Moyn (eds), *Rethinking Modern European Intellectual History* (OUP 2014).

Conclusion

1. The *Structure* of ICL's History

In Don DeLillo's 1973 novel *Great Jones Street*, one of the many characters littering the sprawling, surrealist narrative is identified as the "Morehouse Professor of Latent History". This professorship is described as dealing with the history of "events that almost took place, events that definitely took place but remained unseen and unremarked on…and events that probably took place but were definitely not chronicled."[1] Somewhat counterintuitively from a conventional historiographical perspective, the *potential* and *possible* histories that go unrecorded are identified as being "often more important than the recorded events, whether real or potential."[2] DeLilo's view of history as the "sum total of all the things they aren't telling us"[3] bears a distinct resemblance to the historiographical project that has been undertaken in this thesis and, in particular, the understanding of history as comprised of *silences* borrowed from Trouillot in Chapter 3.[4] And it is ultimately a concern for what lies beyond the familiar historiographical terrain ICL scholars typically traverse that has been at the heart of this thesis.

Before beginning to explore this uncharted territory, I first attempted to gain a better sense of the historiographical conditions that created it. And to this end, at the start of the thesis I stated as one of my primary aims a desire to make visible the often invisible ways that history enters into and shapes the disciplinary discourses taking place within ICL scholarship. In this regard, my concern contrasts with other work undertaken as part of the *turn to history* presently taking place within the field of ICL.[5] To this end, in the introductory chapter I identified three primary aims for this thesis:

- Firstly, what are the 'mainstream' or 'conventional' accounts of ICL, and how do ICL scholars typically present the history and development of the field?
- Secondly, what historiographical premises does this account rest on and why does it achieve predominance over other possible accounts?
- And thirdly, what would it look like to move beyond these historiographical constraints and, if possible, how might the field's history otherwise be told?

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[1] Don DeLillo, *Great Jones Street* (Houghton Mifflin 1973) 74-5.
[2] ibid 75-6.
[3] Don DeLillo, *Libra* (Viking Press 1988) 321.
[4] Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History (20th Anniversary Edition)* (Penguin Random House 2015). And as further elaborated in Chapter 3, s.3.6.
[5] As set out in Chapter 1, s.1.4.2(a-c).

I achieved these research aims by following in the footsteps of Tallgren and Skouteris and "bring[ing] to the fore the structure and function of contemporary histories of international criminal law."[6] These *structural* components could include "history's narrative and literary styles, its temporalities, plots, and tropes".[7] To bring "structure" to the fore, I drew on the concept of periodisation, which I argued can help us to understand what gives shape to the "accepted history" of ICL. This account starts with "Tokyoberg",[8] undergoes a period of prolonged stagnation during the Cold War, and then experiences a sudden resurgence and flurry of development in the 1990s and 2000s.[9]

In terms of the historiographical function this type of account serves, a number of idiosyncrasies are noted by Tallgren. Firstly, they tend to take a linear form, typically assuming a "jubilant tone of transhistorical evolution towards the global progress witnessed at present, and striving for a hopefully even brighter future."[10] Secondly, there is a focus on singular events and moments, individuals, cases, trials, and institutions. This creates a narrative tendency where events are: "captured and delimited, frozen out of chaotic temporal continuity and spatial contingency, becoming emblems of evolution that are organised chronologically in the search of a coherent story – descriptive rather than analytical – of an order of international law taking shape."[11] And thirdly, Tallgren also notes a proclivity to establish a "barricade" between ICL and the more distant origins we might find in its past.[12] Periodisation provides a way of understanding this account and these tendencies, as it gives us a sense of how time is managed when the development of ICL is charted. And by carving up the long expanse of time that makes up the disciplinary pasts of ICL into distinct but synergistic phases of development, we can see how these linear accounts that focus on singular events and moments, and which create temporal 'barricades' between past and present, are maintained.

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[6] Immi Tallgren and Thomas Skouteris, 'Editor's Introduction' in Immi Tallgren and Thomas Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (OUP 2019) 6.
[7] ibid.
[8] Gerry Simpson, 'History of Histories' in Kevin John Jeller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (OUP 2013) 3
[9] Christine Schwöbel-Patel, 'The Market and Marketing Culture of International Criminal Law' in Christine Schwöbel-Patel (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2014) 266. As set out in Chapter 2, s.2.6 and more generally in Chapters 4, 6, and 7.
[10] Immi Tallgren, 'Searching for the Historical Origins of International Criminal Law' in Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds), *The Historical Origins of International Criminal Law: Volume 1* (Torkel Opsahl Academic EPublishers 2014) xvii.
[11] ibid xviii.
[12] ibid xix.

2. The *Possibilities* of ICL's Histories

Having identified one of the structural components that shapes the form ICL's history takes, I then used an awareness of this to explore histories of ICL not so constrained. At the heart of this inquiry was firstly a desire to demystify the received historical wisdom much ICL scholarship either rests on or actively perpetuates.[13] And secondly, to reclaim those events and historical occurrences that "silently mark the margins" of ICL and which are either considered as holding little precedential value for understanding contemporary international criminal justice or which are not considered at all.[14] Although unremarked upon by ICL scholars, I argued that these marginal(ised) episodes have much to tell us about the contemporary functions and dysfunctions of ICL, as well as its development more generally.

To this end, Chapters 5 and 8 looked at specific episodes which, I argued, provide insights about contemporary ICL and which point to the possibilities for how we understand the history of the field beyond the familiar narratives. Whilst some of these insights are specific to the historical events and contexts each Chapter looked at, they also tell us something about the nature and function of ICL and international criminal justice more generally.

Firstly, both episodes illustrate how ICL norms were drawn on as a way of understanding and framing a specific kind of atrocity or injustice, which were also connected to a broader political cause or social justice movement. For the CRC members bringing the *We Charge Genocide* petition, genocide and the possibility of individual criminal responsibility for international crimes were looked to as a novel way of reframing the violence and injustices associated with the struggle for racial justice and equality in America. They also looked to the international community to act as guarantors of this possibility in light of the failure of domestic political action. Similarly, in the context of the Vietnam War, we saw how various participants in the anti-war movement used ICL norms to reframe the (im)morality of the War and how it was being fought. For conscientious objectors, ICL norms provided a way of grounding active resistance to service in the military. Whilst for the participants in the Russell Tribunal—and the various commissions of inquiry it inspired—we saw how the language and aesthetics of international criminal justice were drawn on in informal, non-institutional settings as a way of prompting political action.

Taken together, both episodes thus provide an insight into how particular ICL norms, and the possibility of *international criminal justice* more generally, were shaping the politics

[13] As set out in Chapters 4, 6, and 7.
[14] Tallgren (n 10) xxv.

of particular social movements. Both episodes thus also provide an example of a moment where ICL acted as a language of resistance against a body politic that had thus far proved unreceptive to their particular political aims.[15] However, whilst both episodes do provide an example of how the language of ICL was used as a way of articulating and directing grass roots political resistance, they were also moments when their radical visions for particular international legal norms were met with resistance. In this regard, the CRC petitioners were faced with convincing the international community to adopt a radical understanding of genocide discordant with accepted understandings. And similarly, in the context of the Vietnam War, anti-war activists used ICL norms to reframe the morality of the War, which clashed with the accepted understandings of it.

To this end, if both episodes saw international criminal justice norms used as a language of resistance, they also perhaps hinted at the limits of ICL as a means of achieving certain kinds of *justice*. Hodgson has more recently explored this theme in the context of contemporary attempts by civil society groups to censure the Australian government for the offshore detention of asylum seekers, by using the preliminary investigation mechanism contained in the Rome Statute.[16] In particular, Hodgson identifies Article 15(1) as providing an avenue for civil society actors to draw on "international criminal law's normative expressive function" and to "expand international criminal law's definitions to capture migration-related harms and shift the status quo away from such border policing practices."[17] This mirrors similar strategies that have been adopted in response to the European Union's migration and refugee policies in the Mediterranean and Libya.[18]

That ICL and its institutional architecture have proved either unresponsive or ineffective, in this regard, perhaps signals something of the limits of international criminal justice itself—as was the case in both the *We Charge Genocide* and Vietnam War episodes.[19] This also perhaps speaks to the broader ambiguities about the kind of 'justice' that lies at the heart

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[15] Although in both cases this obviously changed over time, with the Vietnam War eventually drawing to a close and with the Civil Rights movement eventually gaining more momentum in the years that followed, albeit not as a direct result of these efforts.

[16] Natalie Hodgson, 'International Criminal Law and Civil Society Resistance to Offshore Detention' (2020) 26(3) Australian Journal of Human Rights 449.

[17] ibid 462.

[18] Owen Bocott, 'ICC Submissions Call for Prosecution of EU Over Migrant Deaths' (*The Guardian*, 3 June 2019) <https://www.theguardian.com/law/2019/jun/03/icc-submission-calls-for-prosecution-of-eu-over-migrant-deaths> accessed 1 February 2022. On this petition, see: Maya Thomas-Davis and Omer Shatz, 'EU & Libya: interview with Omer Shatz' (2020) 85 Socialist Lawyer 14.

[19] On this, see: Ioannis Kalpouzos and Itamar Mann, 'Banal Crimes Against Humanity: The Case of Asylum Seekers in Greece' (2015) 16(1) Melbourne Journal of International Law 1; Ioannis Kalpouzos, 'International Criminal Law and the Violence Against migrants' (2020) 21(3) German Law Journal 571; and Vincent Chetail, 'Is There Any Blood On My Hands? Deportation as a Crime of International Law' (2016) 29(3) LJIL 917. On the EU's external border regime as perpetuating forms of imperial violence, see: John Reynolds, 'Fortress Europe, Global Migration & the Global Pandemic' (2020) 114 AJIL Unbound 342.

of the *international criminal justice* project,[20] and whether it can offer anything other than retributive justice.[21] This is in contrast to the lofty *global justice* claims that are often made of ICL and which ICL institutions are expected to deliver.[22] In this regard, the *We Charge Genocide* and Vietnam War episodes might stand as earlier precedents for these more recent attempts to mobilise the institutional mechanisms of international criminal law and justice.

3. Future Directions

With the above insights in mind, the research undertaken in this thesis signals future directions for ICL scholarship. Most immediately, by drawing on the concept of periodisation and thus "bring[ing] to the fore the structure and function" of the contemporary histories of ICL,[23] I have exposed one of the sources of what d'Aspremont has labelled "turntablism". D'Aspremont uses this term to conceptualise what he identifies as a tendency to remain confined to familiar narratives and ways of telling the history of international law.[24] Although deployed to critique the achievements of the 'turn to history', it is equally insightful when applied to ICL scholarship more broadly and, in particular, recent engagements with the history of the field. Adopting the concept of periodisation helps to explicate how certain temporal framings produce particular understandings about the development of the field—albeit one among other possible narrative structures we might look to.[25] As an antidote to

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[20] On this theme, see: Frédéric Mégret, 'What Sort of Global Justice is "International Criminal Justice"?' (2015) 13(1) Journal of International Criminal Justice 77; and also Sarah M.H. Nouwen and Wouter G. Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity' (2015) 13(1) Journal of International Criminal Justice 157. See also Boas and Chifflet noting the difficulties of articulating the meaning of "justice" in *international criminal justice*: Gideon Boas and Pascale Chifflet, *International Criminal Justice* (Edward Elgar 2017) 1.

[21] For example, see Grewal on the limits of the retributive paradigm in advancing women's right: Kiran Kaur Grewal, 'International Criminal Law as a Site for Enhancing Women's Rights? Challenges, Possibilities, Strategies' (2015) 23 Feminist Legal Studies 149.

[22] See for example: Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (4th edn, Penguin 2012); Linda Carter, Mark Ellis, and Charles Chernor Jalloh (eds), *The International Criminal Court in an Effective Global Justice System* (Edward Elgar 2016); Luis Moreno Ocampon, 'The International Criminal Court: Seeking Global Justice' (2008) 40(1) Case Western Reserve Journal of International Law 215; Bruce Broomhall*, International Justice and the International Criminal Court* (OUP 2003); and David Bosco, *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time* (OUP 2014).

[23] Tallgren and Skouteris (n 6) 6.

[24] Jean d'Aspremont, 'Turntablism in the History of International Law' (2020) 20(2-3) Journal of the History of International Law 472.

[25] Indeed, recent scholarship engaging with the works of the theorist Hayden White signal the possibilities of this kind of inquiry. Both d'Aspremont and Gevers are excellent examples of how White's work might be used in the context of international law and ICL scholarship to understand the narrative structures present in these bodies of work: Jean d'Aspremont, *The Critical Attitude and the History of International Law* (Brill 2019); and Christopher Gevers, 'The "Africa Blue Books" at Versailles: World War I, Narrative and Unthinkable Histories of International Criminal Law' in Immi Tallgren and Thomas Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (OUP 2019)

these recursive tendencies, d'Aspremont suggests "radical" critique, which is identified as: "conscious intervention to redraw the past and mobilise it to serve a present claim in a way that deliberately and consciously displaces existing markers, periodisation and causal sequencing."[26]

By bringing to the fore the *structural* components of ICL's histories and by exploring these new historical moments and perspectives,[27] we have been able to rupture the markers, periodisations, and causal sequencing that dominates ICL scholarship. This ultimately helps to introduce *messiness* into our accounts of the field and to disrupt the false sense of order such narratives provide.[28] In this regard, this approach signals the possibilities of ICL's histories and what stories, narratives, and accounts might exist beyond the familiar events and institutional locations that dominate ICL scholarship.

3.1 Moving Beyond Progressive History: Embracing the 'Untimely' and 'Messy'

One historiographical tendency we might break free from by embracing a "radical" critique as d'Aspremont suggests, is the progressive view ICL scholars tend to take when recounting the field's history. As has been argued throughout this thesis, the history of ICL tends to be told through a familiar narrative arc that runs from "Tokyoberg" to The Hague,[29] and which captures the progressive institutional advance of the international criminal justice project.[30] Although ICL scholars have discipline specific reasons which explains why they are drawn to progressive narratives, they are by no means unique in this regard. Indeed, *progress* is a familiar theme and disciplinary sensibility in various subfields of law and international law scholarship.[31] The language of *progress* thus becomes "so perfectly

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[26] Jean d'Aspremont, 'Critical Histories of International Law and the Repression of Disciplinary Imagination' (2019) 7(1) London Review of International Law 89, 114.
[27] As in Chapters 4 and 8.
[28] As noted in Chapter 3. See: James Goodman, 'For the Love of Stories' (1998) 26(1) Reviews in American History 255, 269; and Richard K. Sherwin, 'Historical Truth and Narrative Necessity in a Criminal Case' (1994) 47(1) Stanford Law Review 39, 41.
[29] Simpson (n 8) 3
[30] On the association between ICL institutions and *progress*, see: Barrie Sander, 'International Criminal Justice as Progress: From Faith to Critique' in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds), *Historical Origins of International Criminal Law: Volume 4* (Torkel Opsahl Academic Publishers 2015). On the progressive tendencies of ICL scholarship more generally, see: Frederic Megret, 'International Criminal Justice: A Critical Research Agenda' and Immi Tallgren, 'Who are the "We" in International Criminal Law?' in Christine Schwöbel (ed), Critical Approaches to International Criminal Law: An Introduction (Routledge 2014) 20-21 & 78.
[31] Given that law itself is often presented as "progression towards justice and equality and celebrates the winners in the doctrinal war—the statute passed, the principle that succeeded…" See: Rosemary Auchmuty and Erika Rackley, 'Feminist Legal Biography: A Model for All Legal Life Stories' (2020) 41(2) The Journal of Legal History 186, 191. Alston, for example, has noted that international lawyers have "long been accused of portraying their discipline as an intrinsically or inexorably progressive one". See: Philip Alston, 'Does the Past Matter? On the Origins of Human Rights' (2013) 126 Harvard Law Review 2043, 2063. Also see Kennedy noting a tendency within international scholarship to present the: "slow and steady progress of law against

embedded in international law's everyday life that its constant use passes by unnoticed",[32] that it also provides an animating and omnipresent force in international legal discourses.[33] Whilst this progressive view is certainly a function of how we understand law, legal institutions, and their capacities to bring about change and create order—as Auchmuty and Rackley note above—it is also reflective of how we tell the *story* of its development. To this end, Johns et al have noted that a focus on singular "events" or sequences of "events" provides international law with a "code or sequence by which to orient itself and generate a sense of disciplinary movement" towards progress and improvement.[34]

In the context of the histories of ICL, periodisation thus provides a useful way of thinking through how these progressive disciplinary narratives are constructed, as it gives us a sense of the consequences of relying on specific *events* to tell the history of the field. These 'events' might be specific historical *moments* such as "Tokyoberg" or institutional developments such as the creation of the ad hoc tribunals, which can be imbued with a progressive edge by "relating them to one another into coherent historical or causal relationships."[35]

Interestingly, writing on how international law scholars convey a progressive understanding of the field, Altwicker and Diggelmann identify periodisation as one of four primary techniques relied upon.[36] This includes, firstly, the technique of "ascending periodisation" where progress narratives are created by cutting the history of international law into two or more periods, and where the most recent is given a favourable label. Secondly, there is the technique of "proving increase valuation" in which the increasing value-orientation of international law is 'proved' or pointed to as evidence of progress. Authors employing this technique often point to international legal instruments as evidence of this. Thirdly, there is the "detection of positive trends" which creates progress narratives out of present or recent developments and events, which are then treated as if they are reliable forerunners of important developments. The final technique described by Altwicker and Diggelmann is to highlight purported "paradigm shifts", where the movement or transformation into a new paradigm is treated as evidence of progress. In international law

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power, reason against ideology, international against national, order against chaos in international affairs." See: David Kennedy, 'The Disciplines of International Law and Policy' (1999) 12(1) LJIL 9, 90. See similarly: P.W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (University of Chicago Press 1999) 109.

[32] Thomas Skouteris, *The Notion of Progress in International Law Discourse* (Springer 2010) 1.

[33] Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?' (2014) 25(2) EJIL 425.

[34] Fleur Johns, Richard Joyce, Sundhya Pahuja, 'Introduction' in Johns, Joyce, and Pahuja (eds), *Events: The Force of International Law* (Routledge 2011) 2.

[35] Skouteris (n 33) 9.

[36] Altwicker and Diggelmann (n 34) 433-437.

discourses, these techniques are typically supported by four underlying strategic assumptions about international law: the predominance of positive forces in history, positing law and violence as opposites, asserting that institutionalisation is evidence of rationality, and that the use of progressive language contributes to progress itself.

Whilst Chapters 2, 4, and 6 have illustrated extensively how this technique of "ascending periodisation" shapes the mainstream accounts of the history of ICL, we can also note the presence of the three others identified by Altwicker and Diggelmann. For example, 'proving increase valuation' is present in references to ICL institutions as evidence of the *humanisation* of international law or the progression of society towards some civilisational ideal.[37] Similarly, we can note the presence of the 'detection of positive trends' in how the history of ICL is told as a narrative of institutional development, with these identified as evidence of the gradual sophistication of the field—that is, from 'Tokyoberg' *to* The Hague.[38] Furthermore, as we have seen in the transitions between the *phases* of ICL's development, we can also note the presence of the fourth technique of "paradigm shifts".[39]

Periodised histories carry these sorts of progressive accounts particularly well, such that they are "not seen as history at all", rather they are simply viewed as the "way in which legal change is presented…the linear story of one thing building upon another on a forward-moving path to progress."[40] In this regard, periodisation helps to simplify the past into a narrative of disciplinary progress.[41] This ultimately has the potential to impoverish historical understanding, given that change is presented as "neither random nor constant".[42] The approach I have adopted in this thesis helps to disrupt this historiographical pattern by firstly drawing attention to it and secondly by seeking out discontinuities that disturb these dominant narratives. By embracing what McNeilly has described as "untimely histories" which eschew linearity, progression, and predictability, we can generate new understandings of the field and its development.[43] Evidently, there is much to be gained from embracing *messiness*.[44]

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[37] See e.g. Chapter 4, s.4.5.2.
[38] See e.g. Chapter 6, s.6.4.1.
[39] See e.g. Chapter 4, s.4.5.2 and Chapter 6, s.6.3.
[40] Russell Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education* (Routledge 2021) 108.
[41] ibid, 112 & 116.
[42] Peter Stearns, *World History: The Basics* (Taylor & Francis 2010) 74. Mégret makes a similar point in the context of the histories of international criminal justice, albeit it in relation to linear narratives rather than periodisation: Frédéric Mégret, 'International Criminal Justice Writing As Anachronism: The Past that Did Not Lead to the Present' in Thomas Skouteris and Immi Tallgren (eds), *The New Histories of International Criminal Law: Retrials* (OUP 2019) 74.
[43] Kathryn McNeilly, 'Are Rights Out of Time? International Human Rights Law, Temporality, and Radical Social Change' (2019) 28(6) Social & Legal Studies 817.
[44] On the potential for the "messy" histories of ICL, see: Vasuki Nesiah, 'Doing History With Impunity' in Karen Engle, Zinaida Miller, D. M. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (CUP 2016) 96.

3.2 Moving Beyond Institutional History: A Social History of ICL?

With the above in mind, it now bears reflecting on what new historiographical directions we might follow in future ICL scholarship. Based on Chapters 5 and 8 of this thesis, two possible directions will now be identified. As was reemphasised above, both chapters sought to engage with a history of ICL by looking at how particular ICL norms were drawn on to animate the politics of a particular social-movement.[45] To this end, Chapter 5 looked at the Civil Rights Congress as a radical civil rights organisation, whilst Chapter 8 explored the anti-war movement more generally.

TWAIL scholarship is particularly useful, in this regard, given its concern for exploring international law *from below.*[46] This kind of 'bottom up' approach could give us a better sense of the extent to which particular ICL norms or international criminal justice institutions are used as a tool of resistance or emancipation by individuals, grassroots political movements, activist groups, or civil society organisations. And given that ICL norms are increasingly looked to by such groups,[47] this approach would help us to understand how receptive international criminal justice institutions have proved to these kinds of claims. Doing so would position us to consider the counter-hegemonic potential of ICL, how it has persisted over time, and whether it has impacted the development of ICL itself.[48] Evidently, the possibility of *individual criminal responsibility* holds value for a variety of individuals, actors, and groups pursuing a wide range of political and social justice causes.[49] Whilst

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[45] Here, social movement is understood as a "sustained and collective effort, usually operating outside of established institutional channels, either to bring about or resist social change." See: Moshe Hirsch, 'Social Movements, Reframing Investment Relations, and Enhancing the Application of Human Rights Norms in International Investment Law' (2020) 34(1) LJIL 127, note 56.

[46] Rajagopal, for example, explores Third World and transnational resistance to the international legal order as a way of understanding its colonial legacies: Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (CUP 2003); and Rajagopal, 'International Law and Social Movements: Challenges of Theorising Resistance' (2003) 41(2) Columbia Journal of Transnational Law 397.

[47] Indeed, as has been argued, international criminal justice is said to have "monopolised" a broad range of human rights and "global justice" claims: Nouwen and Werner (n 20).

[48] On TWAIL as providing the means to explore the counter-hegemonic potential of ICL, see: John Reynolds and Sujith Xavier, '"The Dark Corners of the World": TWAIL and International Criminal Justice' (2016) 14 Journal of International Criminal Justice 959, 976.

[49] For example, ICL and international criminal justice institutions have been looked to as a form of resistance in the Palestinian struggle for self-determination and against ongoing human rights abuses. See for example: Pearce Clancy and Rania Muhareb, 'Putting the International Criminal Court's Palestine Investigation into Context' (Opinio Juris, 2 April 2021) <http://opiniojuris.org/2021/04/02/putting-the-international-criminal-courts-palestine-investigation-into-context/> accessed 15 February 2021; and Noura Erakat & John Reynolds, 'We Charge Apartheid? Palestine and the International Criminal Court' (TWAILR: Reflections #33/2021) <https://twailr.com/we-charge-apartheid-palestine-and-the-international-criminal-court/> accessed 1 February 2022.

these sorts of projects have been launched in the context of international human rights law scholarship,[50] ICL scholars have been slower to adopt this approach.

Another, closely related, approach we might take is that of *social history*. Whilst calls for a social history of international law have previously been made, they largely remain unheeded.[51] And this is similarly true of ICL scholarship. This absence is particularly curious given the profound impact the so-called 'turn to history' has had on international law scholarship,[52] as well as the increasing presence of social history work since the 1960s, when this approach began to popularise.[53]

A social history approach is concerned with "*real life* rather than abstractions, with *ordinary* people rather than privileged elites, with everyday things rather than sensational events."[54] Two of the key focuses for social historians are: an emphasis on large groups of people rather than elites or leading individuals and, relatedly, a rejection of the tendency present in conventional historical work to focus on high politics, diplomacy, and great ideas.[55] The mission of social history is thus to "tie the exciting development in intellectual and cultural history down to the social, economic, and political bedrock."[56] This also encompasses so-called 'people's history' approaches.[57]

In doing so, we might also heed Vadi's call to scale down the scope and perspective of our historical explorations.[58] To this end, Vadi points to a micro-history approach as a way

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[50] For review essays exploring recent works looking at this theme of 'resistance' and social movements, see: Susan Mathews, 'Resistance is Futile—You Will Be Assimilated' (2006) 19(1) LJIL 259; and Kiyoteru Tsutsui, Claire Whitlinger, and Alwyn Lim, 'International Human Rights Law and Social Movements: States' Resistance and Civil Society's Insistence' (2012) 8 Annual Review of Law and Social Science 367. For an example of this approach, see: Neil Stammers, *Human Rights and Social Movements* (Pluto Press 2009).

[51] On the need for a social history approach to the history of international law, see: Martti Koskenniemi, 'Expanding Histories of International Law' (2016) 56(1) American Journal of Legal History 104, 107; Valentina Vadi, 'International Law and Its Histories: Methodological Risks and Opportunities' (2017) 58(2) Harvard International Law Journal 311, 339; and Jessica M. Marglin, 'Notes Towards a Socio-Legal History of International Law' (2021) 29 Rechtgeschichte—Legal History 277.

[52] As we saw in Chapter 1 of this thesis.

[53] Although more recently questions have been raised as to its longevity. See: Robert B. Townsend, 'The Rise and Decline of History Specializations Over the Past 40 Years' (December 2015) Perspectives on History <https://www.historians.org/publications-and-directories/perspectives-on-history/december-2015/the-rise-and-decline-of-history-specializations-over-the-past-40-years> accessed 1 February 2022.

[54] Raphael Samuel, 'What is Social History?' (1985) 35(3) History Today <https://www.historytoday.com/archive/what-social-history> accessed 1 February 2022.

[55] See: Peter N. Stearns, 'Social History' in Lynette Spillman (ed), *Oxford Bibliographies* (OUP 2021) <https://www.oxfordbibliographies.com/view/document/obo-9780199756384/obo-9780199756384-0131.xml> accessed 1 February 2022. Also see: Christoph, 'Social History' in James D. Wright (ed), *International Encyclopaedia of the Social & Behavioural Sciences* (2nd edn, Elsevier 2015).

[56] Charles Tilly, 'The Old New Social History and the New Old Social History' (1985) 7(3) Review (Fernand Braudel Center) 363, 395.

[57] As popularised in anglophone historiography by Thompson. See: E.P. Thompson, 'History From Below' (1965) 65 Times Literary Supplement 275.

[58] Valentina Vadi, 'Perspective and Scale in the Architecture of International Legal History' (2019) 30(1) EJIL 53.

forward.[59] Microhistory is "more intensive and focused than a survey, more far-reaching in its implications than a case study, and more centred on those at *the bottom* than most biographies". It uses this perspective to generate broader insights about a society or period of history.[60]

By pursuing these kinds of approaches, a social history of ICL would be concerned with how the ideas and concepts around which the field is structured are, to borrow Levitt and Merry's phrase, *vernacularised*. For Levitt and Merry, vernacularisation looks to how ideas and practices are extracted from the "universal sphere" of international organisations to their "translation into ideas and practices that resonate with the values and ways of doing things in local contexts."[61] Cogan has made a similar call for a "vernacular" history of international law, which looks at how law can be "generated and used through lived experience and conflict and articulated outside of the formal arenas" we typically focus on.[62] This would give us a view of the history of international law from the perspective of those who *lived* it, rather than those who *thought* about it.[63] Although given the limits of 'critical' history when written from such a "privileged position", historiographical caution will be required.[64]

Pursuing the history of ICL as told through either a 'social movement' or 'social history' approach gives us an opportunity to explore something akin to what Simpson has characterised as the "shadow history" of ICL; that is, the development of ICL that did not occur through the trials and other events that are typically identified for historical signification.[65] We are thus presented with an opportunity to break free from the disciplinary equivalent of what Guha famously described as "elitist historiographies",[66] given our focus will no longer be on a narrow range of institutional locations, but will instead look to the other settings where ICL norms are drawn on and gain resonance. In the context of international law and its various subfields, such an elitist historiography might constitute

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[59] Valentina Vadi, 'The Power of Scale: International Law and Its Microhistories' (2018) 46(4) Denver Journal of International Law and Policy 315.
[60] Scott W. Stern, 'Big Questions in Microhistory' (2020) 32(2) Journal of Women's History 128, 128-9.
[61] See: Sally Engle Merry and Peggy Levitt, 'The Vernacularization of Women's Human Rights' in Stephen Hopgood, Jack Synder, and Leslie Vinjamuri (eds), *Human Rights Futures* (CUP 2017) 213; and Peggy Levitt and Sally Merry, 'Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India, and the United States' (2009) 9(4) Global Networks 441.
[62] Jacob Katz Cogan, 'A History of International Law in the Vernacular' (2020) 22(2-3) Journal of the History of International Law 205, 205.
[63] Marglin (n 51).
[64] John Henry Schlegel, 'Sez Who? Critical Legal History without a Privileged Position' in Markus Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (OUP 2018).
[65] Gerry Simpson, 'Unprecedents' in Thomas Skouteris and Immi Tallgren (eds), *The New Histories of International Criminal Law: Retrials* (OUP, 2019).
[66] Ranajit Guha, 'On Some Aspects of the Historiography of Colonial India' in Ranajit Guha & Gayatri Chakravorty Spivak (eds), *Selected Subaltern Studies* (OUP 1988) 37.

what Bederman has labelled "foreign office international legal history"[67] which is itself a translation of Flaherty's critique of "law office history" into the international context.[68] For Bederman and Flaherty, this kind of legal history tends to have a narrow institutional focus to the detriment of broader contextual understandings, whilst also being overtly instrumentalist in the type of historical inquiry it pursues and the sources it draws on.

Despite the absence of this kind of work, as Chapters 5 and 8 have shown, there is much insight to be gained from exploring the development of ICL in these non-institutional contexts. To borrow Stewart's phrasing; it presents an opportunity to explore the "war crimes movement from below".[69] This would allow us to get a sense of how the language and ideas of international criminal justice gain resonance with and within particular communities or locales. If international crimes are cultural products that are socially, politically, historically, and legally located and produced,[70] this kind of approach opens up the possibility of exploring the social and cultural conditions that have given ICL meaning outside the familiar institutional terrain we typically inhabit.

4. Closing

If engaging history does not just involve a reflection on the past, but also entails a reflection on the "consciousness of the discipline itself" and how it "creates and manages its conditions of reproduction", by bringing to the fore the structure of ICL's history this thesis has provided an insight into what these historiographical premises and conditions might be.[71] And whilst *time* has thus far received scant attention from ICL scholars, I have shown that by reflecting on how time is managed within these disciplinary histories, we are given an opportunity to reflect on what these "conditions of reproduction" might be. Although Chapters 2, 4, and 6 illustrated that the management and representation of time can act as a historiographical constraint on the kind of history that is produced, I have also shown how an awareness of these limits can potentially be liberating.

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[67] David Bederman, 'Foreign Office International Legal History' in Matthew Craven, Malgosia Fitzmaurice, and Maria Vogiatzi (eds), *Time, History and International Law* (Brill 2007).
[68] Martin S. Flaherty, 'History "Lite" in Modern American Constitutionalisim' (1995) 95(3) Columbia Law Review 523, 553.
[69] Luke J. Stewart, '"A New Kind of War": The Vietnam War and the Nuremberg Principles, 1964-1968' (PhD thesis, University of Waterloo 2014).
[70] Nessam McMillan, *Imagining the International: Crime, Justice, and the Promise of Community* (Stanford University Press 2020) 10-11.
[71] John D. Haskell, 'The Choice of Subject in Writing Histories of International Law' in Jean d'Aspremont, Tarcisio Gazzini, Andre Nollkaemper, and Wouter Werner (eds), *International Law as a Profession* (CUP 2017).

Having identified one aspect of the *conditions of reproduction* and a cause of these recursive tendencies on our scholarly engagements with the field's past, we are thus presented with an opportunity to explore new historiographical territory. In this regard, Chapters 5 and 8 have illustrated the possibilities that might result from such a critical intervention. In seeking to do 'critical' histories of ICL, however, we should do so with an awareness of the different possible meanings of 'critical'. To this end, Jodoin and Lofts identify seven primary meanings we might associate with the term. This includes: inclined to judge severely and find fault; characterised by careful, exact evaluation and judgment; characteristic of critics or criticism; crucial or decisive; indispensable or essential; reflecting a state of crisis or emergency; and fraught with danger, risk, or peril.[72] Work that *critically* intervenes in ICL's pasts with a view towards producing new historical understandings might possess all of these qualities, given that not only will it involve *critiquing* mainstream understandings, but is also essential to moving the discipline forward, can provide a disciplinary turning point, is fraught with danger and risk, and comes at a time when the field is believed to be in a state of "crisis".[73] And it is argued that the research undertaken in this thesis makes a positive contribution to this scholarly endeavour.

[72] Sébastien Jodoin and Katherine Lofts, 'What's Critical About Critical International Law? Reflections on the Emancipatory Potential of Legal Scholarship' in Prabhakar Singh and Benoît Mayer, *Critical International Law: Postrealism, Postcolonialism and Transnationalism* (OUP 2014) 328.
[73] Joseph Powderly, 'International Criminal Justice in an Age of Perpetual Crisis' (2019) 32(1) LJIL 1; and Sergey Vasiliev, 'The Crises and Critiques of International Criminal Justice' in Kevin Jon Heller, Frédéric Mégret, Sarah M. H. Nouwen, Jens David Ohlin, and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (OUP 2020).

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