

PHILOSOPHICAL JUSTIFICATIONS IN INTERNATIONAL CRIMINAL LAW
JURISPRUDENCE: A SYSTEMATIC CONTENT ANALYSIS IN PURSUIT OF
RULE OF LAW AND INSTITUTIONAL LEGITIMACY

by

ALBERT NELL

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Supervisors: Prof R Cryer & Dr B Tripković
School of Law
College of Arts and Law University of
Birmingham

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Prosecutor v Setako (Judgment and Sentence) ICTR-04-81-T (25 February 2010)
Prosecutor v Setako (Judgment) ICTR-04-81-A (28 September 2011)
Prosecutor v Simba (Judgment and Sentence) ICTR-2001-76-T (13 December 2005)
Prosecutor v Simba (Judgment) ICTR-01-76-A (27 November 2007)
Prosecutor v Zigiranyirazo (Judgment) ICTR-01-73-T (18 December 2008)
Prosecutor v Zigiranyirazo (Judgment) ICTR-01-73-A (16 November 2009)

Mechanism for International Criminal Tribunals (MICT)

Prosecutor v Ngirabatware (Judgment) MICT-12-29-A (18 December 2014)
Prosecutor v Šešelj (Judgment) MICT-16-99-A (11 April 2018)

Special Court for Sierra Leone (SCSL)

Prosecutor v Fofana and Kondewa (Judgment) SCSL-04-14 (2 August 2007)
Prosecutor v Fofana and Kondewa (Sentencing) SCSL-04-14 (9 October 2007)
Prosecutor v Fofana and Kondewa (Judgment) SCSL-04-14 (28 May 2008)
Prosecutor v Norman (Decision on Preliminary Motion Based on Lack of Jurisdiction Child Recruitment) SCSL-2004-14-A (31 May 2004)

International Criminal Court (ICC)

Judgment on the Prosecutor's appeal against the decision of Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58' ICC-01-04 (13 July 2006)
Prosecutor v Ahmad al Faqi al Mahdi (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016)
Prosecutor v Germain Katanga (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2014)

Prosecutor v Germain Katanga (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/04-01/07 (23 May 2014)

Prosecutor v Jean-Pierre Bemba Gombo (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/08 (21 March 2016)

Prosecutor v Jean-Pierre Bemba Gombo (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/05-01/08 (21 June 2016)

Prosecutor v Jean-Pierre Bemba Gombo (Judgment on the appeal of Mr Jean-Pierre Memba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/08 A (8 June 2018)

Prosecutor v Mathieu Ngudjolo Chui (Judgment pursuant to Article 74 of the Statute) ICC-01/04-02/12 (18 December 2012)

Prosecutor v Mathieu Ngudjolo Chui (Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to Article 74 of the Statute”) ICC-01/04-02/12 A (27 February 2015)

Prosecutor v Thomas Lubanga Dyilo (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012)

Prosecutor v Thomas Lubanga Dyilo (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/04-01/06 (10 July 2012)

Prosecutor v Thomas Lubanga Dyilo (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06 A 5 (1 December 2014)

Abbreviations

AC	-	Appeals Chamber
CIL	-	Customary International Law
ECCC	-	Extraordinary Chambers in the Courts of Cambodia
ELP	-	Exclusive Legal Positivism
IAC	-	International Armed Conflict
ICC	-	International Criminal Court
ICCPR	-	International Covenant on Civil and Political Rights
ICL	-	International Criminal Law
ICTR	-	International Criminal Tribunal for Rwanda
ICTY	-	International Criminal Tribunal for the Former Yugoslavia
IHL	-	International Humanitarian Law
I/HR	-	International Human Rights
ILP	-	Inclusive Legal Positivism
IMT	-	International Military Tribunal
IR	-	International Relations
JCE	-	Joint Criminal Enterprise
MICT	-	Mechanism for International Criminal Tribunals
NCSL	-	<i>Nullem crimen sine lege</i> ('legality')
NIAC	-	Non-international Armed Conflict
RoPE	-	Rules of Procedure and Evidence
RoR	-	Rule of Recognition
SCA	-	Systematic Content Analysis
SCSL	-	Special Court for Sierra Leone
STL	-	Special Tribunal for Lebanon
TC	-	Trial Chamber
TWAIL	-	Third World Approaches to International Law
UDHR	-	Universal Declaration of Human Rights
UN	-	United Nations
UNCSW	-	United Nations Commission on the Status of Women
UNSC	-	United Nations Security Council
WWI	-	World War One
WWII	-	World War Two

Introduction

0.1 Basic argument

‘Every one of us has in truth an underlying philosophy of life, even those of us to whom the names and the notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals..’¹

Philosophy has often been used in international criminal law (ICL) jurisprudence, but such use has not yet been systematically analysed nor the impact thereof on institutional legitimacy ascertained. This thesis empirically identifies the philosophies used in a selection of ICL judgments, before evaluating their compliance with a formal rule of law standard. The rule of law standard adopted is that of Lon Fuller, which is discussed in section 1.2.3.2. Suffice it here to briefly note that the proposed rule of law requires public, clear and consistent rules and justifications which contribute to predictability in and foreseeability of the application of law.² This protects the moral agency of legal subjects who can then adapt their behaviour beforehand in accordance with consistently pronounced law rather than shifting standards of conduct.³ Compliance with the rule of law by ICL judicial bodies⁴ would, therefore, give effect to the individual’s moral autonomy.

These rule of law considerations directly tie into the outcome-based legitimacy of ICL judicial bodies. The impact on legitimacy constitutes the third part of the thesis, after the identification of the philosophies and the measurement of their use against the rule of law. Outcome-based legitimacy is determined by the output of the judiciaries, i.e. whether judgments, and this also pertains to supportive philosophical justifications, are clear and consistent.⁵ Since these are also requirements under Fuller’s rule of law, the close relationship between rule of law and outcome-based legitimacy is assured. Outcome-based legitimacy, in turn, leads into consent legitimacy. Consent legitimacy revolves around whether ICL judicial bodies and their pronouncements are perceived to be legitimate by the international community (here especially their constituency, other

¹ BN Cardozo, *The Nature of the Judicial Process* (Yale University Press 1946) 12.

² LL Fuller, *The Morality of Law* (Yale University Press 1969) 39-94.

³ HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (OUP 1968) 181; Fuller (n 2) 162; J Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) 272.

⁴ In this study, ‘judicial bodies’ will refer to ‘international criminal tribunals and courts’ unless sense requires specific labelling. See, for e.g., C Damgaard, *Individual Criminal Responsibility for Core International Crimes* (Springer 2008) 271; K Oellers-Frahm, ‘Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions’ (2001) 5 *Max Planck UNYB* 69; CPR Romano, ‘International Courts’ (Oxford Bibliographies 2012) <www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0046.xml> accessed 20 July 2018.

⁵ T Treves, ‘Aspects of Legitimacy of Decisions of International Courts and Tribunals’ in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 172.

states and academics). Consent legitimacy is particularly important in contemporary ICL where allegations of ideological bias have, for example, been raised against the International Criminal Court (ICC).⁶ It is argued that any proof of greater consistency in (even a part of) the ICL justificatory regime, i.e. closer conformity to the rule of law, will contribute towards greater outcome-based legitimacy which should, in turn, improve consent legitimacy.⁷ Increased consent legitimacy could encourage greater compliance with the directives of these judicial bodies thereby strengthening accountability for international crimes.

Systematic content analysis (SCA) will be utilised as framework for this study because it ‘collects a set of documents, such as judicial opinions on a particular subject, and systematically reads them, recording consistent features of each and drawing inferences about their use and meaning’.⁸ SCA enables, firstly, the selection of commensurable jurisdictions; secondly, the empirical systematisation of philosophies and those aspects of arguments which revealed philosophy and, thirdly, the measurement of the philosophies against the rule of law standard adopted in this study and the impact thereof on institutional legitimacy.⁹ SCA thus divides the thesis into three substantive parts, i.e. firstly, delineating the selection of jurisdictions and materials to be investigated;¹⁰ secondly, determining the philosophies, which were used by the selected ICL judicial bodies to support their findings, through coding¹¹ and; thirdly, comparing this philosophical justificatory apparatus against the proposed rule of law standard and its attendant effects on institutional legitimacy.¹²

The next section considers the broader relevance of the thesis. In the process, legitimacy, which was touched on above, will be elucidated. The introduction will be concluded with the chapter outline. Chapter 1 will provide a detailed discussion on SCA as methodology as well as attendant study precepts and demarcations.

⁶ See section 0.2 below.

⁷ S Dothan, ‘How International Courts Enhance Their Legitimacy’ (2013) 14 *Theoretical Inquiries in Law* 456-458.

⁸ MA Hall and RF Wright, ‘Systematic Content Analysis’ (2008) 96 *California Law Review* 64. See also O Holsti, ‘Content Analysis’ in Gardner Lindzey and Elliott Aronson (eds), *The Handbook of Social Psychology* (2nd edn, Vol. II, Addison-Wesley 1968) 601 and section 1.2.

⁹ Hall and Wright (n 8) 79 et seq.

¹⁰ See section 1.2.1.

¹¹ See section 1.2.2. This part constitutes the main analysis of data under each chapter.

¹² See section 1.2.3. While the investigation into consistency structures the data, the measurement against the remainder of Fuller’s rule of law concludes every substantive subsection in the chapters. The main measurement for legitimacy occurs in the conclusion across all the data.

0.2 On the broader significance of the study

The significance of this thesis, firstly, revolves around the systematisation of philosophy as an under-explored element of the ICL justificatory narrative which, as part of such narrative, has and will continue to serve as persuasive authority for other judicial proceedings. Secondly, and as indicated in section 0.1, this argumentative narrative impacted institutional legitimacy in various ways. This section will reflect on both of these contributions, while also establishing ‘philosophy’ and ‘legitimacy’ conceptually. Finally, some additional merits of the study will be pointed out.

Since it is foundational to the thesis, ‘philosophy’ has to be clarified conceptually first. This study uses ‘legal theory’ and ‘philosophy of law’ (sometimes ‘philosophy’ in short since the context is almost always law¹³) interchangeably.¹⁴ In agreement with Freeman, philosophy of law entails ‘general theoretical questions about the nature of laws and legal systems, about the relationship of law to justice and morality and about the social nature of law’.¹⁵ Philosophy of law is thus synonymous with the second meaning ascribed to jurisprudence by Fichtelberg, namely ‘a deeper view regarding the nature and purpose of the law in general’.¹⁶ While not exhaustive, these definitions serve as functional point of departure here.

Systematically identifying philosophy in ICL jurisprudence is important because it has not yet been done. In addition, ICL provisions have been vague, unclear or non-existent (or in Hartian terms resorted under the ‘problems of the penumbra’¹⁷). In these cases, the philosophies utilised by judicial bodies played a significant part in the conceptualisation of particular rules as well as the reading afforded thereto.¹⁸ In sum, the solutions proffered were shaped by legal philosophy.¹⁹ This

¹³ Two exceptions may be Pal’s opposition to communism, for which see Pal Dissent 253, 547(24), and the use of a Thales theorem in *Prosecutor v Stanišić and Župljanin* (Judgment) IT-08-91-A (30 June 2016) Separate Opinion of Judge Afande para 2. This study focuses on philosophy in the context of law and so these arguments will not be discussed here.

¹⁴ R Wacks, *Understanding Jurisprudence An Introduction to Legal Theory* (3rd edn, OUP 2012) 1 footnote 1.

¹⁵ M Freeman, *Lloyd’s Introduction to Jurisprudence* (9th edn, Thomson Sweet Maxwell 2014) 2. See, similarly, Wacks (n 14) 1.

¹⁶ A Fichtelberg, ‘Liberal Values in International Criminal Law A Critique of Erdemović’ (2008) 6 *JICJ* 7.

¹⁷ HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 607.

¹⁸ R Cryer, T Hervey, B Sokhi-Bulley with A Bohm, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 5. For confirmation see also LV Prott, *The Latent Power of Culture and the International Judge* (Professional Books 1979) 119; J Wessel, ‘Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication (2006) 44 *Columbia Journal of Transnational Law* 395; Freeman (n 15) 12. See *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/08 A (8 June 2018) Separate Opinion Judge Christine Van den Wyngaert and Judge Howard Morrison para 2. For reliance on several philosophers to clarify interpretation, causation and complicity, see *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/08 A (8 June 2018) Concurring Separate Opinion of Judge Eboe-Osuji paras 110, 157-181, 223-231.

¹⁹ For a finding to this effect in relation to the Tokyo IMT, see JB Keenan and BF Brown, *Crimes against*

study accepts that the more indeterminate a norm is, the more crucial the ‘process by which, in practice, the norm can be made more specific’.²⁰ Clarifying the legal philosophies thus used is important for better understanding the development of ICL jurisprudence. Justificatory arguments of judicial bodies constitute persuasive authority for other judiciaries tasked with dispensing ICL.²¹ Clarifying a hitherto under-explored element of the justificatory arguments should further illuminate the quality of the persuasive authority in question. This study, therefore, aims to cultivate awareness of this part of the justificatory narrative and engender sensitivity to the use thereof on the part of ICL judiciaries.

Since philosophical justifications enable a judicial body to read a particular provision in several different ways, these justifications are significant. They may adversely or favourably impact the determinacy, coherence and consistency of the law thus applied which, in turn, might be detrimental or beneficial to the legitimacy of the institution involved.²² The ICL judiciary itself acknowledged the importance of coherence for the body of law they dispense.²³ This has also been supported in literature since ‘the series of decisions which a judge makes must appear to be consistent and based on a consistent philosophy’.²⁴

In the absence of consistency, concerns that the justifications offered for particular legal positions were arbitrarily cherry-picked or pre-conceived might ensue. Although complete consistency or

International Law (Public Affairs Press 1950) 58. Indeed for the concern at the ICTY that it ‘should not happen that due to shifting majorities [and, arguably, ideological and philosophical positions] the Appeals Chambers changes its jurisprudence from case to case’, see *Prosecutor v Kvočka et al* (Judgment) IT-98-30/1-A (28 February 2005) Separate Opinion of Judge Shahabuddeen para 107 quoting from *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) Joint Dissenting Opinion of Judge Schomburg and Judge Guney on Cumulative Convictions para 13. This argument is accepted in jurisprudential writings too, see LL Fuller, ‘The Case of the Speluncean Explorers’ (1949) 62 *Harvard Law Review* 616; P Suber, *The Case of the Speluncean Explorers Nine New Opinions* (Routledge 1998).

²⁰ T Franck, ‘The Power of Legitimacy and the Legitimacy of Power: International law in an Age of Power Disequilibrium’ (2006) 100 *American Journal of International Law* 102. See also *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/08 A (8 June 2018) Separate Opinion Judge Christine Van den Wyngaert and Judge Howard Morrison para 4.

²¹ For e.g., *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) paras 533, 538; *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06 A 5 (1 December 2014) para 49. For the view from the bench that the ICTY and ICTR will ‘stand as examples of best practice for the prosecution of international crimes’, see *Prosecutor v Mrkšić, Radić and Šljivančanin* (Judgment) IT-95-13/1-A (5 May 2009) Partially Dissenting Opinion of Judge Pocar para 11. For the importance of drawing from predecessors, see T Meron, *The Making of International Criminal Justice A View From the Bench Selected Speeches* (OUP 2011) 114.

²² See, for e.g., T Franck, ‘Legitimacy in the International System’ (1988) 82 *American Journal of International Law* 713-751; Suber (n 19) xi-xii; Wessel (n 18) 395; Wacks (n 14) 40.

²³ *Prosecutor v Alekšovski* (Judgment on Appeal) IT-95-14/1-A (24 March 2000) para 113 approved in *Prosecutor v Akayesu* (Judgment on Appeal) ICTR-96-4-T (1 June 2001) para 22.

²⁴ Prott (n 18) 187. For the comparable requirement of a minimum degree of regularity and certainty, see Freeman (n 15) 15.

inconsistency of theoretical justifications might be unrealistic in a social environment, such as the ICL system, generally consistent arguments are, for the preceding reasons, to be preferred. Granted, neither consistency nor inconsistency in philosophical justifications adopted in any particular case will inevitably result in unfair or wrong decisions. However, the overall lack of coherence and consistency in law may adversely affect an institution's legitimacy. Consistency for purposes of this study is closely linked with the Fullerian rule of law desiderata which was noted in section 0.1 and will be discussed in section 1.2.3.2.

Apart from the systematisation of philosophy in ICL judgments, the significance of this thesis, therefore, also pertains to institutional legitimacy. While different types of legitimacy are applicable in the context of the ICL judicial bodies, most important for this study, and which will now be conceptually explained, are outcome-based as well as consent legitimacy.²⁵

Outcome-based legitimacy²⁶ includes questions pertaining to the characteristics of judgments, e.g., whether the reasons for decision are clear and consistent with previous decisions.²⁷ Judges play an important role in a judicial body's outcome-based legitimacy. Judgments have the potential to enhance the legitimacy of rules depending on the motivation offered for them.²⁸ This is exacerbated in the case of ICL, which is a relatively nascent field, where judges play a more active role in the development of the law. The thesis pursued here accepts that philosophical justifications are part of a judicial body's reasons for decision and could, therefore, bolster the body's outcome-based legitimacy if their use is clear and consistent. Identifying and measuring the philosophies to have informed judicial bodies' justifications against a formal rule of law standard, requiring clarity and consistency, enables findings regarding outcome-based legitimacy.

Consent legitimacy, on the other hand, pertains to the degree of consent to and approval for a judicial body by its constituency.²⁹ It has been suggested that legal judgments will be perceived to

²⁵ A Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice' (2012) 25 *Leiden Journal of International Law* 492-493 additionally identifies whether the institution is vested on values, principles and goals shared by the majority of its constituency (purpose legitimacy), whether it gives effect to values universal to the whole community within which it exists (universal values legitimacy) as well as factors related to the judicial body's performance such as answerability and transparency of decision-making (performance legitimacy). In Treves (n 5) 171 the legitimacy of judicial decisions has been grouped into source-based theories, process-based theories and outcome-based theories.

²⁶ Outcome-based legitimacy is sometimes labelled 'performance' legitimacy, but for uniformity 'outcome-based' legitimacy will be used throughout. See the similarity, for example, in Cassese (n 25) 492-493; Treves (n 5) 172.

²⁷ Treves (n 5) 172. Franck (n 20) 94 links clarity with determinacy while Franck (n 22) 741 links consistency with legitimacy.

²⁸ A Pellet, 'Discussion Following Presentations by Tullio Treves and Rein Müllerson' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 206 as well as R Howse, *ibid*, at 207.

²⁹ Cassese (n 25) 492-493.

be legitimate by the international community (including states, private individuals, judges, academics and other interest groups) if they are considered ‘generally just, legally correct and unbiased’.³⁰ Consent legitimacy can thus be improved if judgments are thoroughly reasoned, appear determined by law and require actions deemed to be acceptable by the international community. In sum, ‘the norms a court refers to and its method of reasoning can affect the way its judgments are received and shape its legitimacy’.³¹ Outcome-based legitimacy may thus impact consent legitimacy. Of course, enhancing the consent legitimacy of ICL judiciaries is necessary to improve the chances that states will comply with their judgments and accept their jurisdiction.

Illustratively, those states who initially supported the ICC and those who ab initio opposed it, have exerted pressure on the consent legitimacy of the ICC. By only opening cases thus far against African defendants, the ICC has been criticised for exhibiting prejudice towards the continent from which most of its member states hail.³² While several African countries announced their intention to withdraw from the ICC, only Burundi has withdrawn to date.³³ On the other hand, political considerations have ensured that powerful (and military active) states have not ratified the Rome Statute, including the USA, Israel, India, China and Russia.³⁴ The nature of the ICC has meant it relies on states to ensure suspects are arrested and transferred to the Court. The culmination of the first-mentioned perception of bias and the last-mentioned exertion of self-interest has led to countries flaunting their obligations in this regard, thereby further undermining the consent legitimacy of the Court.³⁵ The argument for consent legitimacy is thus especially relevant for the ICC, which is the permanent international court established for adjudicating ICL violations. Improving consent legitimacy through consistency in justificatory narrative might not solve these political obstacles directly but could improve the cachet of the ICC and lead to an overall more

³⁰ Dothan (n 7) 456.

³¹ Ibid 457-458.

³² See generally, A Cassese, ‘Soliloqui’ in Heikelina Verrijn Stuart and Marliese Simons, *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese: Interviews and Writings* (Amsterdam University Press 2009) 176; R Cryer, ‘The Philosophy of International Criminal Law’ in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 262.

³³ As of 6 July 2018, South Africa is reconsidering its intention to withdraw. See, for instance, ‘SA’s position in Africa regarding ICC exaggerated - ISS’ available at <www.news24.com/Africa/News/sas-position-in-africa-regarding-icc-exaggerated-iss-20180706> (accessed on 24 Aug 2018). Burundi became the first country to withdraw, see <www.nytimes.com/2017/10/27/world/africa/burundi-international-criminal-court.html> (accessed on 24 Aug 2018). Gambia rejoined, see <www.hrw.org/news/2017/02/17/gambia-rejoins-icc> (accessed on 24 Aug 2018). As recently as February 2018, the AU called for withdrawal, see <<http://eastafriamonitor.com/african-union-calls-mass-withdrawal-icc/>> (accessed on 24 Aug 2018).

³⁴ As of 20/07/2018, the USA, Russia and Israel have signed, but not ratified, the Rome Statute, whereas China and India have neither signed nor ratified the treaty.

³⁵ The refusal of the South African Government to arrest Omar al Bashir, while he visited the country for the AU Summit in Johannesburg during June 2015, reveals how politics and the perception of bias against Africans contributed to thwart the ICC’s jurisdiction.

acceptable system.³⁶

Finally, this study's significance extends beyond the systematisation of the philosophical narrative and its impact on legitimacy, although those remain the primary contributions. It also contributes to a relatively new and, as such, under-explored academic inquiry. Little research has been done on this topic. Existing scholarship is selective in terms of research design and, therefore, unrepresentative of the totality of the judicial bodies' case law³⁷ as well as jurisdictionally,³⁸ thematically³⁹ or temporally limited.⁴⁰ Cherry-picking some cases of a limited number of jurisdictions reflects an incomplete picture of the particular bodies' jurisprudence and precludes comprehensive inter-curial findings. This is exacerbated by studies which only focus on a particular theme reflective of one philosophical approach. An investigation into all the cases of the selected judiciaries, as intended by this study, is necessary to fairly and comprehensively establish the philosophical positions to have emanated from these judicial bodies' diverse judging panels and to identify inter-curial trends. Only this level of systematisation will enable the proposed comparisons with rule of law and test impact on legitimacy. Finally, the limitations of existing literature on this topic also pertain to their methodological design as most studies are solely based on traditional legal analysis. It is in part to address the lack of a systematic investigation into the judgments that this study aims to contribute by adopting qualitative SCA.⁴¹

Thus, while academic literature is beginning to appear in this field, it is still limited. Aware of its

³⁶ B Ferencz, 'The Prosecutor: Interview with Benjamin Ferencz' in Heikelina Verrijn Stuart and Marlise Simons, *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese: Interviews and Writings* (Amsterdam University Press 2009) 37.

³⁷ Fichtelberg (n 16) 3-19; Cryer (n 32) 232-267.

³⁸ Q Wright, 'Legal Positivism and the Nuremberg Judgment' (1948) 42 *American Journal of International Law* 405-414; SL Paulson, 'Classical Legal Positivism at Nuremberg' (1975) 4 *Philosophy & Public Affairs* 132-158 both focus on the Nuremberg IMT. N Boister and R Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008) 271-300 focuses on philosophy at the Tokyo IMT; Cryer (n 32) 243-244 conceded this point in relation to the ad hoc Tribunals. G Ferrera and M Alexander, 'Appellate Judges and Philosophical Theories: Judicial Philosophy or Mere Coincidence?' (2011) 14 *Richmond Journal of Law and the Public Interest* 561 investigate judicial philosophy, but their scrutiny is limited to the US Supreme Court.

³⁹ See, for example, E Kopelman, 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial' (1991) 23 *New York University Journal of International Law and Politics* 373-444 which focuses on the dissent of Judge Pal at Tokyo; B Van Schaak, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals' (2008) 97 *Georgetown Law Journal* 119-192 which is limited to the legality principle; B Van Schaak, "'The Grass that Gets Trampled when Elephants Fight": Will the Codification of the Crime of Aggression Protect Women?' (2010) 15 *UCLA Journal of International Law & Foreign Affairs* 327 which focused on the crime of aggression.

⁴⁰ All the studies in the previous two footnotes omitted the most recent cases at the ICC, ICTR and ICTY.

⁴¹ The methodology adopted in this study is discussed at 1.2. There are exceptions, e.g., G Schubert, 'Jackson's Judicial Philosophy: An Exploration in Value Analysis' (1965) 59 *American Political Science Review* 940-963 on Justice Jackson, but this study employed quantitative (as opposed to qualitative) SCA; was limited to only one role-player involved in the present study and only in his capacity as US Supreme Court Justice rather than as prosecutor at Nuremberg IMT, which is the focus here.

present embryonic state, one author expressed the wish that his chapter on philosophy in ICL ‘...provokes further thought, and has provided some of the tools to work within this area’.⁴² This study intends to honour this wish and pursue this important contemporary debate.

0.3 Structuring of thesis

Having briefly introduced the basic argument of the thesis and the broader significance thereof, the thesis will hereafter be divided into a methodology chapter and four parts, corresponding to the philosophical categories analysed for rule of law compliance. SCA, as methodology, is discussed in chapter 1 alongside other general premises and limitations. Part A, dealing with natural law and legal positivism, will consist of two chapters in accordance with the relevant codes. Thus, chapter 2 will analyse those codes historically linked to natural law and legal positivism, namely just war theory, cosmopolitanism and the policy-oriented approach. Chapter 3 will investigate the codes in substantive ICL linked to natural law and legal positivism, namely sources of law, substantive crimes, principles of liability and techniques of interpretation. Part B will deal with ethical theories and consists of one chapter. Chapter 4 will thus investigate the use of utilitarianism and deontology both generally and regarding sentencing purposes. Part C codes for critical approaches and consists of one chapter. Feminism, antecedents to Third World Approaches to International Law (TWAIL) and generic instances of othering will be coded for in chapter 5. Part D will code for systemic philosophies in one chapter. Chapter 6 will therefore code for realism and liberalism. Finally, chapter 7 will constitute the conclusion.

This study reflects ICL as at 8 June 2018.

⁴² Cryer (n 32) 266.

Chapter 1

Methodology

1.1 Introduction

This study investigates the use of philosophy in international criminal law (ICL) jurisprudence. The justificatory narrative thus identified will be measured against a rule of law standard and its contribution to institutional legitimacy evaluated.¹ As was suggested in the introduction, some form of systematisation of research data for the consequent measurement thereof against the rule of law standard was necessary. For this study, qualitative systematic content analysis (SCA) provides the necessary systematisation. Detailing SCA is required because the legal method is often imbibed unconsciously through the training process, resulting in methodologies frequently left unarticulated in research.² Added incentive to detail SCA emanates from the infrequent use of qualitative SCA in legal studies and because it structures this study. Throughout the discussion of SCA, general premises and limitations of the study design will be elucidated.

1.2 Research methodology and design – Systematic content analysis (SCA)

SCA is a social science technique and will be understood as ‘any procedure for assessing the relative extent to which specified references, attitudes, or themes permeate a given message or document’ and as ‘any technique for making inferences by systematically and objectively identifying specified characteristics of messages’.³ The ‘specified...themes’ or ‘characteristics’ investigated in this study were the philosophies relied on by ICL role-players and the ‘messages’ they permeated, ICL pronouncements.⁴

This study purports to analyse a series of ICL pronouncements by combining qualitative research with SCA. Before discussing whether SCA and traditional legal analysis may be used together, it is necessary to briefly juxtapose them. SCA investigates a series of cases, which are systematically

¹ See section 0.2.

² See, for e.g., P Chynoweth, ‘Legal Research’ in A Knight and L Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 35; R Cryer, T Hervey, B Sokhi-Bulley with A Bohm, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 2.

³ The first definition is that of PJ Stone, *An introduction to the General Inquirer: a computer system for the study of spoken or written material* (Harvard University and Simulmatics Corporation) quoted in O Holsti, ‘Content Analysis’ in Gardner Lindzey and Elliott Aronson (eds), *The Handbook of Social Psychology* (2nd edn, Vol. II, Addison-Wesley 1968) 597, whereas the second is Holsti’s own, *ibid*, at 601. See also MA Hall and RF Wright, ‘Systematic Content Analysis’ (2008) 96 *California Law Review* 64.

⁴ This study revolves around the encoding process of ICL pronouncements, i.e. the ‘causes or antecedents of the message’, in particular. See Holsti (n 3) 604, 606. See also O Holsti, *Content Analysis for the Social Sciences and Humanities* (Addison-Wesley 1969) 24, 68.

selected, for overall patterns, whereas traditional legal analysis focuses on a smaller number of exemplary cases which are selected due to the researcher's belief that they are illustratively important for some or other point. SCA presupposes that the series of cases under scrutiny are essentially of equal value, whereas traditional legal analysis relies on the expertise of the researcher to select a few noteworthy cases and discuss the important themes and social effects of the decisions. Because of its linkage to the social sciences, SCA attempts to achieve greater objectivity, repeatability and falsifiability in research as compared to traditional legal analysis, which has been criticised for being a subjective exercise.⁵ Critically for this study, with its focus on justificatory patterns, SCA is interested in breadth while traditional legal analysis focuses on depth in research.⁶

Charges that (quantitative) SCA neglects subtleties in the judicial process resulted in the realisation that 'one form of analysis does not displace the other' and that SCA 'can complement more interpretive forms of legal scholarship'.⁷ Thus, qualitative SCA is possible although it has been scarce in the context of legal research.⁸ This study supports the belief that SCA and traditional legal analysis are not mutually exclusive, but may be complementary.⁹ Even the most rigorous quantitative analysis cannot completely escape from qualitative techniques.¹⁰ Thus, the method adopted in this study will be qualitative SCA, as it ensures both systematic breadth of and qualitative depth into research data.

While this thesis does not ask the quantitative question, which can be rendered statistically (and which is also a possible course of study),¹¹ it is not incongruous with the quantitative approach. It is concerned with the trends (or consistency) in the philosophical categories used by the courts. Trends suggest a numerical quality. Yet the point is that the trends will only be fully investigated through a qualitative analysis of the selected cases as opposed to a statistical analysis.

In passing, it can be counter-argued that this study is simply a traditional qualitative analysis and that it is unnecessary to utilise qualitative SCA. However, this study conforms with the approach of

⁵ Hall and Wright (n 3) 63-66, 76-79. For the importance of social science methods for law, see H Oliphant, 'A Return to Stare Decisis' (1928) 14 *ABA J* 71, 161 quoted, *ibid*, at 63.

⁶ Hall and Wright (n 3) 88.

⁷ Hall and Wright (n 3) 81 fn 70, 82-83, 99, 118. See also Holsti (n 3) 598-602.

⁸ *Ibid*.

⁹ Compare Holsti (n 3) 597-598; Holsti (n 4) 11; Hall and Wright (n 3) 82-83, 99, 120-121. For the view that research rarely reflects only one methodology and that some theories answer certain questions better than others thereby justifying eclecticism, see Cryer, Hervey, Sokhi-Bulley with Bohm (n 2) 14.

¹⁰ Holsti (n 3) 600.

¹¹ For support that content analysis may rely on (qualitative) 'conceptual description and narrative illustrations rather than numbers', see Hall and Wright (n 3) 118. See similarly Holsti (n 4) 11.

SCA especially as an explanation of the self-reflexive process through which it has been structured.¹² SCA is invested in the very architecture of this study as the philosophies identified demarcate chapters, the codes identified delineate subsections within chapters and the analysis of codes for consistency provides the overall argument in relation to the rule of law.

As briefly alluded to under section 0.1, SCA requires (i) a proper selection of cases to investigate (ii) coding cases and (iii) analysis of the case coding.¹³ SCA, in the context of this thesis, therefore structures the argument through (i) a proper selection of judicial pronouncements or ‘cases’ to investigate (ii) identifying and analysing signifiers (or ‘codes’) of philosophical justifications (or ‘philosophical categories’) and (iii) analysis of coded data against the rule of law standard. It is possible to roughly demarcate part (i) and (ii) as expository and part (iii) as evaluative scholarship.¹⁴ The following sections illuminate the three constitutive elements of SCA for this study. While this chapter provides an overview of the methodology and substantively addresses the issue of case selection (i.e. part (i)), parts (ii) and (iii) systematise the thesis argument and structure the study’s chapters.

1.2.1 Case selection

Turning to part (i) of SCA, this study investigates a series of ICL pronouncements. The systematisation of what necessarily has to be a selection of cases is the subject of this section. As such, this section serves as an important preface to the rest of the study. In order to comply with part (i), the sampling frame (or ‘theoretical universe of all relevant cases’) and selection method (the cases that will be considered and studied in fact) require elucidation.¹⁵ The sampling frame of this study can be understood as ICL pronouncements rendered by domestic, international or hybrid judicial bodies whether in their advisory opinions, judgments on merits, sentencing or decisions on procedural matters; pronouncements made by counsel or through academic writings. However, this ‘theoretical universe of all relevant cases’ is too heterogeneous to be a proper object of study. Indeed, SCA requires that the cases investigated must be of equal value.¹⁶ Consequently, this section sets out the selection method to be considered in postulating a narrower, more homogeneous group of relevant cases. To properly demarcate the relevant cases that may be considered for philosophical categories, several factors will be considered, most notably, jurisdictions, judicial levels (e.g. appeal

¹² Hall and Wright (n 3) 64 explain the close affinity between the traditional reading of legal decisions and SCA.

¹³ Hall and Wright (n 3) 79 et seq.

¹⁴ Cryer, Hervey, Sokhi-Bulley with Bohm (n 2) 9. See also J Austin, *The Province of Jurisprudence Determined* (John Murray 1832) 278; J Bentham, *A Fragment on Government* (Clarendon Press 1891) 98-99.

¹⁵ Hall and Wright (n 3) 101-105. See also Holsti (n 3) 653-654.

¹⁶ Hall and Wright (n 3) 65-66.

or trial), documentary output and role-players. This section is foundational to the entire study design as it delineates the cases which will be investigated and which ones omitted.

The focus will be on the judgments from the fully international criminal judicial bodies created since WWII. Several reasons dictate the focus on the international regime as opposed to the domestic one. Firstly, the study's research design precisely aims to investigate the philosophical underpinnings of the seminal international criminal judicial bodies. Secondly, as the jurisdiction of the International Criminal Court (ICC) is based upon complementarity with domestic jurisdictions, domestic courts will likely be guided by the jurisprudence of the ICC when they adjudicate upon international crimes. Elucidating the theoretical approaches underpinning the ICC (actually or potentially) may thus help to prevent unarticulated prejudices and assumptions being unknowingly assumed and perpetuated by domestic courts.¹⁷ This point can be argued in relation to the persuasive value of other ICL judiciaries to be considered in this study for domestic judiciaries too. Thirdly, well reasoned international legal judgments can arguably buttress domestic jurisdictions in the face of executive pressure to digress from proposed international standards.¹⁸ Fourthly, questions into the nascent structures, based on a voluntarist model, involved with coercion in international law are much more pressing than the same questions in domestic systems which are firmly based on coercion.¹⁹

Consequently, the judgments of the post-WWII Tribunals, the Nuremberg and Tokyo International Military Tribunals (IMTs), will be investigated; the judgments of the post-Cold War Tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Mechanism for International Criminal Tribunals (MICT) will be researched and, finally, the judgments of the first permanent court of ICL, the ICC, will be analysed.²⁰

These judicial bodies are selected because they are (and were) the seminal judicial bodies involved with enforcing ICL. The Nuremberg and Tokyo IMTs were the first International Tribunals tasked

¹⁷ This point was made in relation to the ICTY and domestic courts in *Prosecutor v Ntagerura et al.* (Judgment) ICTR-99-46-T (25 February 2004) Separate Opinion of Judge Dolenc para 5.

¹⁸ S Dothan, 'How International Courts Enhance Their Legitimacy' (2013) 14 *Theoretical Inquiries in Law* 463-464.

¹⁹ See, for e.g., T Franck, 'Legitimacy in the International System' (1988) 82 *American Journal of International Law* 707.

²⁰ For works on the respective judicial bodies generally, see WA Schabas, *The UN International Criminal Tribunals The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006); N Boister and R Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008); BN Schiff, *Building the International Criminal Court* (CUP 2008); T Taylor, *The Anatomy of the Nuremberg Trials* (Skyhorse 2013).

with bringing perpetrators of the crime against peace and crimes against humanity alongside war crimes to justice (thereby also justifying this as the temporal starting point of the study²¹). Their respective judgments and separate opinions constitute the foundation of modern ICL and, as such, justify their inclusion. The ad hoc Tribunals, created post-Cold War, were the first international judicial bodies since the post-WWII IMTs to adjudicate upon ICL. While they started slowly, their jurisprudential output has now become pivotal in the development of ICL. Since the MICT was established by the United Nations Security Council (UNSC) on 22 December 2010 and ‘tasked with continuing the “jurisdiction, rights and obligations and essential functions”²² of the ICTR and the ICTY; and maintaining the legacy of both institutions’,²³ the justifications for including the ICTY and ICTR apply mutatis mutandis to this institution. Finally, although it has rendered very few judgments thus far,²⁴ the ICC is set up to become the authoritative ICL court of the future.²⁵ This, added to the adverse political climate the court finds itself in currently,²⁶ confirms the importance of evaluating its justificatory narrative for rule of law compliance.

Omitted from this study, therefore, will be the plethora of hybrid ICL structures such as the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Iraqi High Tribunal and the Special Tribunal for Lebanon (STL) dealing, as they do, with domestic law and generally lacking the judicial quality of the jurisdictions selected. Although the Special Court for Sierra Leone (SCSL) will also not be directly investigated, its jurisprudence will, at times, be insightful for the purposes of this work as it primarily expounds ICL and some philosophical considerations are evident in its reasoning. Paying some attention to the SCSL is justified because, unlike the hybrid courts, ‘it is a creature of international law, not domestic law’.²⁷ Some illustrative references will thus be made to this institution.²⁸

This study’s focus will be on the majority and separate (including dissenting) judgments (both trial and appeal where they exist) on merits and sentencing (where applicable) from the selected jurisdictions. Separate and dissenting opinions, as has been pointed out in another context, can

²¹ WA Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 1-3.

²² UNSC Resolution 1966.

²³ <www.unmict.org/en/about> accessed on 3 June 2016.

²⁴ As of 20/07/2018 only a handful of judgments have been rendered, namely *Lubanga*, *Katanga*, *Ngudjolo*, *Bemba* and *Al-Mahdi*.

²⁵ This was definitely the intention at its creation although it has been difficult getting this Court fully functional.

²⁶ See section 0.2.

²⁷ Schabas (n 20) 6.

²⁸ For concerns regarding the quality of SCSL reasoning, however, see R Cryer, ‘Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study’ (2006) 11 *Journal of Conflict & Security Law* 253.

become important in the development of jurisprudence as it might raise ‘an innovation not yet accepted, and permitting it to mature in public consciousness’.²⁹ Moreover, separate and dissenting opinions are often theoretically insightful as they provide judges greater freedom to express their particular understanding of the law and their mandate. While the judgments will be the central focus, academic writings of the selected role-players will also be considered where they shed light on positions adopted intra-curially.

This study will not focus on the decisions, procedural pronouncements (such as decisions dealing with the Rules of Procedure and Evidence (RoPE) at the ad hoc Tribunals and the ICC), transcripts or memoranda of the judicial bodies owing to constraints of space. The exceptions to this general rule will be the Rule 61 decisions and a few significant interlocutory decisions at the ICTY. The Rule 61 decisions are included because they were the first substantive decisions made by the ICTY and, as such, contain reasoned findings revelatory of philosophical position. Since only five Rule 61 decisions were rendered,³⁰ they moreover constitute a small and self-contained selection. The interlocutory decisions at the ICTY will not be the main focus of this study either, but a few of these decisions are seminal to ICL, in particular the *Tadić* decision,³¹ and so will be included in the cases under investigation.

Regarding the selected judgments, this thesis emphasises justifications rather than outcomes.³² Outcomes are not necessarily linked to articulated justifications. However, this study is precisely focused on articulated philosophical justifications. Shedding light on the quality of justifications is crucial as justifications are the outcomes in the making. This thesis, therefore, focuses on philosophy as an element of the justificatory regime which limits its ambit. Yet, it is the intention to show how complex a single facet of the judicial argumentative structure might be. Hopefully this might entice future research into this and other components of the justificatory narrative. Although only a part of the total justificatory narrative will be explored, any taint of the part, will taint the

²⁹ LV Prott, *The Latent Power of Culture and the International Judge* (Professional Books 1979) 114. See also *Prosecutor v Prlić et al* (Judgment Volume 6 of 6) IT-04-74-T (29 May 2013) Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti p 89.

³⁰ *Prosecutor v Nikolić* (Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-94-2-R61 (20 October 1995); *Prosecutor v Martić* (Decision) IT-95-11-R61 (8 March 1996); *Prosecutor v Mrkšić* (Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-95-13-R61 (3 April 1996); *Prosecutor v Karadžić and Mladić* (Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-95-5-R61 and IT-95-18-R61 (11 July 1996); *Prosecutor v Rajić* (Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-95-12-R61 (13 September 1996).

³¹ For e.g., *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995); *Prosecutor v. Hadžihasanović, Alagić & Kubura* (Decision on Joint Challenge to Jurisdiction) IT-01-47-PT (12 November 2002).

³² For which SCA is particularly suited, see Hall and Wright (n 3) 98.

whole. While a wholesome part will not necessarily mean a wholesome institution, it could contribute thereto.

As a general rule, this study will focus on the pronouncements of the judges from the selected judicial bodies. The exception to this will be the opening and closing arguments of the prosecutors and defence counsel at Nuremberg and Tokyo. As these were the first ICL Tribunals, both teams of counsel needed to adopt clear philosophical arguments in order to substantiate their respective positions in relation to the ICL regime and the trials themselves. These arguments shed additional light on the philosophical approaches adopted by the first ICL Tribunals as they provided the framework from which the judicial bodies themselves worked. Not all counsel were philosophically minded, however, and this study will only focus on the main role-players that were so inclined.

It tended to be the chief prosecutors and the chief defence counsel who were most concerned with the theoretical framework and justification of the trials. Exceptionally at Nuremberg, however, the defence chose Hermann Jahrreiss (supporting counsel for Alfred Jodl) to address, on behalf of all the accused, ‘general questions of law and fact’.³³ Counsel on both sides recognised that their opening and closing statements were a declamation to the international community as well as posterity and utilised it accordingly. At Tokyo, for example, chief prosecutor Keenan began his opening address by admitting his responsibility to present ‘an outline of our theory of the law under which we are proceeding’ alongside the facts to be proven.³⁴ Because the prosecution believed that irreconcilable philosophies characterised the positions of the opposing counsel at Tokyo, they felt the need to justify their theoretical position and ‘to relate the transitory and ephemeral factors of the trial to permanent values which are found in legal history and philosophy’.³⁵ Consequently, this study will emphasise the arguments adopted by the main participants on both sides in so far as they were manifested in the opening and closing arguments.

Pronouncements by counsel in subsequent post-Cold War ICL proceedings will not be scrutinised in any great depth, since the state of affairs during the 1990s differed markedly from those which existed immediately after WWII. ICL was on much firmer ground by this time and the precedential value of the IMTs’ judgments, Statutes and subsequent legal codifications had become established.³⁶ Of necessity, the post-WWII counsel had to turn towards more abstract, philosophical arguments as

³³ Taylor (n 20) 433, 474.

³⁴ Transcript of Proceedings 4 June 1946, 383.

³⁵ JB Keenan and BF Brown, *Crimes against International Law* (Public Affairs Press 1950) 13.

³⁶ GA Res 95(I) of 11 December 1946 affirmed the principles of international law recognised by the Nuremberg Charter and the judgments of the Tribunal.

they attempted to justify the nascent ICL legal regime. In the 1990s, the ICL legal regime was no longer as rudimentary nor in need of as much philosophical justification and so arguments could rather be based directly on the plethora of extant legal instruments.³⁷ This study will thus not focus on the arguments made by the post-Cold War prosecutors or defence counsel.

As mentioned earlier, equality of the cases under scrutiny is essential for SCA.³⁸ The equality of the selected cases here might be questioned, e.g., trial versus appeal judgments or pronouncements of judges versus statements from counsel. Yet, because this thesis is concerned with justifications rather than outcomes, equal weight can be afforded to these different cases in order to reveal which philosophical justifications were used by the selected ICL role-players and the patterns thereof.

1.2.2 Coding

Coding (part (ii) of SCA) explains which of the selected cases are illustrators of particular philosophical categories (i.e. those cases will be discussed which reveal reasoned interpretations of the codes). Coding, for this study, is the empirical process through which signifiers (or ‘codes’) are established as indicators of philosophical justifications (or ‘philosophical categories’³⁹), which constitute the indicated. Coding is a self-reflexive exercise which identified various signifiers of philosophical justifications while reading the selected cases. The revealed philosophical categories demarcate the thesis’ chapters and parts, while the specific codes, indicative of the said categories, constitute the subsections in chapters.⁴⁰ This section will elucidate the two components of the coding process, i.e. the signified philosophical categories and the signifier codes, while reflecting on attendant study precepts too.

As a preliminary, this study accepts that a taxonomy of philosophies can be postulated and is worthwhile.⁴¹ Any overarching taxonomy of philosophies, by function, has to be general. As Raz pointed out, ‘theories belong to a tradition by their frame of reference’ rather than because ‘they all share a central credo’.⁴² Yet, generalisation necessarily entails a degree of simplification which, as

³⁷ Which in addition to GA Res 95(I) of 1946, included the Geneva Conventions of 1949 and the Additional Protocols of 1977.

³⁸ Hall and Wright (n 3) 65-66.

³⁹ For the meaning of ‘philosophy’ used here, see M Freeman, *Lloyd’s Introduction to Jurisprudence* (9th edn, Thomson Sweet Maxwell 2014) 2. See also section 0.2.

⁴⁰ The structure of the thesis is reflected in section 0.3.

⁴¹ BH Bix, ‘Natural Law: The Modern Tradition’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP 2002) 63 fn 13. Contrast, however, J Coleman, ‘Beyond Inclusive Legal Positivism’ (2009) 22 *Ratio Juris* 392.

⁴² BH Bix, *Jurisprudence: Theory and Context* (7th edn, Sweet & Maxwell 2015) 35, 64 quoting from J Raz, ‘The Argument from Justice, or How Not to Reply to Legal Positivism’ in George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing 2007).

Bix rightly pointed out, may result in distortion.⁴³ In order to address these pitfalls, an explanation of the philosophies used in this study will preface each part to clarify their meaning as they emerged in the different contexts.

This thesis does not purport to present the philosophies held by the selected role-players in their personal capacities. Obviously, the role-players' personal beliefs might differ from the arguments they made in their juridical capacities. A study elucidating such personal views, which requires interviews, is simply not the study envisaged here. This study focuses on the recorded philosophical arguments as they appear in the selected ICL cases. It bears noting that intentionality in the ICL judicial bodies' reliance on philosophy cannot be assumed. The possibility of courts not fully or truthfully articulating their justifications also exists. These limitations appear irrespective of the methodological approach adopted as inherent to the object to be researched, namely judgments. This study will, however, be able to investigate what judges 'say and do internal to the case law'.⁴⁴ Once rendered, legal judgments provide an authoritative expression of law. The question regarding intention or motive behind a particular justification then becomes less important than the fact that the justification was employed. The matter of legitimacy is also more assuredly determined based on what ICL role-players actually say in official pronouncements.

Through the coding process, the philosophical categories identified for this study were natural law and legal positivism, deontology and utilitarianism, feminism and antecedents to Third World Approaches to International Law (TWAAIL), realism and liberalism. Liberalism, as systemic philosophy, will be shown throughout the study to explain various coded instances of the other philosophies. While theoretical debates surrounding various philosophies' contours abound, for purposes of this thesis these debates were not the focal point.⁴⁵ This thesis does not claim to expound the undisputed objective version of the various philosophies identified. The aim is rather to empirically identify the philosophies as understood by the selected ICL judicial bodies. At times, extensive analysis was necessary for this identification (especially regarding natural law and positivism). Yet, the investigated judicial pronouncements rarely (if ever) purported to be comprehensive philosophical treatises. Pronouncements usually either contained paradigmatic philosophical ideas or reflected philosophy when argument could be juxtaposed with its opposing approach. At the very least, whenever the analysis was open to debate, this study hoped to reveal

⁴³ BH Bix, 'Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate' (1999) 12 *Canadian Journal of Law and Jurisprudence* 25; Bix (n 42) 64.

⁴⁴ Hall and Wright (n 3) 95-100. See also Holsti (n 3) 602.

⁴⁵ See, for example, D Beyleveld and R Brownsword, 'The Practical Difference between Natural-Law Theory and Legal Positivism' (1985) 5 *Oxford Journal of Legal Studies* 1.

that the philosophical narrative was not as clear as it could be.⁴⁶ Just because another philosophy could have argued in the same way, was not necessarily conclusive as a reading of a whole argument was necessary to venture findings on classification.

Turning to the indicators or codes, in SCA traditionally codes should not overlap.⁴⁷ However, the subject matter of this thesis, namely philosophies adopted by ICL judicial bodies, rendered perfect compliance with this postulate difficult. This was due to the fact that certain philosophies might overlap and a particular code might reveal instances of both simultaneously.⁴⁸ Furthermore, the systemic philosophy of liberalism, as will be argued throughout, contextualised various other instances of philosophical justification. In short, neither the philosophical categories to which the codes pointed nor the codes themselves could have been hermetically sealed. Although this was an exception to the general rule, it is the intention to reveal the complex interplay of philosophical categories in ICL jurisprudence. This also confirmed why a qualitative rather than a quantitative approach was necessary pertaining to the interpretation of the coded data. Where overlap occurs, it will not undermine the analysis under part (iii) against the rule of law standard precisely because it is a qualitative rather than quantitative analysis.

To reiterate, coding is a process wherein certain signifiers, reflective of philosophy, are searched for in ICL texts. Most of the codes themselves only point to the relevant parts of judgments from where a further analysis is required to ascertain the philosophical category adopted. Coding (as part (ii) of SCA) can move beyond explicit variables towards implicit variables which require inference and evaluation.⁴⁹

The overall thesis design to code for philosophy (part (ii) of SCA) in the selected ICL pronouncements (part (i) of SCA) and then measure those justifications against the rule of law and institutional legitimacy (part (iii) of SCA) is inductive, i.e. findings on rule of law and legitimacy are derived from coded data. Coding (part (ii)) is, however, rarely only inductive or deductive. As noted in section 0.2, a limited number of studies have appeared on this topic. Several philosophies were thus already identified in ICL and could be deductively sought in the coded data. Also,

⁴⁶ Which is, of course, a relevant consideration on the Fullerian desiderata adopted here. See section 1.2.3.2.

⁴⁷ Holsti (n 3) 646; Hall and Wright (n 3) 108.

⁴⁸ Two philosophies may engage the same codes, e.g., liberalism considers individualism and, like natural law, legality and interpretation too. See, for e.g., D Robinson, 'A Cosmopolitan Liberal Account of International Criminal Law' (2013) 26 *Leiden Journal of International Law* 148-149. One code may reveal multiple philosophies, e.g., the self-reflexive code by definition may refer to any philosophy.

⁴⁹ Hall and Wright (n 3) 108.

through the coding process, certain philosophies emerged inductively from the coded data. The thesis codes represent clear and repeatable *indicia* to ascertain philosophy in judicial pronouncements. Once identified, codes also aided in determining which versions of the philosophical categories were invoked.

The codes, through which the thesis' identification of philosophical category occurred, will be briefly noted. Self-reflexive statements (deductive code⁵⁰) by definition could reflect any philosophy. These statements do not require much analysis as they explicitly revealed philosophy. The coded self-reflexive statements revealed natural law, legal positivism and ethical theories. Just war (deductive code⁵¹) and cosmopolitanism (deductive code⁵²) have historical roots in natural law,⁵³ while the policy-oriented approach (deductive code⁵⁴) used in ICL jurisprudence will be argued to reveal natural law.⁵⁵ Substantive ICL, viz, sources of law (deductive code⁵⁶), substantive crimes (deductive code⁵⁷), *nullem crimen sine lege* (NCSL) (deductive code⁵⁸) and interpretation (deductive code⁵⁹) also exhibited natural law and legal positivism. Sentencing rationales (deductive codes⁶⁰) form the central codes for findings on deontology and utilitarianism. The women question (deductive code⁶¹), colonialism (deductive code⁶²) and othering (inductive code from research data) reflect approaches critical towards the existing, traditional Western liberal narrative premised on a male-centric individualism. Finally, several philosophical justifications were informed by political or systemic concerns. State-centrism and individualism (inductive codes from research data) were

⁵⁰ Boister and Cryer (n 20) 271 as well as R Cryer, 'The Philosophy of International Criminal Law' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 232.

⁵¹ B Van Schaak, "'The Grass that Gets Trampled when Elephants Fight': Will the Codification of the Crime of Aggression Protect Women?" (2010) 15 *UCLA Journal of International Law & Foreign Affairs* 327; Cryer (n 50) 252-253.

⁵² Boister and Cryer (n 20) 271.

⁵³ See, for e.g., J Moussa, 'Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law' (2008) 90 *International Review of the Red Cross* 966; MC Nussbaum, 'Kant and Stoic Cosmopolitanism' (1997) 5 *Journal of Political Philosophy* 5.

⁵⁴ Cryer (n 50) 247-249.

⁵⁵ See, in literature, G Gilmore, *The Ages of American Law* (Yale University Press 1977) 90; M Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 11; N Duxbury, *Patterns of American Jurisprudence* (OUP 1997) 176. R Higgins, *Problems & Process International Law and How We Use It* (OUP 1995) 10 explicitly sees this as a movement away from positivism.

⁵⁶ Cryer (n 50) 249-250.

⁵⁷ E.g. Boister and Cryer (n 20) 130.

⁵⁸ B Van Schaak, '*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals' (2008) 97 *Georgetown Law Journal* 119; Cryer (n 50) 243-245.

⁵⁹ WA Schabas, 'Interpreting the Statutes of the Ad Hoc Tribunals' in LC Vohrah, F Pocar, Y Featherstone et al (eds), *Man's Inhumanity to Man Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 847 et seq.

⁶⁰ R Cryer, H Friman, D Robinson and E Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2nd edn, CUP 2010) 22.

⁶¹ R Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 *McGill Law Journal* 217; Cryer (n 50) 259-263.

⁶² Cryer (n 50) 259-263.

exemplary of these systemic codes.

Not all of the selected cases (part (i) of SCA) revealed every or, indeed, any single code. Some of the selected cases evinced no philosophical categories. The cases which did not reveal philosophy are reflected in the conclusion as part of the study's findings. Further, when a judicial body merely accepted the law as set out in earlier case law, which has been called the 'tonorial and agglutinative' style,⁶³ it was not counted in this thesis unless the entire philosophical argument was restated. The objective is to consider the articulation of philosophical category in ICL jurisprudence rather than the non-reflective reliance on previous legal authority.

While the analysis of the codes (under part (ii) of SCA) in order to identify the philosophical categories relied on in the cases under scrutiny will be descriptive, the subsequent analysis thereof against the rule of law will be inferential (the focus of part (iii)). This approach, it is suggested, is completely congruous with the overarching requirement of SCA that the coding process not be one of 'reading between the lines' whereas the interpretation of the results of the coding process may consider more latent aspects.⁶⁴

1.2.3 Analysis of coded data

1.2.3.1 Qualitative framework

The study will next elucidate its qualitative framework for the analysis under part (iii). Suffice it to repeat that consistency, or non-contradiction, of philosophical justifications will be imperative under the adopted Fullerian rule of law standard.⁶⁵ The patterned use of philosophical arguments will structure the thesis and data. This sub-section deals with the overall framework in terms of which patterns will be identified, while the next sub-section details the Fullerian rule of law standard which will be utilised in relation to the coded data.

Three dynamics provide the means for comparing the reliance on philosophy between the selected role-players for part (iii) of the SCA, namely the extra-curial, inter-curial and intra-curial dynamics. This framework is crucial for the determination of consistency and, by extension, compliance with the rule of law because it explains which aspects are to be compared for purposes of this study. This also structures the study argument.

⁶³ See tonsorial and agglutinative style noted by Prott (n 29) 177.

⁶⁴ Holsti (n 3) 600. See also Holsti (n 4) 12.

⁶⁵ See sections 0.1 and 0.2.

Firstly, the extra-curial dynamic (which sets the philosophical approaches of ICL judicial bodies against an external reference point) can itself be subdivided into the value-based extra-curial dynamic (which measures the philosophical approach of ICL judicial bodies against a standard such as rule of law) and an interest-based extra-curial dynamic (which weighs the philosophical approaches of ICL judicial bodies against the interests of the international legal community which created it). The value-based extra-curial dynamic represents the meta-dynamic for this study as all of the other dynamics address the query whether ICL judiciaries as a whole contributed to the rule of law and, consequently, the institutional legitimacy of ICL. The interest-based extra-curial dynamic emerges in relation to systemic and societal concerns which impact judgments and are especially relevant in chapters 5 and 6.

Secondly, the inter-curial dynamic compares the use of philosophy between different ICL judicial bodies. This enables horizontal comparisons between the post-WWII IMTs or between the post-Cold War bodies (here the ICC may be included). The comparison between the earlier post-WWII IMTs and the later post-Cold War bodies is also ensured. Throughout the individual chapters, this dynamic serves as the backbone for structuring the thesis in terms of the patterned use of philosophy.

Thirdly, the intra-curial dynamic juxtaposes the use of philosophy within a particular judicial body over time and is itself subdivided into the inter-jurist dynamic (which compares the position between judges or counsel on the same judicial body) and the intra-jurist dynamic (which sets the earlier pronouncements of a particular judge or counsel against later pronouncements⁶⁶). Counsel will be compared thus, but, due to the practice of collegiate judgments, it is often difficult to ascribe particular findings to individual judges.⁶⁷ This explains why the focus will be on the trends that have emerged from the ICL judicial bodies rather than on establishing each individual judge's philosophical approach.⁶⁸ While the focus will, therefore, not specifically be on the inter-and intra-jurist dynamics, they will be discussed in cases where they are unambiguously present.

This division roughly corresponds to the argument of Holsti that meaningful conclusions from SCA

⁶⁶ See for e.g., E Kopelman, 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial' (1991) 23 *New York University Journal of International Law and Politics* 373-444 arguing how Pal may be seen as a positivist, an adherent to TWAIL or as a product of his own circumstances. See also Cryer (n 50) 245.

⁶⁷ R Cryer, 'International Criminal Tribunals and the Sources of International Law Antonio Cassese's Contribution to the Canon' (2012) 10 *Journal of International Criminal Justice* 1047 fn 10.

⁶⁸ S Jodoin, 'Understanding the Behaviour of International Courts An Examination of Decision-Making at the ad hoc International Criminal Tribunals' (2010) 6 *Journal of International Law and International Relations* 5, 31.

require data to be compared with other data whether from a single source over the course of time (here labelled the intra-curial dynamic), or from two or more sources (here labelled the interest-based extra-curial dynamic and inter-curial dynamic) or against a standard (which the rule of law argument essentially is and here labelled the value-based extra-curial dynamic).⁶⁹

1.2.3.2 Rule of law as standard

The rule of law represents the standard against which the coded data will be measured as part (iii) of SCA. For purposes of the precepts and broader limits on study design, the rule of law concept will first be contextualised and justified against competing ideals before delving into its specific meaning and contours for this study.

Broadly, the rule of law can be formulated in both a formal and substantive sense. In the formal sense, law must be able to guide the conduct of its subjects. In itself this omits any guidelines as to who may author the law or whether fundamental rights or justice should be included in an understanding of law.⁷⁰ The formal view considers how law is made as well as its essential attributes. The substantive approach goes further and also considers the basic content of law. These views have been placed on a spectrum from ‘thinner’ to ‘thicker’ versions. On this view, the more substantive the approach the more requirements are understood to be inherent to the concept. But the subsequent conceptions include the requirements of the previous ‘thinner’ conceptions, so all the formal versions of the rule of law are implied in every substantive version thereof – even the ‘thinnest’ substantive version contains all the requirements of the ‘thickest’ formal approach.⁷¹

While attempting to extrapolate the rule of law to international law, it has been suggested that the added strain imposed by substantive rule of law approaches, i.e. engaging with whether a law is good or bad, militates against it.⁷² International society is fractured and, as such, the rule of law in the international arena cannot (yet) be as (substantively) comprehensive as that in domestic systems. This explains why a formal rule of law standard will be pursued in this study.

⁶⁹ Holsti (n 3) 605. See also Holsti (n 4) 28-31.

⁷⁰ LL Fuller, *The Morality of Law* (Yale University Press 1969) 155-156; J Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 211-214, 218-220. See also S Beaulac, ‘The Rule of Law in International Law Today’ in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009) 201.

⁷¹ Beaulac (n 70) 201. See also PP Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) *Public Law* 467. Although adopting a substantive conception, J Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) 268-271 incorporates considerations that overlap with the formal conception of Raz (n 70) 214 and Fuller (n 70) 39-94.

⁷² Beaulac (n 70) 201.

Still, there is growing support for the emergence of the rule of law as a principle in international law.⁷³ Accordingly, the rule of law in international law has been tasked to balance ‘the sovereign independence of states’ which allows for ‘unrestricted assertions of power’.⁷⁴ Regardless of whether the rule of law has become a principle of international law or is still in the process of becoming part of it, it is clearly an important virtue for any legal system to aspire to.⁷⁵ This is true also if the rule of law is seen as quality of a legal system which enables it to function efficiently rather than as the ultimate aim of such a system in itself.⁷⁶ This confirms that the rule of law is a worthwhile and meaningful commitment for purposes of this thesis.

A necessary interjection at this stage pertains to whether the rule of law, with its designs on consistency, is the only or best standard for this study. While the rule of law is one of the central political ideals of a legal system which constrains the ‘illegal or extra-legal use of power’,⁷⁷ it is not the only normative political ideal worthy of pursuit in a legal system. It competes with justice, security, efficiency and similar ideals. However, this study agrees that ‘other things being equal, the greater conformity [to the rule of law] the better’.⁷⁸ Some have argued that other principles, like justice and the social good, are to be achieved through the rule of law and not while circumventing or ignoring it.⁷⁹

An important and related argument entails that consistency or, phrased differently, conformity with the formal version of rule of law does not necessarily safeguard against substantive iniquity.⁸⁰ However, a moral standard requires a normative argument which will itself be controversial. To advance a Dworkinian argument, for e.g., integrity in the context of community morality may be proposed as such a standard.⁸¹ Several aspects, however, suggest that such a standard is premature in current ICL. Dworkinian integrity presupposes a political community based on fraternal

⁷³ Beaulac (n 70) 198, 220 as well as J Waldron, ‘The Rule of International Law’ (2006) 30 *Harvard Journal of Law & Public Policy* 16.

⁷⁴ Beaulac (n 70) 207.

⁷⁵ Waldron (n 73) 15, 29 links it to the moral health and the honour of the legal profession. See also GP Fletcher and JD Ohlin, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’ (2005) 3 *JICJ* 541 footnote 2.

⁷⁶ Raz (n 70) 225-229.

⁷⁷ C Murphy, ‘Lon Fuller and the Moral Value of the Rule of Law’ (2005) 24 *Law and Philosophy* 239.

⁷⁸ Raz (n 70) 228. See also Craig (n 71) 469.

⁷⁹ Finnis (n 71) 23, 353; Waldron (n 73) 15.

⁸⁰ Which could be a concern for those who see formal rule of law as separate from morality. See generally, R Dworkin, ‘The Elusive Morality of Law’ (1965) 10 *Villanova Law Review* 631-639; HLA Hart, ‘Review The Morality of Law by Lon Fuller’ (1965) 78 *Harvard Law Review* 1285-1286. D Lyons, *Ethics and the Rule of Law* (CUP 1984) 83 argues that ‘treating cases in a regular or uniform manner may be a necessary condition of justice, but is not a sufficient condition’.

⁸¹ R Dworkin, *Law’s Empire* (Harvard University Press 1986) 176-275.

obligations.⁸² While this type of community may exist in the domestic context (and even this assumption was criticised⁸³), its existence on the international plane, with its heterogeneous communities, will ostensibly be more difficult to realise. Integrity in the Dworkinian sense might also not always be insulated from immorality if immorality pervades institutional history and community morality.⁸⁴ In sum, Dworkinian integrity presents a moving target which will be difficult to apply in the current ICL landscape.

Dworkinian institutional history and community morality by definition presuppose pattern and consistency. Right or wrong can only be determined once a standard has settled. In sum, a new field of law needs to develop its history and patterns first – this study precisely looks to such patterns. In a nascent regime like ICL it seems more prudent, at present, to utilise standards which are linked to law itself and, indeed, might contribute to the clarification of the institutional history which a Dworkinian approach will require. Simply, envisaged, as a matter of study design, is an empirical study rather than a normative one. Hopefully, this study could provide some of the necessary insights upon which normative approaches might build in the future.

This also does not mean that the formal rule of law embodies no substantive concerns. The rule of law aims to mobilise the law to promote the social good and limit harm to freedom and human dignity.⁸⁵ The importance of the rule of law for human dignity is well captured by Raz when he argues that the ‘observance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future’.⁸⁶ The requirements of the rule of law that law be applied predictably and coherently ensures that individuals can align their conduct with the law and in advance of its application.⁸⁷ This is especially true in the (international) criminal law context as well.⁸⁸ In the process some protection is afforded to individual moral agency, i.e. substantive concerns.

These considerations guide this thesis’ adoption of a formal rule of law approach. Due to its clarity,

⁸² Ibid 214.

⁸³ AC Hutchinson, ‘Indiana Dworkin and Law’s Empire’ (1987) 96 *Yale Law Journal* 653-656; A van Blerk, *Jurisprudence an Introduction* (Butterworths Lexisnexis 1998) 97.

⁸⁴ R Wacks, ‘Judges and Injustice’ (1984) 101 *South African Law Journal* 272; R Wacks, *Understanding Jurisprudence An Introduction to Legal Theory* (3rd edn, OUP 2012) 138.

⁸⁵ Raz (n 70) 228-229.

⁸⁶ Raz (n 70) 221. See also Fuller (n 70) 162; Finnis (n 71) 272; NJ McBride and S Steel, *Great Debates in Jurisprudence* (Palgrave 2014) 71.

⁸⁷ Raz (n 70) 214; A Marmor, ‘Exclusive Legal Positivism’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP 2002) 124.

⁸⁸ HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (OUP 1968) 181; Fletcher and Ohlin (n 75) 541 footnote 2.

the version of Lon Fuller will be used.⁸⁹ Briefly, Fuller, required law to be (1) created (2) public (3) prospective (4) non-contradictory (5) clear (6) not require conduct ultra vires the affected party (7) stable and (8) congruent with its administration.⁹⁰ Fuller noted that the priority of the desiderata inter se as well as the stringency with which they should be applied depended on the field of law in question.⁹¹ Moreover, the requirements do not lend themselves to ‘separate and categorical statement’.⁹² They function as a whole to ensure that ‘a system of rules for governing human conduct...is efficacious and at the same time remain what it purports to be’.⁹³ The principles especially relevant for this study revolve around the rules and their justification being created/general, public, prospective, non-contradictory and stable. Generality requires the making of laws or, in the case of the judiciary, the explanation and justification of legal positions. When force or politics are used to rule, governance will not be through the rule of law. Public rules and, in the case of the judiciary, justifications require the reasons for legal positions to be given in judgments. This principle questions whether the underlying philosophical justifications are acknowledged in a judgment. Retrospective rules or, in the case of the judiciary, justifications are to be avoided under the rule of law. While Fuller conceded that such rules might sometimes be necessary in a living system of law as a curative measure,⁹⁴ this exception does not apply in relation to criminal law. Contradictory rules or justifications for legal positions undermine the rule of law because they undermine the predictability and foreseeability of the law’s application. Likewise, changing rules or justifications often will also undermine the rule of law. The other rule of law principles appeared infrequently.⁹⁵

Throughout the requirements of generality, non-contradiction and stability the notion of consistency is pivotal and serves as the main structuring principle in this study along the dynamics discussed in section 1.2.3.1. Consistency directly engages Fuller’s non-contradiction requirement and the consequences for the other principles tend to follow from this requirement. Whenever justificatory narratives undermined the predictability and foreseeability of the application of law in a manner which impeded the moral agency of the person to act in accordance with the law, the rule of law would be directly infringed.⁹⁶

⁸⁹ Fuller (n 70) 153.

⁹⁰ Fuller (n 70) 39-94. See generally Murphy (n 77) 239-247; Waldron (n 73) 17; Beaulac (n 70) 205-220. For a substantive rule of law argument which agrees with the desiderata, see Finnis (n 71) 270-271, 287, 351.

⁹¹ Fuller (n 70) 93.

⁹² Ibid 104.

⁹³ Ibid 97.

⁹⁴ Ibid 53.

⁹⁵ I.e. the ultra vires, clarity and lack of congruence desiderata.

⁹⁶ Hart (n 88) 181; Fuller (n 70) 162; Finnis (n 71) 272.

While it has been criticised, none of Fuller's opponents have argued that his rule of law principles are incorrect.⁹⁷ Indeed most of these principles are found in Raz too.⁹⁸ Much of the controversy surrounded the connection between the rule of law and morality. As it has been debated elsewhere,⁹⁹ it is not critical for purposes of this study, with its focus on the relatively uncontroversial desiderata, to resolve whether the rule of law desiderata are also implicitly moral or not. None of the arguments in this study falls on this point. In sum, Fuller's procedural natural law comfortably resorts under the formal end of the rule of law spectrum which ICL can realistically hope to realise at its present stage of development. This reiterates why it is the rule of law standard used in this thesis.

In agreement with Fuller, therefore, this study accepts as a precept that substantive iniquity is difficult to realise through his rule of law principles.¹⁰⁰ But, while '[o]bserving the rule of law by no means guarantees that [violations of people's dignity] do not occur...it is clear that deliberate disregard for the rule of law violates human dignity'.¹⁰¹ Adherence to Fuller's requirements is a necessary rather than sufficient condition for honouring human independence and dignity.¹⁰² If, hypothetically, therefore, a 'wrong' philosophy was used, this study will at least reveal the patterned use thereof and, as such, could serve as the point of departure for a more substantive-oriented study.

Additional precepts pertaining to the rule of law need to be briefly clarified. Firstly, it is accepted that rule of law (consistency) designs can be evaluated over time and different jurisdictions. On some views the rule of law standard itself might be circular, i.e. there is rule of law as there is law. Alternatively, rule of law could be seen as a mere checklist, requiring a ticking of Fuller's principles. However, this view seems simplistic as consistency, which is central to these rule of law arguments, reveals. Simply put, it is possible to have law which is argued in an inconsistent manner. While there is then nominally 'law', it falls foul of rule of law standards which require it to be capable of guiding conduct (to adopt Fuller's purpose for law¹⁰³) – inconsistent law will most likely

⁹⁷ HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 623-624; HLA Hart, *The Concept of Law* (OUP 1961) 202; Hart (n 88) 181; Fuller (n 70) 187 et seq; Raz (n 70) 214-218; Bix (n 41) 81; McBride and Steel (n 86) 70.

⁹⁸ Cf. Raz (n 70) 214-218.

⁹⁹ Fuller (n 70) 95-151, 187-242; Raz (n 70) 223-226; McBride and Steel (n 86) 66 et seq. However, even Hart, 'Positivism and the Separation of Law and Morals' (n 97) 624 conceded that generality and constancy in law precludes it being seen as morally utterly neutral.

¹⁰⁰ Van Blerk (n 83) 113.

¹⁰¹ Raz (n 70) 221. Compare Freeman (n 39) 113.

¹⁰² McBride and Steel (n 86) 73. LL Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 657 recognises that order and justice are inextricably linked.

¹⁰³ This purpose need not be the only one. It is widely supported, see Hart (n 88) 181; Finnis (n 71) 272; McBride and Steel (n 86) 70.

not so direct conduct. Adding another layer of complexity, in a living system of law, Fuller also warned against trying to realise all desiderata rigidly.¹⁰⁴ As another precept, this study agrees with Fuller and Raz that the existence of a legal system is a matter of degree.¹⁰⁵ Therefore, the compliance with rule of law in ICL can be tested and is not circular.

Another precept pertains to the relationship between the rule of law and the judiciary. As a point of departure the judiciary is taken to play an intrinsic role in the realisation of ICL. Since ‘just about any matter arising under any law can be subject to a conclusive court judgment, it is obvious that it is futile to guide one’s action on the basis of the law if when the matter comes to adjudication the courts will not apply the law and will act for some other reasons’.¹⁰⁶ Their justifications more generally, shape rules and should be subjected to rule of law considerations as such. Fuller and Raz both suggest that rule of law considerations play out in courts.¹⁰⁷ This seems true irrespective of whether a court merely interprets the law or acts as lawmaker (only the congruence desideratum of Fuller falls away in the latter case, but all the others are engaged).¹⁰⁸

As a matter of study design, it must be noted that rule of law considerations need not only revolve around law-making (as occurs under Fuller) but can also pertain to the institutional dimension. In ICL this would question whether judicial bodies enjoy general jurisdiction, are easily accessible for legal subjects, are independent, objective and effective.¹⁰⁹ While these are important aspects for the broader extrapolation of the rule of law to international law, they fall outside the scope of this study with its focus on the philosophical justifications in the pronouncements of ICL role-players.

Important, finally, is the connection between the rule of law and legitimacy, on the one hand, and the different types of legitimacy, on the other. Compliance with rule of law gives effect to the institution of law which is the requirement under outcome-based legitimacy.¹¹⁰ Rule of law has been directly tied to consent legitimacy. Thus, on an interactional understanding of law, the ‘disregard of the principles of legality may inflict damage on the institution of law itself’.¹¹¹ And again: ‘If we

¹⁰⁴ Fuller (n 70) 93

¹⁰⁵ Fuller (n 70) 42-45, 122-123, 145; Raz (n 70) 211-222. Finnis (n 71) 276-281 also noted that legal systems and the rule of law exist as a matter of degree.

¹⁰⁶ Raz (n 70) 217.

¹⁰⁷ Fuller (n 70) 81-91; Raz (n 70) 216-217. See also LL Fuller, ‘Adjudication and the Rule of Law’ (1960) 54 *American Society of International Law Proceedings* 1-8; AM Danner, ‘When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War’ (2006) 59 *Vanderbilt Law Review* 3.

¹⁰⁸ Fuller (n 70) 82; Raz (n 70) 217 footnote 6.

¹⁰⁹ Beaulac (n 70) 212-220.

¹¹⁰ T Treves, ‘Aspects of Legitimacy of Decisions of International Courts and Tribunals’ in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 172. See sections 0.2 and 0.3.

¹¹¹ Fuller (n 70) 221. Compare Freeman (n 39) 113.

view the law as providing guideposts for human interaction, we shall be able to see that any infringement of the demands of legality tends to undermine men's confidence in, and respect for, law generally'.¹¹² Outcome-based legitimacy, in turn, can contribute to consent legitimacy. Consent legitimacy is based on a set of complex factors (predictability, foreseeability, self-interest etc.). It would be naïve to claim completely predictable judicial reasoning will ensure consent legitimacy, let alone that consistency in a part of the justificatory regime will do so. The claim presented here is more restrained, namely that a predictable justificatory narrative may contribute to improve consent legitimacy.

1.3 Conclusion

While explaining SCA as this study's methodology, crucial concepts like 'philosophy' and 'rule of law' were clarified. The precepts and contours of the study design were established. Part (i) of the SCA pertaining to case selection was undertaken and explained in this chapter. This serves as the source from which the data will be coded. Part (ii) and (iii) of the SCA, dealing with coding and analysis, structures the subsequent chapters. As noted in this chapter, the coding process was self-reflexive with a continuous dialectic between the identification of codes and the philosophical categories thus signified. This chapter both explained its preference for the rule of law generally and the specific understanding of the rule of law as utilised in this study. Also, importantly, this chapter sets out the framework through which the patterns of compliance with the rule of law desiderata or lack thereof between the selected judicial bodies are to be determined.

¹¹² Fuller (n 70) 222.

Part A

Natural Law and Legal Positivism as philosophical categories for coding in the selected international criminal law role-players

Coding for consistency in, or in Fullerian terms the non-contradictory use of, natural law and legal positivism resulted in the largest dataset under any philosophical category in this thesis. This necessitated dividing the applicable codes into two chapters, namely one focused on codes historically linked to these philosophies and one linked to the appearance of these philosophies in material ICL codes. The larger dataset enabled more detailed findings which, in turn, meant that a more nuanced discussion of the substantive understandings afforded to these philosophical categories will be pursued in this preface. The specific codes will be detailed in chapters 2 and 3 respectively.

Coding for natural law and legal positivism is complicated by the theoretical debate about their distinction. Briefly, some questioned the viability of persisting with the distinction,¹ while many others have premised arguments thereon.² It is especially important for this study that the distinction has been accepted in international law and international criminal law (ICL) theory,³ as well as in

¹ D Beyleveld and R Brownsword, 'The Practical Difference between Natural-Law Theory and Legal Positivism' (1985) 5 *Oxford Journal of Legal Studies* 17-32 questioned the conceptual and practical significance of the distinction, concluding significance on the part of the former while the latter arguably finds significance in a weaker claim of difference. See also BH Bix, 'Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate' (1999) 12 *Canadian Journal of Law and Jurisprudence* 24-31; BH Bix, 'On the Dividing Line Between Natural Law Theory and Legal Positivism' (2000) 75 *Notre Dame Law Review* 1617; R Cotterrell, *The Politics of Jurisprudence* (2nd edn, OUP 2003) 117-143; J Coleman, 'Beyond Inclusive Legal Positivism' (2009) 22 *Ratio Juris* 392; NJ McBride and S Steel, *Great Debates in Jurisprudence* (Palgrave 2014) 87.

² HLA Hart, *The Concept of Law* (OUP 1961) 181-182; J Stone, *Human Law and Human Justice* (Stanford University Press 1965) 74-77, 212-215; RWM Dias, *Jurisprudence* (3rd edn, Butterworths 1970) 544-546; Beyleveld and Brownsword (n 1); R Shiner, *Norm and Nature The Movements of Legal Thought* (Clarendon Press 1992) 284-307, 324 notes the impossibility of compatibility; B Reynolds, 'Natural Law versus Positivism: The Fundamental Conflict' (1993) 13 *Oxford Journal of Legal Studies* 441, 447; W Morrison, *Jurisprudence* (Cavendish 1997); A van Blerk, *Jurisprudence an Introduction* (Butterworths Lexisnexis 1998) 1-25; Bix, 'On the Dividing Line' (n 1) 1618 fn 23; BH Bix, 'Natural Law: The Modern Tradition' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP 2002) 96; Cotterrell (n 1) 114-117, 119-123; Coleman (n 1) 384-386; R Wacks, *Understanding Jurisprudence An Introduction to Legal Theory* (3rd edn, OUP 2012) 10-117; M Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Thomson Sweet Maxwell 2014) 75-480; BH Bix, *Jurisprudence: Theory and Context* (7th edn, Sweet & Maxwell 2015) 33-91.

³ In the context of international law, see R Cryer, T Hervey, B Sokhi-Bulley with A Bohm, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 35-41. In the context of ICL, see S Ratner and AM Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 *American Journal of International Law* 291, 293; N Boister and R Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008) 271-300; BN Schiff, *Building the International Criminal Court* (CUP 2008) 15-18; R Cryer, 'The Philosophy of International Criminal Law' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 239; K Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2011) 21 *European Journal of International Law* 1094; R Cryer, H Friman, D Robinson and E Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, CUP 2014) 21-26. In the context of IHL, see A Nell, 'The ICRC

ICL judicial pronouncements.⁴ This provides evidence of the distinction's vitality in the present context. The taxonomy adopted here endeavours to steer between the pitfalls of postulating straw men, on the one hand, or overtly fragmented theories, on the other.⁵ As with any taxonomy, the resultant discussions cannot claim to include every view held under the respective theories. The subsequent explanations will briefly set out natural law and positivism before reflecting on their interrelationship as is relevant for this study.

Natural law accepts a necessary conceptual connection between law and morality.⁶ Traditional natural law arguments included the existence of higher law, details of its content and the consequences of the existence of a 'higher law'.⁷ This higher law was derived either from nature, divine revelation, religious documents or human nature.⁸ Cicero argued in exemplary fashion that natural law is universal, unchanging, knowable through reason and determinative of legal validity.⁹ Traditional natural law was concerned with the status of morality and the implications thereof for conduct. Later theories revolved around the law, the moral evaluations required to describe the law as well as to determine the validity of laws.¹⁰ Natural law's focus is often away from conventional law towards a higher or basic aspiration that guides such conventional law, potentially teleologically (i.e. towards such basic aspiration as an objective).¹¹ Thus, while natural law does not reject conventional law, such law is neither necessary nor sufficient to establish the natural law approach.

On the other hand, 'legal positivism' derives from 'positive (human-created (posited)) law'.¹² Legal positivism adopted the social sources thesis, which 'asserts that law is, in essence, a social creation'.¹³ Moreover, in terms of the separability thesis, establishing the law is both necessarily and

Study on Customary International Humanitarian Law as Viewed through the Prism of 14th-18th Century Jurisprudential Thought' (2014) *African Yearbook on International Humanitarian Law* 1-28.

⁴ On the judicial pronouncements, see self-reflexive statements under section 2.2. See also, for the Tokyo IMT, Boister and Cryer (n 3) 277-300.

⁵ J Raz, 'Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment' (1998) 4 *Legal Theory* 1; Bix, 'On the Dividing Line' (n 1) 1614.

⁶ Dias (n 2) 383; Beyleveld and Brownsword (n 1) 4; Reynolds (n 2) 448; Cotterrell (n 1) 115; D Meyerson, *Understanding Jurisprudence* (Routledge 2007) 43; Wacks (n 2) 10, 32.

⁷ Hart, *The Concept of Law* (n 2) 182; Bix, *Jurisprudence: Theory and Context* (n 2) 69.

⁸ Morrison (n 2) 15-178; Van Blerk (n 2) 6; Bix, 'On the Dividing Line' (n 1) 1614-1615; Cotterrell (n 1) 115; Meyerson (n 6) 33-36; Cryer, Hervey, Sokhi-Bulley with Bohm (n 3) 35; Bix, *Jurisprudence: Theory and Context* (n 2) 69.

⁹ MT Cicero, 'On the Commonwealth' in JEG Zetzel (tr), *Cicero On the Commonwealth and On the Laws* (Cambridge University Press 2008) III.33. See also Stone (n 2) 213.

¹⁰ Bix, 'On the Dividing Line' (n 1) 1615; Bix, *Jurisprudence: Theory and Context* (n 2) 86.

¹¹ Dias (n 2) 381; Bix, 'Natural Law: The Modern Tradition' (n 2) 66, 98; Freeman (n 2) 77-78. See also Hart, *The Concept of Law* (n 2) 184-188.

¹² Dias (n 2) 381; Morrison (n 2) 4-5; Bix, 'Natural Law: The Modern Tradition' (n 2) 62 fn 2; Meyerson (n 6) 45; Cryer, Hervey, Sokhi-Bulley with Bohm (n 3) 37; Wacks (n 2) 57; Bix, *Jurisprudence: Theory and Context* (n 2) 33 fn 1.

¹³ K Himma, 'Inclusive Legal Positivism' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of*

conceptually separate from moral evaluations about what the law should be.¹⁴ However, morality does play a role in legal practice and the separation thesis should not be construed too narrowly.¹⁵

Natural law and legal positivism were reportedly historically tied to the law-as-it-ought-to-be and the law-as-it-is as respective points of departure.¹⁶ While this has remained their respective primary interest, both have increasingly shown interest in the opposite side. A difference in mood, style and focus thus endures between the two approaches.¹⁷ The is/ought distinction has led some to argue that the conflict between natural law and legal positivism is a false dilemma as these factors cannot be simplified.¹⁸ This would provide additional evidence of the distinction between them.

These philosophical categories can be used in combination. The Grotian approach invokes both natural law and legal positivism independently and together.¹⁹ On this view, natural law and positivism exist alongside each other, with natural law often supplementing positivism.²⁰ Thus, natural law and legal positivism constitute parallel sources of law.²¹ The Grotian approach was popular with the selected ICL role-players, yet often even these arguments showed favouritism towards natural law or positivism. Still, at most, such instances will be coded as Grotian inclining towards one or the other approach.

Importantly for the taxonomy in this study, natural law and legal positivism can be seen as existing

Jurisprudence & Philosophy of Law (OUP 2002) 126. See also J Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 38; J Raz, 'The Morality of Obedience' (1985) 83 *Michigan Law Review* 739; Van Blerk (n 2) 6; M Stone, 'Formalism' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP 2002) 182; Meyerson (n 6) 44; Coleman (n 1) 383, 391 favours the social thesis rather than the separability thesis as central for positivism.

¹⁴ A Marmor, *Positive Law and Objective Values* (Clarendon 2001) 71 quoted in Bix, *Jurisprudence: Theory and Context* (n 2) 35. See also J Austin, *The Province of Jurisprudence Determined* (John Murray 1832) 278; J Bentham, *A Fragment on Government* (Clarendon Press 1891) 98-99; Hart, *The Concept of Law* (n 2) 181; Reynolds (n 2) 445; Morrison (n 2) 5; Van Blerk (n 2) 21; Ratner and Slaughter (n 3) 293; B Simma and A Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 *American Journal of International Law* 302-303; Bix 'Patrolling the Boundaries' (n 1) 18; Bix, 'On the Dividing Line' (n 1) 1615-1616; Himma (n 13) 136; Cotterrell (n 1) 114; Meyerson (n 6) 44; Cryer, Hervey, Sokhi-Bulley with Bohm (n 3) 37; Wacks (n 2) 10, 32, 58.

¹⁵ Simma and Paulus (n 14) 308; J Raz, 'About Morality and the Nature of Law' (2003) 48 *American Journal of Jurisprudence* 2-15; Cotterrell (n 1) 115; Meyerson (n 6) 46-47; Coleman (n 1) 370; Bix, *Jurisprudence: Theory and Context* (n 2) 35-36.

¹⁶ Dias (n 2) 381-385; Coleman (n 1) 386, 393; Wacks (n 2) 32.

¹⁷ HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 598-599; Beylveld and Brownsword (n 1) 3, 18; Bix, 'On the Dividing Line' (n 1) 1617; Freeman (n 2) 76.

¹⁸ Dias (n 2) 544-546; Shiner (n 2) 1-12, 324; AWG Raath, 'Wysgerige Kanttekening by HJ Van Eikema Hommes se Regsbeginsel-Teorie' (2017) 1 *Journal for Christian Scholarship* 60.

¹⁹ H Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 *British Year Book of International Law* 21.

²⁰ *Ibid* 21-22.

²¹ *Ibid* 22.

on a spectrum.²² Some have even argued that positive law inevitably develops towards natural law and vice versa due to the nature of the opposing side's criticisms requiring closer adherence to its point of view.²³ While the determinism in this argument is debatable, the point that convergence occurred due to critique cannot be gainsaid. The spectrum metaphor incorporates the multiplicity of views within each paradigm which, in turn, acknowledges their respective internal historical variety.²⁴ On the opposite ends both have traditional versions often incompatible with each other. As both move towards the centre, however, the approaches start to coalesce with increasing compatibility visible.²⁵ This metaphor explains the classification of philosophies which are not absolutely pure or, phrased differently, on one or the other end of the spectrum. Where one philosophy is predominantly visible, it is possible to classify the position accordingly.²⁶ The spectrum metaphor also holds for Grotian arguments wherein natural law and legal positivism are used independently and together.²⁷

It was the increasing convergence of natural law and legal positivism at the hypothetical centre of the spectrum which led some to question the overall distinction. However, importantly for this study, this cannot negate the prior centuries of difference – it merely suggests a relatively recent coalescing on some views. The centre point of the spectrum (at best) nullifies the distinction for that point. It should not negate the previous divergent thought (it would be to mistake the spectrum for the centre point). Furthermore, whether the modern versions of the theories perfectly overlap – or whether the exact middle of the spectrum has been reached – is itself controversial and a debate for theorists (and another study!).²⁸

The discussion next turns to HLA Hart's positivism as it is central to the taxonomical divide made in this study between exclusive legal positivism (ELP) and inclusive legal positivism (ILP). Hart, in particular, was a pivot in the coalescing between natural law and legal positivism. While he

²² For support of such a metaphor, see R Tur, 'The Kelsenian Enterprise' in R Tur and W Twining (eds), *Essays on Kelsen* (Clarendon Press 1986) 165-167.

²³ Shiner (n 2) 326.

²⁴ The spectral nature of natural law and legal positivism is confirmed by Reynolds (n 2) 441; Ratner and Slaughter (n 3) 293; Simma and Paulus (n 14) 303; Bix 'Patrolling the Boundaries' (n 1) 17-18; J Finnis, 'Natural Law: The Classical Tradition' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP 2002) 3-8; Bix, 'Natural Law: The Modern Tradition' (n 2) 64-68; Cryer, Hervey, Sokhi-Bulley with Bohm (n 3) 35; Wacks (n 2) 26-27, 58; Freeman (n 2) 75-76, 314; Bix, *Jurisprudence: Theory and Context* (n 2) 35, 85.

²⁵ Stone (n 2) 219-226; Raz (n 13) 739; Wacks (n 2) 31; Freeman (n 2) 108.

²⁶ 'The idea of a pure positive law, like that of natural law, has its limitations' as per H Kelsen, *General Theory of Law and State* (3rd edn, 1949) 401 quoted in L Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 641.

²⁷ Lauterpacht (n 19) 21.

²⁸ See footnotes 1-3 above.

accepted a minimum content of natural law, it was merely consequent to the human condition. He did not argue that ‘law is derived from morals’ or that the two are necessarily connected (which would have entered natural law territory).²⁹ Central to Hart’s theory was the rule of recognition (RoR) which was a complex set of criteria through which the rules that form part of a legal system could be distinguished from rules that did not.³⁰ The RoR thus pertained to legal validity. Officials, including judges, had to accept and obey the RoR ‘from the internal point of view as a public, common standard of judicial decision, and not as something which each judge merely obeys for his part only’.³¹ Officials had to critically reflect on their and their colleagues’ deviations from such a common standard as mistakes.³² While the RoR was often left unexpressed, it could be ‘shown in the way in which particular rules are identified...by the courts or other officials’.³³ Importantly, for this study, Hart also recognised that all rules have a ‘core of certainty’ and a ‘penumbra of doubt’ – in the latter cases judges exercise hard discretion.³⁴ Crucially, judicial discretion was not extensive or the model of law construed would collapse.³⁵ Using judicial discretion has been understood as moving judges beyond the existing law (and subsequent criticisms had to be on moral grounds).³⁶ While moral standards could be invoked to legislate for gaps, ‘it did not follow from this that these standards were already there in the rules for the judges to find’.³⁷ For purposes of the taxonomical separation of positivism and natural law, hard discretion was an obstacle. One of the problems was that judges rarely conceded that they were using hard discretion to make law. In this thesis, if discretion was not evident, it will be assumed that the judiciary purported to be working normally within the boundaries of law. In agreement with Ockham’s razor, if something ‘can be interpreted without assuming this or that hypothetical entity, there is no ground for assuming it’.³⁸

Influenced by Hart, legal positivism separated into ELP and ILP.³⁹ This, however, only occurred after the post-WWII IMTs delivered their judgments. The difference between ELP and ILP revolves around the ‘conceptual’ connection between law and morality, i.e. the separability thesis.⁴⁰ ELP

²⁹ Hart (n 17) 623; Hart, *The Concept of Law* (n 2) 188-195; Wacks (n 2) 79.

³⁰ Bix, *Jurisprudence: Theory and Context* (n 2) 40.

³¹ Hart, *The Concept of Law* (n 2) 108-113.

³² *Ibid* 113.

³³ *Ibid* 98.

³⁴ Hart (n 17) 607; Hart, *The Concept of Law* (n 2) 119-132; Stone (n 13) 181; Bix, *Jurisprudence: Theory and Context* (n 2) 46.

³⁵ Hart, *The Concept of Law* (n 2) 130; Van Blerk (n 2) 43; Cotterrell (n 1) 99.

³⁶ Hart, *The Concept of Law* (n 2) 132, 141; Van Blerk (n 2) 44.

³⁷ Freeman (n 2) 327.

³⁸ B Russel, *History of Western Philosophy* (Routledge 1996) 435. See also C Romano, ‘The Proliferation of International Judicial Bodies: The Pieces of the Puzzle’ (1999) 31 *International Law and Politics* 709 fn 1.

³⁹ See Meyerson (n 6) 51-54; Wacks (n 2) 110-113; Bix, *Jurisprudence: Theory and Context* (n 2) 49.

⁴⁰ Bix, ‘Natural Law: The Modern Tradition’ (n 2) 97-98; Himma (n 13) 125; Meyerson (n 6) 33; Freeman (n 2) 312; Bix, *Jurisprudence: Theory and Context* (n 2) 49.

entails that the ‘existence and content of every law is fully determined by social sources’.⁴¹ If judges consider morality during the establishment of a new rule, they are determining what the law ought to be rather than is.⁴² For ELP the validity criteria emanating from a Hartian RoR contain no moral terms, just ‘morally-neutral “pedigree” criteria’.⁴³ ILP, as foreshadowed by Hart, argues that there is ‘no necessary moral content to legal rule (or a legal system), [but] a particular legal system may, by conventional rule, make moral criteria necessary or sufficient for validity in that system’.⁴⁴ ILP differs from natural law in that moral criteria are contingent, derived from choices and actions of particular legal officials, rather than part of the nature of law (i.e. present in all systems).⁴⁵ In sum, for ILP, law can be deduced from extra-legal sources provided that a ‘valid legal rule [essentially the RoR⁴⁶] specifically mandates recourse to such concepts to determine its content’.⁴⁷ Raz called the incorporation of moral principles into the RoR ‘on the borderline of positivism’.⁴⁸

This study purports to code for consistency, i.e. compliance with Fuller’s rule of law, regarding natural law, exclusive legal positivism (ELP) and inclusive legal positivism (ILP). Although not completely beyond criticism, this taxonomical division allows sufficient generalisation while being nuanced and sensitive to the theoretical debate between natural law and positivism. Moreover, it is the classification allowed on the coded data. In sum, both natural law and legal positivism allow judges to refer to extra-judicial sources but the mode for so doing differs: natural law argues that morality and law are conceptually linked while positivism may allow reference to morality as extra-judicial law-making (ELP and strong discretion in a Hartian ILP sense) or because the posited law authorised such a reference (ILP). If positivism does not make the argument that the reference is directed by a RoR or is an exercise in lawmaking, it runs a risk of being construed as natural law because natural law need not make any justificatory argument (except that the solution is

⁴¹ Raz, *The Authority of Law* (n 13) 46; Bix, *Jurisprudence: Theory and Context* (n 2) 49. See also Bix ‘Patrolling the Boundaries’ (n 1) 19; A Marmor, ‘Exclusive Legal Positivism’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP 2002) 104; Himma (n 13) 125, 140; Meyerson (n 6) 54; S Shapiro, ‘Was Inclusive Legal Positivism Founded on a Mistake?’ (2009) 22 *Ratio Juris* 326 fn 1; Wacks (n 2) 31, 42, 59, 106; McBride and Steel (n 1) 52.

⁴² Raz, ‘Postema’ (n 5) 5; Simma and Paulus (n 14) 304-305; Finnis, ‘Natural Law: The Classical Tradition’ (n 24) 8-11; Himma (n 13) 140; Shapiro (n 41) 328-329; Coleman (n 1) 370; Bix, *Jurisprudence: Theory and Context* (n 2) 50.

⁴³ Bix ‘Patrolling the Boundaries’ (n 1) 19.

⁴⁴ Bix, *Jurisprudence: Theory and Context* (n 2) 49. See also Hart, *The Concept of Law* (n 2) 181-182; Bix ‘Patrolling the Boundaries’ (n 1) 19-20; Finnis, ‘Natural Law: The Classical Tradition’ (n 24) 11-15; Bix, ‘Natural Law: The Modern Tradition’ (n 2) 97-98; Marmor (n 41) 104-110; Himma (n 13) 125, 136; Meyerson (n 6) 51-52; Shapiro (n 41) 326 fn 1; Wacks (n 2) 31, 42, 59; McBride and Steel (n 1) 51-52.

⁴⁵ Bix ‘Patrolling the Boundaries’ (n 1) 19; Bix, ‘Natural Law: The Modern Tradition’ (n 2) 98; Bix, *Jurisprudence: Theory and Context* (n 2) 49-50.

⁴⁶ Bix ‘Patrolling the Boundaries’ (n 1) 19; HLA Hart, *The Concept of Law* (2nd edn, OUP) 250; Coleman (n 1) 367.

⁴⁷ Cryer, Hervey, Sokhi-Bulley with Bohm (n 3) 37. See also Hart, *The Concept of Law* (n 2) 199; Shapiro (n 41) 327; Wacks (n 2) 42, 110-111.

⁴⁸ Raz, *The Authority of Law* (n 13) 47.

‘reasonable’ which is implied in the reference to it) as the link between morality and law is a necessary one.

The theoretical battle lines may never be entirely clear.⁴⁹ This thesis proceeds from the assumption that these theories can be identified in (actual) judicial arguments and codes accordingly in the subsequent two chapters. It is not about solving the overall jurisprudential complexities involved in the (abstract) debate, but to have workable labels to explain separate techniques in (actual) judicial argumentation. Normally ICL role-players tended to venture straightforward pronouncements which reflected ideas traditionally held by one approach or the other (towards the respective ends of the spectrum) and could be coded for accordingly. This was often further clarified when the two approaches were juxtaposed in argument. Sometimes, however, the lack of detail in pronouncements impeded the unambiguous identification of philosophies especially when they revolved around matters pertaining to the centre of the spectrum. On the converse, if a judicial body deliberately adopted a position closer to the middle point, it could follow that the body might clearly state where it was in relation to the line. If the role-player had such a nuanced view, it was likely to be noted.

As occurs throughout the thesis, the coded data will be structured around the rule of law principle requiring consistency before the remaining Fullerian desiderata will be tested if applicable. Finally, as will be detailed in section 6.3, liberalism in ICL revealed a tension between criminal law liberalism, favouring the rights of the accused, and human rights (HR) liberalism, favouring the rights of the victims.⁵⁰ Part A produced a few codes which also revealed this tension and thereby linked up with liberalism, namely the policy-oriented approach, NCSL and interpretation. While the two liberalisms consistently pervaded the part B and C codes, they are noted in part A where they appeared.

⁴⁹ Bix, ‘On the Dividing Line’ (n 1) 1623.

⁵⁰ D Robinson, ‘The Two Liberalisms of International Criminal Law’ in Carsten Stahn and Larissa van den Herik (eds) *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010) 115-118. See also GP Fletcher and JD Ohlin, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’ (2005) 3 *JICJ* 540, 544.

Chapter 2

Historical philosophical codes utilised in ICL jurisprudence: Just war theory, cosmopolitanism and the policy-oriented approach

2.1 Introduction

This chapter focuses on codes which embody doctrines historically tied to natural law and legal positivism, namely just war, cosmopolitanism and the policy-oriented approach. Also, since it explicitly revealed natural law and legal positivism, self-reflexive statements of international criminal law (ICL) role-players preface this chapter. Chapter 3 codes for natural law and legal positivism through substantive ICL and principles of liability. Both chapters must be understood against the preceding discussion on natural law and positivism. Because natural law and positivism exist on a spectrum, the identification of these philosophies required extensive analysis, at times, for part (ii) of systematic content analysis (SCA). It bears repeating that the data identified under part (ii) of SCA is presented on the qualitative frameworks discussed in section 1.2.3.1 for patterns of consistency. Consistency directly engages the Fullerian principle requiring laws not to be contradictory. This constitutes the backbone of the argument throughout this thesis. Depending on the code and the amount of data identified, the thesis will consolidate these findings on consistency per role-player or per time period, i.e. post-WWII or post-Cold War. Evaluation against the remaining rule of law principles, if applicable, will conclude the discussions on each code. Institutional legitimacy will be discussed in the study conclusion, since it can only be addressed once all philosophical justifications have been identified and measured against the rule of law.

2.2 Self-reflexive statements

In a few cases ICL role-players explicitly conceded their allegiances to natural law and legal positivism. These instances are coded here as ‘self-reflexive’ statements of philosophical category. Per definition, this code could reveal other philosophies as well since it codes for arguments which utilise philosophy expressly.¹ Both references to philosophy by name or references to characteristic elements of philosophies will be noted. The data revealed by this code serves as an additional justification for the inclusion of natural law and legal positivism in this study. It reveals that ICL role-players accepted these theories as separate and professed their allegiance to them explicitly. Because the dataset was small, the post-WWII International Military Tribunals (IMTs) will be discussed together. This also applies to the post-Cold War judicial bodies, including the

¹ Another dataset also appears in chapter 4.

International Criminal Court (ICC).

A small number of self-reflexive statements on natural law and legal positivism were evident from the selected prosecutors at Tokyo. Chief prosecutor Keenan explicitly argued for the existence of the ‘natural law of international law’.² He based the foundation of international law on natural law, seeing that the sense of right and wrong shared by all people and necessity served to stimulate natural law and convert it into rules of law.³ For Keenan and Brown, even the Nuremberg Charter was a translation of natural law principles into positive law as ‘law, previously resting on the authority of reason alone was given legalistic shape and political and physical sanction’.⁴ While positivism does not deny that natural law principles might be the basis for positive law, the overall gist of Keenan and Brown’s arguments revealed a preference for natural law. Their argument suggested the primacy of natural law and the subsequent ‘reinforcement of that law by political, military and sociological power’, as promulgation in the Charters of the IMTs was, was merely advantageous for the ‘certainty, clarity and finality’ required by positivism.⁵

Keenan and Brown continued that natural law was not only the progenitor of positive law, but also served as a direct and parallel source of law. Thus, as international law was still primitive, *ius* and *lex* were both to be considered as legal sources. Moreover, *ius*, which was ‘predetermined by norms of moral, juridical and legal justice’, had to be discovered by judges relying on their discretion.⁶ The relationship between natural law and positivism was further resolved in favour of the former when they justified punishment on the grounds that the imbalance between good and evil can thus be addressed. If good was not restored then justice would not ensue. Justice, moreover, followed when judges conformed to the precepts of natural law or positive law which was in harmony with natural law.⁷ These sentiments elevated natural law above positive law as a higher normative system. If this approach is not natural law (which, of course, the role-players suggested through their explicit terminology) the most charitable interpretation ought to be a Grotian approach firmly inclined towards natural law. The Grotian approach, as indicated in the preface, relies on natural law and posited, consensual sources of law in combination.⁸

² Transcript of Proceedings 4 June 1946, 405-406 (hereafter ‘Transcript’) invoked Justice Cardozo, US Supreme Court, and Lord Wright, Chairman of the United Nations War Crimes Commission. On Keenan as natural lawyer see also K Sellars, ‘Imperfect Justice at Nuremberg and Tokyo’ (2011) 21 *European Journal of International Law* 1095.

³ Transcript 406-410. [References omitted.]

⁴ JB Keenan and BF Brown, *Crimes against International Law* (Public Affairs Press 1950) 43-45.

⁵ Ibid 45.

⁶ Ibid 56.

⁷ Ibid 18-19.

⁸ For the Grotian approach, see the preface to part A and H Lauterpacht, ‘The Grotian Tradition in International Law’ (1946) 23 *British Year Book of International Law* 21.

For purposes of part (ii) of SCA, the possible reading of this data as inclusive legal positivism (ILP) needs brief scrutiny. Hart had not yet introduced ILP to jurisprudence by this stage and, as such, could conclude the matter on whether ILP was a possible finding. Yet, for argument's sake, neither Hartian discretion nor exclusive legal positivism (ELP) is engaged because the particular role-players never purported to work outside the law through their moral principles. It is possible to see Keenan and Brown arguing for a Hartian rule of recognition (RoR) which deems natural law a source of law, but whether this was true seems highly contested as none of the other role-players appeared to accept this from an internal perspective.⁹ In sum, without unnecessarily fragmenting the data through hypotheses,¹⁰ these self-reflexive arguments of Keenan and Brown will be coded as Grotian natural law.

The inclination to natural law seems corroborated when Keenan and Brown upheld immutable and eternal values as the foundation of the trial.¹¹ Immutable principles are a crucial element of natural law. One such an immutable right was that to self-preservation.¹² This right was considered by Keenan and Brown as an intrinsic right of the world society. Only natural law and the rule of reason could curtail this right.¹³

Alongside the preceding arguments, the reliance on religion seemed to explicitly confirm the natural law leanings of the arguments. That a possibly theocentric natural law was intended was further evidenced when Keenan and Brown vested both Nuremberg and Tokyo on 'the Christian-Judaic absolutes of good and evil'¹⁴ and Brown, presenting testimony to the Subcommittee on Genocide in 1950, explicitly recognised his allegiance to Scholastic natural law.¹⁵

Few self-reflexive statements were coded from the defence at Nuremberg and Tokyo. The distrust of self-interested law-making at Nuremberg, where Jahreiss argued that he was 'only [dealing] with the problems of law as it is at present valid, not with the problem of such law as could or should be demanded in the name of ethics or of human progress',¹⁶ neatly embodied the traditional

⁹ For the internal perspective, see HLA Hart, *The Concept of Law* (OUP 1961) 108-113.

¹⁰ C Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 *International Law and Politics* 709 fn 1.

¹¹ Keenan and Brown (n 4) vi.

¹² E.g. T Hobbes, *Leviathan* (R Tuck tr, Cambridge University Press 2007) 91; T Aquinas, 'Summa Theologiae' in RW Dyson (tr), *Aquinas Political Writings* (Cambridge University Press 2008) IaIIae 94.2.

¹³ Keenan and Brown (n 4) 31.

¹⁴ *Ibid* vii.

¹⁵ *Ibid* 162.

¹⁶ H Jahreiss in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol.

separability thesis of positive law.¹⁷ It will therefore count as positivist. At Tokyo, Takanayagi's critique of natural law and equity as 'a roguish thing, if not in civil justice, at least in that category of criminal justice which is closely related to politics, national or international',¹⁸ suggested some hostility to natural law without conclusively ascribing to positivism.

Coding for consistency in self-reflexive statements on natural law and legal positivism in the pronouncements of the selected post-WWII counsel, resulted in a small dataset. The fragmented nature of the dataset makes findings on consistency for Fullerian rule of law difficult. The self-reflexive philosophies utilised, however, served a consistent function. For Keenan and Brown, invoking natural law as the basis of positive law and, indeed, a parallel source of law, attempted to keep the ICL endeavour vital and legitimate. The defence opposed this by adopting the separability thesis (Jahreiss) and opposing natural law (Takanayagi). Of course, functionally, they tried to undermine the arguments of the prosecution in order to provide the most robust defence against the respective indictments.

Self-reflexive statements on natural law and legal positivism appeared at Tokyo but no instances were found in the Nuremberg judgment (and very little in the entirety of the post-Cold War judicial bodies as will be seen below). From Tokyo the opinions of Judges Bernard, Webb, Röling and Pal must be briefly discussed and compared for patterns.

Bernard explicitly revealed his support for natural law which, in paradigmatic fashion, was universal and superior to man-made laws:

'I preferred the expression of natural or universal law to that of international law. The latter has been used too often to define the whole of the rights and obligations of nations as a result either of custom, social convention, treaties or agreements. This whole can or cannot conform to the law shared by all individuals and all nations but does not identify itself with it. It is to this law that I have reserved the qualification of "natural" and "universal". It exists outside and above nations. If opinions differ as to its nature, its existence is not seriously contested or contestable and the declaration of this existence is sufficient for our purpose'.¹⁹

While ILP and ELP may also accept the separate existence of positive law and natural law,²⁰ Bernard's express support for natural law would not sit comfortably with positivism. It is again

XVII:459.

¹⁷ J Austin, *The Province of Jurisprudence Determined* (John Murray 1832) 278; J Bentham, *A Fragment on Government* (Clarendon Press 1891) 98-99.

¹⁸ Transcript of Proceedings 3 March 1948, 42 188 (hereafter 'Transcript').

¹⁹ Bernard Dissent 18.

²⁰ Again for argument's sake as this argument preceded Hart.

possible that this approach which accepts natural law alongside positive law might be construed as Grotian.²¹ This approach is further visible where Bernard argued for a universal authority as necessary to create a Tribunal which could adjudge alleged violations of the universal order. In the absence of such a universal authority, as was the case with Tokyo, the person clothed with ‘actual power and moral authority’ might set up such a trial for the prosecution of persons suspected to have contravened ‘natural and international law’.²² The existence of natural law alongside positive law is reiterated in this argument, but, consistent with his argument quoted above, he explicitly preferred natural law with its designs on universality.²³ Bernard’s self-reflexive statements thus evidenced his preference for Grotian natural law (i.e. support for both natural law and positivism yet favouring natural law).

Some colleagues criticised Webb’s reliance on natural law in draft materials and his final judgment toned down on those submissions.²⁴ Explicit reliance on natural law can, however, still be found in his final judgment. Illustratively, he argued that ‘[t]he Charter, in providing for the [trial and punishment of the crime against peace], does not violate International Law or the Natural Law, but gives effect to it.’²⁵ Webb continued in a Grotian natural law vein by arguing that rules of justice and general principles of law may be used to supplement international law as ‘rigid positivism is no longer in accordance with International Law. The natural law of nations is equal in importance to the positive or voluntary’.²⁶ As argued above, regarding Keenan, Brown and Bernard’s acceptance of natural law and man-made laws as parallel sources of law, a retrospective reading of ILP in these cases is a less convincing interpretation than a Grotian natural law one. In his self-reflexive statements, then, Webb, consistent with Bernard, revealed Grotian natural law.

No self-reflexive statements on natural law and legal positivism were found in the dissent of Röling, but his extra-curial writings produced data. As will be seen in connection with other codes, Röling adopted positivism at times as well, but here characteristic natural law arguments emerged, namely support for a teleological consideration regarding the law as such (‘Humanity of today instinctively turns to this natural law, for the function of law is to serve the well-being of man, whereas present

²¹ Lauterpacht (n 8) 21.

²² Bernard Dissent 1.

²³ Reading Bernard’s argument as natural law is supported by N Boister and R Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008) 280-281. See also, *ibid*, footnote 63 (which evidences self-reflexive natural law, but falls outside this study’s case selection as per section 1.2.1).

²⁴ Boister and Cryer (n 23) 282.

²⁵ Webb Opinion 6.

²⁶ Webb Opinion 9 relied on Oppenheim.

positive international law tends to its destruction'²⁷); the natural law basis of the ICL trials and the role of natural law in guiding the 'revolutionary' change in positive law.²⁸ Under this code, therefore, Röling will be noted for his natural law.

Finally, unlike his Tokyo colleagues, Pal expressly utilised positivism. Pal's rejection of arguments for the criminalisation of aggression based on the progressive nature of law, the laws of nature and the widening sense of humanity resulted in the following argument:

'Indeed, "for many the term 'natural law' still has about it a 'rich, deep odor of the witches' cauldron, and the mere mention of it suffices to unloose a torrent of emotions and fears"...We must not however forget that this doctrine of natural law is only to introduce a fundamental principle of law and right. The fundamental principle can weigh the justice of the intrinsic content of juridical propositions; but cannot affect their formal quality of juridicity...I doubt if its claim that its doctrines should be accepted as positive law is at all sustainable'.²⁹

Pal similarly sided with the law-as-it-is as opposed to the law-as-it-ought-to-be when dealing with whether a judge should favour the moral development of law or not: 'the body called upon to apply it should not force it to be what it is not, even at the risk of missing the most attractive opportunity for contributing towards the development of a temptingly significant concept of international law'.³⁰ These sentiments favour the role of the judge as applier of a consistent body of rules above the judge as adjuster of rules to the dynamic standards of societal justice.³¹ Both arguments conform to the expository/censorial divide made by Bentham and Austin as the question regarding what the law is was separated from an evaluation regarding what the law ought to be.³² This, of course, is the traditional separability thesis of positivism. This argument would, however, not run foul of all forms of natural law – just as was the case with using Hart in the context of post-WWII IMTs for argument's sake – Pal's understanding of natural law's role in legal validity might be congruous with John Finnis' theory.³³ Of course, the better reading, bearing in mind the existing philosophical positions of the time and the explicit philosophical labels he used, is that of traditional positivism as Pal clearly adopts the separability thesis here rather than just making a claim regarding the tests for legal validity.

²⁷ BVA Röling, *International Law in an Expanded World* (Djambatan 1960) 2, 124.

²⁸ Ibid. See also Boister and Cryer (n 23) 284. On the use of natural law in a revolutionary versus reactive sense, see A van Blerk, *Jurisprudence an Introduction* (Butterworths Lexisnexis 1998) 2-3.

²⁹ Pal Dissent 131-134, 49-150. [Footnotes omitted.]

³⁰ Ibid 146.

³¹ LV Prott, *The Latent Power of Culture and the International Judge* (Professional Books 1979) 4-5, 83 et seq.

³² Austin (n 17) 278; Bentham (n 17) 98-99.

³³ J Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) 364-365; Van Blerk (n 28) 115.

The Tokyo judges, unlike their Nuremberg brethren, extensively revealed philosophical category through self-reflexive statements. In terms of this code, Bernard, Webb and Röling adopted a Grotian approach which favoured natural law more, while Pal utilised positivism. As will become clearer when other codes are analysed, Röling oscillated between natural law and positivism, whereas Pal adopted several philosophical approaches.³⁴ Indeed, the *tu quoque* arguments Pal essentially raised in conjunction with his TWAIL sentiments, arguably venture into natural law territory.³⁵ Yet, in terms of the self-reflexive code, both judges were consistent. In sum, there was some philosophical tension in the consistency of philosophy on the inter-jurist dynamic regarding the self-reflexive code at Tokyo but the preponderance of weight was on Grotian natural law.

Overall, the self-reflexive dataset at the post-WWII IMTs was small. The coded instances of the selected prosecutors and defence counsel were fragmented but united by their respective functions to prosecute or defend. The Tokyo judges, unlike their Nuremberg counterparts, explicitly stated their philosophical assumptions. In terms of this code, for rule of law purposes, natural law (albeit often in a Grotian context) was consistently preferred by judges above positive law. Self-reflexive statements as code reached its zenith at Tokyo. The post-Cold War cases contributed very little data to this code and are briefly considered next.

Extra-curially, Cassese expressed his dissatisfaction with positivism and its neglect of the social context within which legal institutions existed. He considered whether ‘one ought not to move beyond the strict legal parameters agreed upon by States, at least whenever the need to oppose glaring injustice would oblige one to do so’.³⁶ On such a view, principle, in this case justice, would overrule state agreement, which is the traditional positivist basis of law in the international arena. Cassese conceded that his writings on law reflected a fluctuation between the legal method and the desire to consider the *lex ferenda*, bearing in mind political, social and economic contexts.³⁷ Cassese’s desire to consider both, what he labelled, positivism and the *lex ferenda*, is probably best coded as a Grotian approach using both philosophies cumulatively. The second case at the ICTY occurred when Bonomy conceded, in academic writing, that his aim was ‘to ensure that the

³⁴ For overall impressions (as opposed to the code-based approach here) of Pal as positivist, pan-Asian or the product of his personal circumstances see E Kopelman, ‘Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial’ (1991) 23 *New York University Journal of International Law and Politics* 375-376, 411-424. For a reading of Pal informed by TWAIL, Hinduism and *tu quoque* arguments see A Nandy, ‘The Other Within: The Strange Case of Radhabinod Pal’s Judgment on Culpability’ (1992) 23 *New Literary History* 49-65.

³⁵ Kopelman (n 34) 407; Nandy (n 34) 49, 65. For *tu quoque* as natural law defence, see H Grotius, *De Iure Belli ac Pacis Libri Tres* (Francis Kelsey tr, Clarendon Press 1925) II.XX.III at 465-466. See sections 2.3 and 5.3.

³⁶ A Cassese, ‘Soliloqui’ in Heikelina Verrijn Stuart and Marlise Simons, *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese: Interviews and Writings* (Amsterdam University Press 2009) 146-147.

³⁷ Ibid at 149.

proceedings before me are conducted fairly. I rely on my years of experience...of such proceedings and my instinctive recognition of what is fair'.³⁸ On this view, fairness was procedural as he linked 'fair' with principles of due process, considerations of expediency and the rights of the accused.³⁹ Reliance on an instinctive sense of 'fairness' seemingly moved beyond the confines of posited law.⁴⁰ Finally, a negligible dataset was derived from the ICC with only one instance of self-reflexive statement coded. Van Den Wyngaert utilised a non-source based teleological argument premised on the Court's 'universalist mission'⁴¹ to oppose the majority's earlier reliance on specific national legal doctrines. Both the overall teleological argument and the universalism here suggested natural law.

Very few instances of self-reflexive statements thus emerged from the post-Cold War Tribunals and the ICC. Moreover, these instances were mostly found in academic writing. Still they generally favoured natural law which is consistent with the findings pertaining to the post-WWII judiciaries above where Grotian natural law was favoured.

Coding for express statements of natural law and positivism resulted in a small dataset. As a code, self-reflexive statements, by definition, complied with the first two requirements of Fuller's rule of law, i.e. created justifications which are public. The desideratum against retrospectivity was not directly engaged by this code. The crucial principles for this code were those pertaining to contradictory rules and stability of rules. The majority of the coded data across all the selected role-players appeared to favour the Grotian approach with specific natural law focus. Coding thus suggested neither contradiction nor instability of rules in relation to self-reflexive statements. The other Fullerian requirements did not come into play regarding this code. While, based on the above, the use of express statements seemingly contributed to the predictable application of the law to which individuals could adapt their conduct, the quantity of the dataset suggested that philosophical categories were often not stated. If natural law was the favourite to be preferred through self-reflexive statements, it was possibly because it was not the norm. While positivism could only be coded for if it was explicitly stated, ironically its absence from self-reflexive statements coupled with the overall dearth of coded data may very well prove its position as the norm. It makes sense

³⁸ I Bonomy, 'The Reality of Conducting a War Crimes Trial' (2007) 5 *Journal of International Criminal Justice* 351.

³⁹ Ibid. For a failed charge of bias on these considerations, see *Prosecutor v Šainović et al* (formerly *Milutinović et al*) (Judgment) IT-05-87-A (23 January 2014) paras 176-186.

⁴⁰ Compare J Hutcheson, 'The Judgement Intuitive: The Function of the "Hunch" in Judicial Decision' (1929) 14 *Cornell Law Quarterly* 274.

⁴¹ *Prosecutor v Mathieu Ngudjolo Chui* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-02/12 (18 December 2012) Concurring Opinion of Judge Christine Van Den Wyngaert para 5.

that especially early ICL jurisprudence explicitly argued for Grotian natural law as it tried to establish the new field of ICL and create a new legal paradigm by bringing the *lex lata* closer to *lex ferenda*. In sum, based on the coded data, self-reflexive statements tended to favour a Grotian natural law approach.

2.3 Just war theory

Before coding for consistency of philosophy in just war arguments, the code will be briefly explained and its historical link with natural law and positivism indicated.⁴² Just war thinking can be divided into the *ius ad bellum* and the *ius in bello*.⁴³ The *ius ad bellum* deals with questions pertaining to the rightness of going to war whereas the *ius in bello* entails how one is to act during a period of armed conflict.⁴⁴ In its traditional natural law guise (prior to the fall of scholastic natural law under Grotius), just war theory tended to conflate the *ius in bello* and the *ius ad bellum* so that only the side with the right to go to war had rights in war.⁴⁵ The moral and rational basis of this approach was the maxim *ex iniuria non oritur ius*, no right arises from an injustice.⁴⁶

Just war thinking lost ground to *raison d'état* in the 18th and 19th centuries. During this stage the state's right to wage war was unlimited due to realpolitik. However, the 20th century's aggressive wars led to a re-emergence of the just war theory. These later developments, which increasingly relied on posited sources, moved for the separate application of the *ius ad bellum* and the *ius in bello*.⁴⁷ After the universal ratification of the Geneva Conventions of 1949, the *ius in bello*

⁴² For a comprehensive account of the historical development of just war, see JT Johnson, *Ideology, Reason, and the Limitation of War Religious and Secular Concepts 1200-1740* (Princeton University Press 1975); JT Johnson, *Just War Tradition and the Restraint of War a Moral and Historical Inquiry* (Princeton University Press 1981); A Bellamy, *Just Wars From Cicero to Iraq* (Polity 2006) 15-114.

⁴³ Although the Latin epithets are a rather recent terminological development. See, R Kolb, 'Origin of the twin terms jus ad bellum/jus in bello' (1997) 37 *International Review of the Red Cross* 553. A third modern addition is *ius post bellum*, but that falls outside the remit of this chapter.

⁴⁴ N Dower, *The Ethics of War and Peace Cosmopolitan and Other Perspectives* (Polity Press 2009) 82-83. See also J Moussa, 'Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law' (2008) 90 *International Review of the Red Cross* 963-968; B Van Schaak, "'The Grass that Gets Trampled when Elephants Fight': Will the Codification of the Crime of Aggression Protect Women?' (2010) 15 *UCLA Journal of International Law & Foreign Affairs* 334; Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia paras 30-31.

⁴⁵ Boister and Cryer (n 23) 273. See also Kopelman (n 34) 398; Kolb (n 43) 554-555; Moussa (n 44) 966. For the acceptance of just cause on both sides in older natural law literature, see A Gentili, *De Iure Belli Libri Tres* (JC Rolfe tr, Clarendon Press 1933) 33; G Best, *Humanity in Warfare The Modern History of the International Law of Armed Conflicts* (Methuen & Co 1983) 39; J Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff Publishers 1985) 23. See, for the equal application of the *ius in bello* during civil wars, E de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (CG Fenwick tr, Carnegie Institute of Washington 1916) 338.

⁴⁶ Moussa (n 44) 966.

⁴⁷ See importantly the Charter of the League of Nations; Charter of the United Nations; Common Article 2 of the universally ratified Geneva Conventions of 1949 and the preamble to Additional Protocol I of 1977. See also Keenan and Brown (n 4) 66-69; Kopelman (n 34) 398-399; Kolb (n 43) 556-558; Boister and Cryer (n 23) 273;

provisions contained therein became binding on all states as a (posited) contractual obligation.⁴⁸ By rejecting reciprocity, this separation ensured compliance with the laws of war irrespective of which party violated the peace originally.⁴⁹ In contemporary international society, the *ius ad bellum* is enshrined in the United Nations Charter which allows the exertion of force for purposes of self-defence.⁵⁰ It has been argued that the Charter itself perpetuates the distinction between ‘good’ defensive and ‘bad’ aggressive wars in a posited source.⁵¹

Indicia in ICL jurisprudence as to whether the *ius ad bellum* and the *ius in bello* were conflated or separated and the reasons provided revealed whether a particular philosophy was relied on for purposes of identifying philosophy under part (ii) of SCA. Only natural law dealing with morality and the normative aims of the law, on the one hand, and positivism generally reliant on the social or separability theses, with their focus on posited sources and the non-conceptual link between law and morality, on the other hand, appeared under this code. Natural law, if understood as requiring a necessary link between law and morality, inevitably tended to evaluations of the justness of cause or *tu quoque*. Positivism tended to reject such analyses in favour of posited sources. It was in the juxtaposition that the difference in argument appeared.

Just war often appeared at the post-WWII IMTs due to their jurisdiction over crimes against the peace. This discussion focuses on the selected counsel arguments on this charge before briefly considering the IMTs’ response thereto. Thereafter, the just war arguments pertaining to the murder charges at Tokyo will be considered as they appeared from counsel and judiciary. It is only once the philosophies used in conjunction with just war per role-player have been identified as required by part (ii) of SCA, that the data will be measured against the rule of law standard (albeit with consistency still structuring the data).

At Nuremberg, US prosecutor Jackson ascribed the pre-WWI development of impunity for inciting and waging wars of aggression to the conflation of just war theory and *raison d’etat*.⁵² Traditional just war thinking shielded the side with just cause from prosecutions for violations *in bello* whereas

Moussa (n 44) 967 as well as R Cryer, ‘The Philosophy of International Criminal Law’ in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 253 which refers to *US v List* (1948) 15 Annual Digest 632 as a positivist source which supports the equality of belligerents.

⁴⁸ Van Schaak (n 44) 366-367.

⁴⁹ Ibid.

⁵⁰ Charter of the United Nations art. 2(4) and 51. See also the Final Report (n 44) para 30.

⁵¹ T Franck, ‘Legitimacy in the International System’ (1988) 82 *American Journal of International Law* 720. See comparably regarding the Covenant of the League of Nations, H Shawcross in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg*, Vol. III:97.

⁵² R Jackson in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg*, Vol. II:145.

the *raison d'état* of the 18th and 19th centuries accepted war as a legitimate activity for states to undertake and thus precluded adjudication upon its legitimacy. Jackson's asserted dismay can be seen as a dissatisfaction with the cumulative effect of these rationales. This culminated in WWI according to Jackson. Thereafter, 'earthy common sense' and 'ethical principles' led to a desire that the requirements of the *ius ad bellum* and the *ius in bello* be considered cumulatively:

'Plain people with their earthy common sense, revolted at such fictions and legalisms so contrary to ethical principles and demanded checks on war immunities...The common sense of men after [WWI] demanded, however, that the law's condemnation of war reach deeper, and that the law condemn not merely uncivilized ways of waging war, but also the waging in any way of uncivilized wars – wars of aggression'.⁵³

This natural law impetus, focused on civilisation, reason and morality, Jackson interwove with posited sources of the (renewed) development of the criminality of wars of aggression.⁵⁴ The combination of natural law and positivism revealed a Grotian approach. Jackson proceeded along the just war route and proclaimed that:

'Any resort to war – to any kind of a war – is a resort to means that are inherently criminal. War inevitably is a course of killings, assaults, deprivations of liberty, and destruction of property. An honestly defensive war is, of course, legal and saves those lawfully conducting it from criminality. But inherently criminal acts cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal. The very minimum legal consequence of the treaties making aggressive wars illegal is to strip those who incite or wage them of every defense the law ever gave, and to leave war-makers subject to judgment by the usually accepted principles of the law of crimes'.⁵⁵

Jackson's task was to loosen the hold *realpolitik* held over just war theory, yet not to resort to the just war theory in its conflated natural law guise as that would lead to cases where the *ius in bello* might not be justiciable. Effectively, Jackson emphasised the *ius ad bellum* and *ius in bello* independently in order to justify the most complete set of rules against impunity. In the process, he relied on posited and natural law sources characteristic of a Grotian approach and coded here thus.⁵⁶

The British Prosecutor, Shawcross continued in traditional *ex iniuria non ius oritur* vein to subject the *ius in bello* to *ius ad bellum*:

'The killing of combatants in war is justifiable, both in international and in municipal law, only where the war itself is legal. But where a war is illegal, as a war started not only in breach of the Pact of Paris but

⁵³ Ibid.

⁵⁴ Ibid 145-146. See comparably R Jackson, 'Address at the First Conference of the Inter-American Bar Association' (Havana, Cuba on 27 March 1941) 4-5, 12-16 where he rejected the notion that all wars are legal based on a mixed Grotian argument. See also T Taylor, *The Anatomy of the Nuremberg Trials* (Skyhorse 2013) 44.

⁵⁵ Jackson (n 52) 146-147.

⁵⁶ Lauterpacht (n 8) 21. For Jackson's collaboration with Lauterpacht see Sellars (n 2) 1087.

without any sort of warning or declaration clearly is, there is nothing to justify the killing, and these murders are not to be distinguished from those of any other lawless robber bands'.⁵⁷

The French Prosecutor, De Menthon, similarly argued that 'all acts committed as a consequence of this aggression...will cease to have the juridical character of acts of war'.⁵⁸ Wartime actions would therefore only be legitimate if the war was itself lawful. For him, a 'war perpetrated in violation of international law no longer really possesses the juridical character of a war, it is truly an act of gangsterism, a systematically criminal undertaking'.⁵⁹ Both Shawcross and De Menthon thus adopted the conflated natural law understanding of just war, premising the *ius in bello* on just cause *ad bellum*.

The defence at Nuremberg, per Jahreiss, countered, as could be expected, in strict positivist fashion, that no general statute was established prior to 1 September 1939 that could determine which wars were forbidden and which wars countenanced by law. The war itself 'swept away all diplomatic and juridical artifices with supreme indifference'.⁶⁰ Jahreiss moreover, reliant on soft law, subscribed to the position that the laws of war apply equally to both belligerents regardless of the war's origins.⁶¹ Jahreiss thus opposed the *ex iniuria non ius oritur* maxim by noting the lack of posited support for prosecution of violations *ad bellum* and enumerating quasi-legal support for prosecuting violations *in bello*. Coding thus revealed a positivist argument here.

At Tokyo, Keenan and Brown, in academic writing, reflected approvingly on the separation between just and unjust wars as necessary for the harmonious functioning of the international community.⁶² For them unjust wars were *mala in se* and so contrary to natural law. This close correlation between law and morality is, of course, central to natural law. However, aware that the crystallisation of this principle in posited sources would give it added legal meaning, they pointed, like their Nuremberg counterparts, to various treaties and resolutions as expressly and implicitly recognising the criminality of aggressive war.⁶³ The reliance on posited sources could not escape a broad interpretation to submit that the very nature of the activity outlawed by the Kellogg-Briand Pact pointed to criminality, that the phrase 'condemn recourse to war' should be construed as

⁵⁷ H Shawcross in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. XIX:458. Sellars (n 2) 1087 discusses the collaboration between Shawcross and Lauterpacht as well.

⁵⁸ F de Menthon in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. V:387.

⁵⁹ *Ibid.*

⁶⁰ Jahreiss (n 16) 467.

⁶¹ *Ibid* 472-473.

⁶² Keenan and Brown (n 4) 66-71.

⁶³ *Ibid* 77-79 and sources cited therein. Kopelman (n 34) 397 confirmed the dual argument adopted.

criminal illegality and that, in spite of the use of understatement in the text of the Pact, ‘it is unthinkable that the Signatories were not assuming, as a matter of course, that aggressive war was a crime’.⁶⁴ They recognised that they were deviating from a literal interpretation of the treaty and justified this on the basis that ethical control allowed just interpretations in certain areas of law.⁶⁵ Although posited sources were thus invoked, this was to supplement moral considerations and the reading afforded to them relied on morality and reason. While this reliance on morality strongly suggested natural law, the reliance on posited sources alongside morality means that coding the approach as Grotian with an inclination towards natural law is more accurate.

Coding for consistency in just war arguments amongst the selected IMT counsel pertaining to the crimes against peace revealed that the prosecutors (with the exception of Jackson) tended towards the conflated natural law argument, albeit with a Grotian approach tempering Keenan and Brown (as it did under the self-reflexive code), while defence counsel adopted positivism. For the prosecution, the need to support the criminalisation of aggression beyond the few unconvincing codifications of the time necessitated a more functional reliance on natural law which narrowed the gap between *lex lata* and *lex ferenda*. When defence counsel Jahreiss’ argument is compared to the prosecutors, their difference becomes apparent – the overall argument of the prosecutors exceeded positivism. Jahreiss’ position was also functional as it provided the strongest argument in favour of the accused, i.e. that the *ius ad bellum* charges were baseless. Having identified the trends in counsel arguments, the effect on the other Fullerian requirements will be considered after considering the data from the respective IMTs as well.

In response to these arguments, the Nuremberg and Tokyo IMTs comparably circumvented the just war theory in relation to aggression and invoked posited sources. Both majorities relied on their respective Charters which established criminal jurisdiction over crimes against the peace.⁶⁶ Both proceeded, however, to read pre-IMT sources in a manner where reason dictated the constructed meanings.⁶⁷ Although this engages the codes of crimes and interpretation in chapter 3, it is addressed here to resolve the just war narrative at the IMTs. Accordingly, the Kellogg-Briand Pact, which solemnly condemned war as an instrument of national policy, was constructed to necessarily

⁶⁴ Keenan and Brown (n 4) 79-80.

⁶⁵ Ibid 81. See also Kopelman (n 34) 397.

⁶⁶ Judgment in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. I:173-174, 218-219; Tokyo IMT Majority Judgment 25-26.

⁶⁷ Judgment in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. I:219-221. Tokyo IMT Majority Judgment 25-26; Boister and Cryer (n 23) 120-121. See also Kopelman (n 34) 392-393.

imply that war was illegal and those who plan and wage it were perpetrating a crime in the process.⁶⁸ This extrapolation from condemnation to illegality and from illegality to criminality revealed an interpretation which would be unacceptable to strict positivism. There is simply no posited, Hartian or ELP discretionary or RoR direction to such an interpretation. The Nuremberg IMT continued with this expansive argument based on reason when it argued that it is just to punish those who attack neighbouring countries in violation of treaties and assurances because ‘the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished’.⁶⁹ Similar logic thus held sway regarding the finding of illegality of aggressive war in Tokyo as compared to Nuremberg, i.e. an expansive reading of a posited source. There was inter-curial consistency here regarding philosophical position adopted. Perhaps this consistency was expected bearing in mind how seminal the Nuremberg judgment was for the Tokyo IMT and the judicial technique of relying on previous authority.⁷⁰ However, as this was pursued through interpretation, the Nuremberg and Tokyo majority pronouncements will not be added to the just war code.

The just war code appeared in the individual opinions at Tokyo. Thus, Röling denied that the posited sources cited by Nuremberg and the Tokyo majority proved the existence of the crimes against the peace charge.⁷¹ While the crimes were thus not criminalised per se, the right of preventative detention, according to him, accrued to the powers victorious in a ‘bellum iustum’.⁷² Whether this argument meant to include the just war theory, in any form, is questionable as Röling’s submission that the ‘conception of “bellum justum” according to natural law, if it has ever amounted to anything more than a mere desideratum, was certainly not a valid part of positive international law in the nineteenth and the early twentieth century’, suggested.⁷³ The *ius ad bellum* of conflated just war, for him, was a ‘fatal doctrine’ in contemporary international society since every war could become global and greatly destructive.⁷⁴ Although the judge’s use of just war was slightly ambiguous, his argument opposed the conflated natural law just war and rather looked towards whether the impugned conduct was of such a nature to threaten the existing order in which case preventative detention would be allowed. Added to this was his rejection of the posited basis of

⁶⁸ Judgment in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. I:220.

⁶⁹ Ibid 219. For the approval of the Tokyo IMT on this point, see Tokyo IMT Majority Judgment 25-26.

⁷⁰ GA Res 95(I) of 1946 also ensured this reliance.

⁷¹ Röling Dissent 26-32. See also Boister and Cryer (n 23) 132, 283.

⁷² Röling Dissent 46. See also R Cryer, ‘Röling in Tokyo A Dignified Dissenter’ (2010) 8 *JICJ* 1115-1116.

⁷³ Quoted in Boister and Cryer (n 23) 284.

⁷⁴ BVA Röling, ‘Introduction’ in C Hosoya, N Ando, Y Onuma and R Minear (eds), *The Tokyo War Crimes Trial An International Symposium* (Kodansha Ltd 1986) 23-24; BVA Röling, *The Tokyo Trial and Beyond Reflections of a Peacemonger* (Antonio Cassese ed, Polity Press 1993) 57.

the crimes against the peace. In sum, Röling's argument is coded as positivist.

Finally, Pal concluded that until 1914 no war was generally deemed to be an international crime although a distinction between just and unjust wars was made sometimes. He rejected these epithets as the products of philosophers which never produced any tangible results in international legal practice.⁷⁵ For Pal, the Kellogg-Briand Pact did not materially alter this position. The right to wage war was still a prerogative of states although the laws applicable in war had to be applied fully and equally. According to Pal, the conflated just war approach seemingly led to the dangerous result that the victim of an unjust war could rightfully take recourse to means that were unlimited, including nuclear weapons.⁷⁶ Despite this lip-service to positivism, Pal built much of his argument around how Japan's conduct was defensive as opposed to aggressive, thereby implicitly using natural law just war theory.⁷⁷ This means that coding revealed an incongruity between the philosophies used by Pal regarding just war. Possibly the divide is explained as positivist on the theory adopted and natural law in the application.

At Tokyo, the just war code also appeared in conjunction with the murder charges. The prosecution's philosophical basis for these charges was simply that 'killings in unlawful wars were, by virtue of the war's illegality, murder'.⁷⁸ That the traditional natural law just war theory was intended by the prosecution was confirmed by subsequent academic writings.⁷⁹ Because, on this view, the Japanese cause was unjust, liability for murder could follow.⁸⁰ The defence, per Takanayagi, argued that the rules of war protect both belligerents regardless of the justness of the commencement of the war.⁸¹ For Takanayagi, 'lawful' belligerency could only excuse murder if the absolute concurrence of all nations to this rule existed. As murder differed from jurisdiction to jurisdiction, such consensus did not exist.⁸²

Again, as with the grounding of the crime of aggression charge, the selected prosecutors and defence counsel here adopted natural law and positivism as binary opposites. The parties were thus far consistent with their own earlier philosophical strategies pertaining to the charge of aggression.

⁷⁵ Pal Dissent 70, 151-152. See, for a similar point, Kopelman (n 34) 410-411; Taylor (n 54).

⁷⁶ Pal Dissent 1038, 1091. See also Kopelman (n 34) 401.

⁷⁷ See for example, Pal Dissent 557-558. See also Sellars (n 2) 1096.

⁷⁸ Boister and Cryer (n 23) 154. See also Tokyo Majority Judgment 34-36; Transcript 425-429; Keenan and Brown (n 4) 64, 119 as well as Pal Dissent 1030. See also Cryer (n 72) 1117-1119.

⁷⁹ Keenan and Brown (n 4) v, 119.

⁸⁰ Boister and Cryer (n 23) 157.

⁸¹ Transcript 42 197.

⁸² Ibid 42 252-42 254.

Again the binary philosophical arguments suggested functionality directing the arguments in order to bolster or oppose the murder charge.

The IMT majority circumvented this issue ‘as [the murder charges] were seen as cumulative to the crimes against peace charges’.⁸³ The dissents of Jaranilla, Röling and Pal addressed the matter directly and, in the process, revealed philosophical positions on the inter-jurist level. Jaranilla critiqued the finding of the majority on the basis that it vested the viability of murder charges on the condition of an unlawful war.⁸⁴ Although his dissent misconstrued the majority’s standpoint (as they did not accept the legality of the war as a defence⁸⁵), Jaranilla rejected the traditional just war theory in favour of the absolute nature of the *ius in bello* due to fears of escalation if just cause allowed impunity. The justification for his position was found in reason rather than in posited authority thereby constituting natural law for coding.⁸⁶ Röling and Pal both invoked the posited Hague Regulations to argue that every war, irrespective of its legality, was regulated by the *ius in bello*.⁸⁷ For Röling basing the *ius in bello* on *ius ad bellum* ‘would be a negation of the recognition of war...since in every war in the future belligerents will claim that the enemy is waging an unjust or illegal war [thereby resulting] in disregard of the rules of warfare’⁸⁸ and for Pal the whole ‘invading army would be guilty of murder and the victors in such a war will return to their primitive rights of total destruction of the vanquished’.⁸⁹ These arguments opposed the conflated natural law approach and relied on posited sources, rendering them positivist. These arguments were consistent with their arguments regarding aggression.

While the majority thus circumvented just war considerations pertaining to the murder charges, Jaranilla, Röling and Pal disapproved of the *ex iniuria non ius oritur* just war position. For them the *ius in bello* had to be complied with irrespective of the *ius ad bellum*. Röling and Pal relied on posited sources while Jaranilla utilised a moral argument. All three judges favoured the universal application of the *ius in bello* due to the realist concern of criminal escalation on the part of those combatants considered to act without *ius ad bellum*.

⁸³ Cryer, Friman, Robinson and Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, CUP 2014) 121 fn 54. See also Tokyo Majority Judgment 36.

⁸⁴ Jaranilla Dissent 10.

⁸⁵ Boister and Cryer (n 23) 166-167.

⁸⁶ Jaranilla Dissent 10 argued that such a theory would ‘shock mankind everywhere and at any time’ which, as far as justifications go, seems based on natural law.

⁸⁷ Röling, noted in Boister and Cryer (n 23) 168 footnote 95, invoked academic authority, among which Oppenheim’s *International Law* (edited by Lauterpacht) and Alfred Verdross. See Pal Dissent 15, 1030-1038.

⁸⁸ Quoted, with approval, in Boister and Cryer (n 23) 169.

⁸⁹ Pal Dissent 1038.

Prior to discussing the post-Cold War Tribunals and ICC, the post-WWII arguments will be briefly measured against the rule of law. Just war as code at the post-WWII IMTs mainly emerged from counsel. The selected prosecutors consistently invoked natural law albeit tempered in a few cases within a Grotian context whereas defence counsel took recourse to positivism. The arguments relative to the role-players were thus not contradictory as required by Fullerian rule of law. Literature has comprehensively proven that aggression was not yet a crime at this time and that the prosecution created a retrospective crime.⁹⁰ Recourse thus appeared to be taken to these philosophical arguments in part to address the retrospective desideratum of Fuller's rule of law. Since they were essentially establishing a new field, arguments in excess of *lex lata* would be functionally inescapable. The IMTs largely circumvented these just war arguments through a flexible interpretation of posited sources (which is philosophically relevant under the interpretation code). In several dissents at Tokyo, however, positivism was consistently used to undermine the aggression charge's basis and to reject the *ex iniuria non ius oritur* arguments of the prosecution regarding the murder charges. Consistent and stable data ensured compliance with Fuller's requirements and engendered the foreseeable and predictable application of law on this code at Tokyo.

Arguably, as a result of international politics and the universal support for the Geneva Conventions, most of the post-Cold War Tribunals' Statutes focused solely on violations of the *ius in bello*. Despite this lack of jurisdiction over aggression, a significant dataset pertaining to just war emerged from the ICTY. While a small dataset emerged from the ICTR, only one dictum was found at the ICC which confirmed the importance of both *ius in bello* and *ius ad bellum* based on the Rome Statute.⁹¹ This section focuses on intra-curial consistency at the ICTY.

Despite the ICTY's lack of jurisdiction over the *ius ad bellum*, just war considerations appeared in the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia. The Report provided guidelines for the prosecutorial strategy into the NATO bombing campaign against Yugoslavia in 1999 and contained detailed reasoning on its findings.⁹² Although not strictly within the ambit of the selected cases,⁹³ it will be briefly considered.

⁹⁰ Boister and Cryer (n 23) 136-137.

⁹¹ *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/08 A (8 June 2018) Concurring Separate Opinion of Judge Eboe-Osuji paras 245, 253, 341-344.

⁹² See generally Moussa (n 44) 985-986.

⁹³ See section 1.2.1.

Firstly, the Report was the result of just war concerns. The argument was that because NATO's resort to force was unlawful, i.e. was not undertaken in self-defence or with the authorisation of the Security Council, all the consequent military actions undertaken by NATO were also illegal.⁹⁴ Secondly, even though the committee did not investigate the 'fundamental legality of the use of force by NATO members against the FRY' because crimes against the peace fall outside the ICTY's jurisdiction, the committee did venture a few obiter comments on just war theory.⁹⁵ The Report, reminiscent of the Tokyo dissents, rejected the *ex iniuria non ius oritur* argument that 'the "bad" side had to comply with the law while the "good" side could violate it at will'.⁹⁶ Although the Report refrained from pronouncing on the *ius ad bellum* regarding the NATO campaign, it concluded, in passing, that premising rights *in bello* on rights *ad bellum* would have an adverse impact on attempts to alleviate human suffering.⁹⁷ The Report therefore dovetailed the post-Geneva Conventions and Additional Protocol international community wherein *ius in bello* commitments are absolute.

Coding for consistency of philosophy regarding just war in ICTY, and to a lesser extent ICTR, jurisprudence resulted in a large dataset given their noted lack of jurisdiction over the *ius ad bellum*. The arguments generally appeared in relation to *tu quoque* arguments, which attempted, in a natural law fashion already known to Grotius, to sidestep responsibility because of equal wrongdoing on the side of the opponent.⁹⁸ Against this context, recourse to posited sources without running foul of the separability thesis proved decisive in the identification of philosophical category.

Already in the Rule 61 *Martić* decision, the principle of distinction was recognised as non-reciprocal thus excluding traditional just war arguments. The TC supported its position, through posited authority, by reflecting on the unilateral commitment in article 1 of the Geneva Conventions to respect and ensure respect for the Conventions in all circumstances.⁹⁹ Likewise, in *Kupreškić*, the ICTY relied on posited sources to confirm the absolute nature of the *ius in bello*.¹⁰⁰ The defence of *tu quoque* was rejected as the duties under IHL were obligations *erga omnes*.¹⁰¹ For the TC, the *tu*

⁹⁴ Final Report (n 44) paras 2, 30.

⁹⁵ Ibid paras 4, 32-33.

⁹⁶ Ibid para 32.

⁹⁷ Ibid para 32. Commentators like Moussa (n 44) 985-986 view this as implicitly rejecting the criticism that the unauthorised use of force by NATO was illegal.

⁹⁸ See Grotius (n 35) II.XX.III at 465-466.

⁹⁹ *Prosecutor v Martić* (Decision) IT-95-11-R61 (8 March 1996) para 15.

¹⁰⁰ *Prosecutor v Kupreškić* (Judgment) IT-95-16-T (14 January 2000) paras 516-517 referring to the Geneva Conventions of 1949 and the *US v von Leeb* case.

¹⁰¹ *Prosecutor v Kupreškić* (Judgment) IT-95-16-T (14 January 2000) paras 23, 515-517, 765. *Prosecutor v Stanišić and*

quoque argument was fundamentally incorrect. It was premised upon IHL as ‘based upon a narrow bilateral exchange of rights and obligations’.¹⁰² The TC stressed the ‘irrelevance of reciprocity, particularly in relation to obligations found within [IHL] which have an absolute and non-derogable character’.¹⁰³ In sum, for the TC the central principle of IHL was the duty ‘to uphold key tenets of this body of law regardless of the conduct of enemy combatants’.¹⁰⁴ The TC emphasised the universal nature of the obligations imposed by the *ius in bello* as a translation of Kant’s categorical imperative that ‘one ought to fulfill an obligation regardless of whether others comply with it or disregard it’ into legal norms.¹⁰⁵ Although this reference to Kant was likely a rhetorical flourish, it added support to the Tribunal’s implied finding that compliance with the *ius ad bellum* was not required for duties pertaining to the *ius in bello* to arise. The duty to comply with the *ius in bello* was independent from the duties and rights of others.

In turn, this line of argumentation was followed in *Kunarac*,¹⁰⁶ *Vasiljević*,¹⁰⁷ *Simić*,¹⁰⁸ *Blaškić*,¹⁰⁹ *Brđanin*,¹¹⁰ *Limaj*,¹¹¹ (implicitly in) *Krajišnik*,¹¹² *Dragomir Milošević*,¹¹³ *Martić*¹¹⁴ and *Prlić*.¹¹⁵ All explicitly repeated the reasoning of earlier cases. The *Kordić and Čerkez* TC dealt with the Bosnian-Croats’ plea that their belligerent actions constituted actions of self-defence against Bosnian-Muslim aggression.¹¹⁶ This plea has been construed to invoke *ius ad bellum* as justification for actions performed *in bello*. The TC, however, dealt with the plea of self-defence as a criminal defence, questioning whether the defence was valid in the particular case under scrutiny as opposed to whether the entire war was amenable to a description of ‘defensive’ (which would have constituted a just war analysis).¹¹⁷ The TC concluded, however, after considering its own Statute and

Župljanin (Judgment Volume 1 of 3) IT-08-91-T (27 March 2013) para 16; *Prosecutor v Mladić* (Judgment) IT-09-92-T (22 November 2017) paras 14, 4198 also rejected *tu quoque*.

¹⁰² *Prosecutor v Kupreškić* (Judgment) IT-95-16-T (14 January 2000) para 517.

¹⁰³ *Ibid* para 511.

¹⁰⁴ *Ibid* para 511. This was also approved of in *Prosecutor v Limaj et al.* (Judgment) IT-03-66-T (30 November 2005) para 193.

¹⁰⁵ *Prosecutor v Kupreškić* (Judgment) IT-95-16-T (14 January 2000) para 518.

¹⁰⁶ *Prosecutor v Kunarac, Kovač and Vuković* (Judgment) IT-96-23-T (22 February 2001) para 580; *Prosecutor v Kunarac, Kovač and Vuković* (Judgment) IT-96-23/1-A (12 June 2002) paras 87-88.

¹⁰⁷ *Prosecutor v Vasiljević* (Judgment) IT-98-32-T (29 November 2002) para 31.

¹⁰⁸ *Prosecutor v Simić, Tadić and Zarić* (Judgments) IT-95-9-T (17 October 2003) para 40.

¹⁰⁹ *Prosecutor v Blaškić* (Judgment) IT-95-14-A (29 July 2004) para 427.

¹¹⁰ *Prosecutor v Brđanin* (Judgment) IT-99-36-T (1 September 2004) para 131.

¹¹¹ *Prosecutor v Limaj et al.* (Judgment) IT-03-66-T (30 November 2005) para 193.

¹¹² *Prosecutor v Krajišnik* (Judgment) IT-00-39-T (27 September 2006) para 294.

¹¹³ *Prosecutor v Dragomir Milošević* (Judgment) IT-98-29/1-T (12 December 2007) paras 798, 906, 917 refer to Article 49 of Additional Protocol I; *Prosecutor v Dragomir Milošević* (Judgment) IT-98-29/1-A (12 November 2009) paras 69, 250.

¹¹⁴ *Prosecutor v Martić* (Judgment) IT-95-11-A (8 October 2008) paras 90, 111, 268-270.

¹¹⁵ *Prosecutor v Prlić et al* (Judgment Volume 1 of 6) IT-04-74-T (29 May 2013) para 279.

¹¹⁶ *Prosecutor v Kordić and Čerkez* (Judgment) ICTY-95-14/2-T (26 February 2001) para 448.

¹¹⁷ Moussa (n 44) 986 as well as *Prosecutor v Kordić and Čerkez* (Judgment) ICTY-95-14/2-T (26 February 2001) paras 449-452.

the Rome Statute of 1998, that ‘military operations in self-defence do not provide a justification for serious violations of [IHL]’.¹¹⁸ The *Boškoski and Tarčulovski* AC also approved this argument emphasising the *ius in bello*.¹¹⁹ The AC relied on posited case law and treaties, to find the *ius in bello* absolute even in a case of possible self-defence against insurgents.¹²⁰ The separation between *ius ad bellum* and *ius in bello* was thus consistently, albeit not always, proven by posited sources.¹²¹ At the ICTR the *Gacumbitsi* TC, reliant on *Kupreškić*, also rejected the *tu quoque* argument.¹²² At the very least these judgments rejected the (natural law) *ex iniuria non ius oritur* and *tu quoque* maxims. In most cases reliance was placed on posited sources with no linkage of law to morality. Bearing in mind that reliance on posited sources is neither necessary nor sufficient for natural law (but could be for positivism), the data suggested consistent positivism and is coded accordingly.

Although the ICTY does not have jurisdiction over the crime of aggression, it has still, as is evident from the preceding discussion, been confronted by just war arguments and has revealed a very consistent philosophical stance in the process. In keeping with its Statute, Geneva Conventions and Additional Protocols heritage, the Tribunal tended to focus on violations of the *ius in bello* regardless of an accused’s rights *ad bellum*. The position adopted, as argued, was consistently positivist and, moreover, consistently held throughout Tribunal jurisprudence in arguments ranging from prosecutorial strategy, the substantive violations of the *ius in bello* to defences (including self-defence and *tu quoque* arguments). While natural law need not deny reference to posited sources, there was a constant refrain from necessarily linking law to morality and negation of historical natural law maxims.

In passing, the Special Court for Sierra Leone (SCSL) will be briefly considered.¹²³ The SCSL also does not have jurisdiction over aggression. Yet a more traditional understanding of the just war

¹¹⁸ *Prosecutor v Kordić and Čerkez* (Judgment) ICTY-95-14/2-T (26 February 2001) para 452, 827. See, similarly for the prosecutor’s position, C Del Ponte, *Confrontation with Humanity’s Worst Criminals and the Culture of Impunity* (Other Press 2008) 246.

¹¹⁹ *Prosecutor v Boškoski and Tarčulovski* (Judgment) IT-04-82-A (19 May 2010) para 44. This was supported by *Prosecutor v Đorđević* (Public Judgment) IT-05-87/1-T (23 February 2011) para 2053; *Prosecutor v Šainović et al* (formerly *Milutinović et al*) (Judgment) IT-05-87-A (23 January 2014) para 1662.

¹²⁰ *Prosecutor v Boškoski and Tarčulovski* (Judgment) IT-04-82-A (19 May 2010) paras 5, 26-51 and the sources cited in footnote 116.

¹²¹ In some cases, no supporting authority was adduced, see *Prosecutor v Stakić* (Judgment) IT-97-24-T (31 July 2003) para 823; *Prosecutor v Galić* (Judgment) IT-98-29-T (5 December 2003) paras 145, 765; *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) paras 812, 1082; *Prosecutor v Nshogoza* (Judgment) ICTR-07-91-T (7 July 2009) para 177; *Prosecutor v Nshogoza* (Judgment) ICTR-2007-91-A (15 March 2010) para 57. See also *Prosecutor v Gotovina et al* (Judgment Volume 1 of 2) IT-06-90-T (15 April 2011) para 13; *Prosecutor v Mladić* (Judgment) IT-09-92-T (22 November 2017) para 14.

¹²² *Prosecutor v Gacumbitsi* (Judgment) ICTR-2001-64-T (17 June 2004) para 165.

¹²³ See section 1.2.1.

doctrine emerged from *Fofana and Kondewa*. In a separate opinion Judge Thompson premised his acceptance of a natural law just cause (thereby exonerating the combatants from violations *in bello*) on the fact that a fight ‘for the restoration of democracy and constitutional legitimacy could be rightly perceived as an act of both patriotism and altruism, overwhelmingly compelling disobedience to a supranational regime of proscriptive norms’.¹²⁴ The majority, however, rejected the defence of necessity, which in the court’s view would have enabled pleas of just cause or just war, in connection with the charged crimes.¹²⁵ Still, the notion that the accused engaged in the armed conflict to protect the democratically elected government from the rebels endured and was accepted by the majority in mitigation of sentencing.¹²⁶ On appeal, just cause also found favour with Judge Gelaga King. Although denying that he was engaging in just war considerations, he clearly accepted that the Government forces had a just cause for which to engage the enemy. This led to an emphasis on the justness of the one party to the conflict’s cause and the injustice of the other side, i.e. an understanding of the hostilities as being between good and evil.¹²⁷ However, the majority quashed this natural law sentiment by maintaining that:

‘[IHL] specifically removes a party’s political motive and the “justness” of a party’s cause from consideration. The basic distinction and historical separation between jus ad bellum and jus in bello underlies the desire of States to see that the protections afforded by jus in bello...are “fully applied in all circumstances to all persons...”’.¹²⁸

The natural law just war considerations regarding the justness of cause was clearly rejected by the majority’s quoted reliance on Additional Protocol I for the posited equality of treatment of all parties to an armed conflict. While the post-Cold War Tribunals consistently emphasised the absolute nature of the *ius in bello*, this case shows how support for the conflated just war approach has endured.

When ICL judicial bodies were established to adjudicate upon violations *ad bellum* and/or *in bello*, just war reappeared as a construct to explain the relationship between the *ius ad bellum* and *ius in bello*. As a theoretical construct it could potentially add moral weight to arguments and justify the criminality of aggression despite the dearth of positive law of the time. As a preliminary to its

¹²⁴ *Prosecutor v Fofana and Kondewa* (Judgment) SCSL-04-14 (2 August 2007) Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute para 90.

¹²⁵ *Prosecutor v Fofana and Kondewa* (Sentencing) SCSL-04-14 (9 October 2007) para 79.

¹²⁶ *Ibid* paras 80-91.

¹²⁷ *Prosecutor v Fofana and Kondewa* (Judgment) SCSL-04-14 (28 May 2008) Partially Dissenting Opinion of Judge George Gelaga King, paras 26-31, 90-94. See Cryer (n 47) 252-253.

¹²⁸ *Prosecutor v Fofana and Kondewa* (Judgment) SCSL-04-14 (28 May 2008) para 530. The quote is from the preamble of Additional Protocol I.

comparison with Fuller's rule of law, a brief consolidation of the trends identified in the philosophies used around this code is necessary. In the process, Fuller's principle of non-contradictory law will be addressed.¹²⁹

This code resulted in a large dataset. The selected post-WWII prosecutors slightly favoured the more traditional conflated natural law form of the theory to justify proceedings against aggression above a Grotian approach thereto. But hereafter coding only revealed isolated support for the conflated natural law version in the separate opinions of two judges at the SCSL. The selected IMT defence counsel opposed natural law through positivism. The IMTs addressed the just war argument by ignoring it and deciding the issues at hand through flexible interpretation of treaties. Just war only appeared in three Tokyo dissents in conjunction with the murder charges. The approach of two were to reject *ex iniuria non ius oritur* and favour posited sources while Jaranilla rejected the maxim on the shock its implementation would cause to human consciousness. The ICTY, and to a much lesser extent, the ICTR, consistently relied on posited sources to separate the *ius ad bellum* and the *ius in bello*.

As code, the philosophies used pertaining to just war theory, conformed to the Fullerian requirements of being created and being public. While the prosecution/defence debate at the post-WWII IMTs suggested that a conflated natural law just war argument would result in law that fell foul of Fuller's prohibition against retrospective law, the IMTs' response resorted under another code (i.e. interpretation). Retrospectivity did not appear in the context of just war at the post-Cold War judiciaries. Apart from the post-WWII prosecution and two judges at the SCSL, the argument against the conflated natural law just war and, indeed, in favour of the separation of *ius ad bellum* and *ius in bello* was consistent and stable, as required by Fuller's principles, inter-curially across the post-WWII defence, the dissenting Tokyo judges and ICTY. Post-Geneva Conventions and Additional Protocols, the ICTY's essentially uniform approach to separate the two can be seen as ensuring congruence, per Fuller, between the rules of the international society captured in treaties and their administration by judicial bodies. In sum, the consistent discarding of traditional conflated just war theory, based on posited sources, from the post-WWII IMTs to the post-Cold War Tribunals, assuredly contributed to the predictability of the application of ICL in these contexts. This bolstered the rule of law.

¹²⁹ See section 1.2.3.2. HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (OUP 1968) 181; LL Fuller, *The Morality of Law* (Yale University Press 1969) 162; Finnis (n 33) 272.

2.4 Cosmopolitanism

Cosmopolitanism also traces its heritage back to natural law. Its central tenets appeared in the natural law of the Cynics, Epicureans and Stoics, while it was also expounded by Immanuel Kant. For the Cynics, the person's link to rational humanity was its first form of moral affiliation and this was determinative for the purposes of conduct.¹³⁰ Diogenes, the Cynic, famously held that he was a citizen of the world.¹³¹ The Stoics elaborated on these views and postulated the idea of the human inhabiting two cities, i.e. the city into which we are born and the community of 'human argument and aspiration'.¹³² For the Stoics, it was reason which enabled us to be fellow citizens in a world-state.¹³³ The ethical implications hereof reverberated in Cicero who understood nature to enjoin everyone to further the good of others because of their status as human beings. One law of nature governed everyone and, consequently, forbade violence against others.¹³⁴ Kant continued this theory when he held that everyone has to be treated as an end unto himself rather than as a means to an end.¹³⁵ In sum, the focus of cosmopolitanism is on the fundamental universal values and moral rules that ought to shape the conduct of people everywhere as well as the transnational duties towards all people elsewhere.¹³⁶

The manner of acceptance or rejection of this code is therefore another indicator of philosophical category. Typically, cosmopolitanism accepts ethical norms which derive their existence and legitimacy from a global ethic. This approach focuses on the moral equality of every human being and the 'moral significance of all human beings as part of one ethical community with transboundary responsibilities across the community'.¹³⁷ For cosmopolitanism the 'individual human being is the relevant "unit" of moral worth, this moral worth should be applied to all human beings equally and universally across the globe, regardless of an individual's place of birth or affiliation to other local communities'.¹³⁸ For natural law, these arguments would be inherent, while positivists would base them on posited laws.

¹³⁰ MC Nussbaum, 'Kant and Stoic Cosmopolitanism' (1997) 5 *Journal of Political Philosophy* 5.

¹³¹ D Laertius, 'Diogenes' in RD Hicks (tr), *Diogenes Laertius Lives of Eminent Philosophers* (Heinemann 1931) VI.63 and for a further example in Stoic literature see M Aurelius, 'Meditations' in Irwin Edman (ed), *Marcus Aurelius and his times* (Walter J Black 1945) X.15, VI.44.

¹³² Nussbaum (n 130) 6-7. See also, for the notion of the two cities, Aurelius (n 131) IV.4, VI.44; LA Seneca, 'De Otio' in John Basore (tr), *Seneca Moral Essays* (Heinemann 1965) 4.1.

¹³³ Aurelius (n 131) IV.4.

¹³⁴ MT Cicero, 'De Officiis' in MT Griffin and EM Atkins (eds), *Cicero On Duties* (CUP 2009) III.27.

¹³⁵ Ibid 12.

¹³⁶ Dower (n 44) 10, 26, 52-71; Nussbaum (n 130) 6.

¹³⁷ Dower (n 44) 10, 26, 52-61.

¹³⁸ R Cryer, T Hervey, B Sokhi-Bulley with A Bohm, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 46; Van Blerk (n 28) 9-10.

Coding for trends in the use of natural law and positivism pertaining to cosmopolitanism at the post-WWII IMTs revealed a moderate dataset which will subsequently be split into the arguments of selected counsel, on the one hand, and those from the IMTs, both majority and dissenting opinions where applicable, on the other. In this way comparisons along the inter-curial dynamic should be easier to make while not losing the intra-curial dynamic. This will, in turn, be compared to the moderate dataset emanating from the post-Cold War judiciaries.

Three of the selected prosecutors at Nuremberg, namely Jackson, Shawcross and De Menthon, adopted cosmopolitan arguments. Jackson justified piercing the veil of German sovereignty (which, in effect, the creation of the IMT engendered) on account of the universal concern involved when world peace was attacked by a rogue member.¹³⁹ By justifying the IMT thus, Jackson echoed the cosmopolitanism of Kant that a universal community was established and developed to such a degree that ‘a violation of laws in one part of the world is felt everywhere’.¹⁴⁰ Jackson comparably justified the IMT’s jurisdiction over Germany’s conduct vis-a-vis its own citizens on the grounds that ‘the German mistreatment of Germans is now known to pass in magnitude and savagery any limits of what is tolerable by modern civilization. Other nations, by, silence, would take a consenting part in such crimes’.¹⁴¹ This cosmopolitan argument, in characteristic natural law fashion, implicitly upheld a superior (homogeneous) normative collectivity which could not tolerate the atrocious actions of the Nazis. State sovereignty was subordinated to a larger, global-state and its interests. The Nazi atrocities engaged transboundary duties and concern to bring rogue members back into harmony with the larger collectivity.

Cosmopolitan ideals were ubiquitous in the opening statement of De Menthon. While his argument implied that a ‘real international society’ did not yet exist, it teleologically advocated its necessary establishment. Lasting peace and certain progress for humanity was dependent on ‘the co-operation of all peoples and through the progressive establishment of a real international society’.¹⁴² Such teleology characterised natural law arguments from Aristotle to Aquinas.¹⁴³ For De Menthon common standards of morality were imperative:

‘There can be no well balanced and enduring nation without a common consent in the essential rules of

¹³⁹ Jackson (n 52) 103-104. See comparably Jackson (n 54) 9.

¹⁴⁰ I Kant, *Perpetual Peace A Philosophical Essay* (MC Smith tr, George Allen and Unwin 1917) 142 and Nussbaum (n 130) 1 for the rendition of ‘Recht’ as ‘law’ rather than as ‘right’.

¹⁴¹ Jackson (n 52) 127.

¹⁴² De Menthon (n 58) 369.

¹⁴³ See, for e.g. Aristotle, *The Politics* (TA Sinclair and TJ Saunders trs, Penguin Books 1992) III.vi and Aquinas (n 12) IaIIae 90.2.

social living, without a general standard of behavior before the claims of conscience, without the adherence of all citizens to identical concepts of good and of evil...There can be no society of nations tomorrow without an international morality, without a certain community of spiritual civilization, without an identical hierarchy of values; international law will be called upon to recognize and guarantee the punishment of the gravest violations of the universally accepted moral laws'.¹⁴⁴

On this argument, the progressive realisation of (in typical cosmopolitan vein, homogeneous) international morality was needed for the establishment of a truly international society. De Menthon linked the Nuremberg proceedings to the realisation of this homogeneous society by arguing that the progressive establishment of an international society (based on a common morality) and justice necessitated that those responsible for aggressive war be declared guilty.¹⁴⁵ Although he clearly conceded that the international community was not yet based on cosmopolitan values, his philosophical allegiance to natural law is firmly evidenced by his pursuit of a universal morality, the teleological necessity of establishing this global state and the central importance of justice. The IMT proceedings were, for him, the actualisation of such a cosmopolitan society.

De Menthon further pursued universal morality in terms of an undifferentiated morality reminiscent of Plato.¹⁴⁶ He required a crime, once declared, to be treated as such regardless of whether the parties involved were national entities or individuals. This would evince 'only one standard of morality' applicable to both international and individual relations. Building prescriptions of law, which were recognised by the international community, on this morality would result in the establishment of 'international justice'.¹⁴⁷

While De Menthon clearly focused on the world-state in the preceding arguments, his arguments also revealed the local city, as espoused by the Stoics. The Nazis, for De Menthon, rejected a human brotherhood through their actions.¹⁴⁸ This then was a major crime committed by the Nazis against:

'the conscience which mankind has today evolved from his status as a human being...[which status is inspired] by a conception essential to the nature of man. This conception is defined in two complementary ideas: The dignity of the human being considered in each and every person individually, on the one hand; and on the other hand, the permanence of the human being considered within the whole of humanity. Every juridical organization of the human being in a state of civilization proceeds from this essential, two-fold conception of the individual, in each and in all, the individual and the universal'.¹⁴⁹

¹⁴⁴ De Menthon (n 58) 369.

¹⁴⁵ Ibid 369-370. That the resort to aggression is typically limited by cosmopolitan thinkers, see Nussbaum (n 130) 11.

¹⁴⁶ Plato argued that there existed an undifferentiated justice for the state and man, see Plato, 'The Republic' in FM Cornford (tr), *The Republic of Plato* (OUP 1955) 54.

¹⁴⁷ De Menthon (n 58) 370.

¹⁴⁸ Ibid 375.

¹⁴⁹ Ibid 407-408.

The argument here was cosmopolitan as the recognition of the unity of all individuals, the individual's worth and the dual existence of the individual as individual and as citizen of a greater collective attests. De Menthon conceded that this universality and homogeneity of individual worth might seem based upon Christian doctrine.¹⁵⁰ He noted that it 'is a general conception which imposes itself quite naturally on the spirit' and which existed in many religions apart from Christianity and, in fact, pre-dated Christianity. It was the more secular understanding of Kant which he quoted 'saying that a human being should always be considered as an end and never a means'.¹⁵¹ In sum, De Menthon based the normative mission of the IMT and a major crime of the Nazis on a traditional natural law cosmopolitanism.

At Tokyo, cosmopolitan arguments appeared in the statements of counsel regarding the world-state idea as well as the murder charges. Keenan and Brown 'postulated an objectively existing moral order as the final medium of international social control. A common morality applies...rooted in the spiritual dignity, worth and value of all men, who constitute a universal brotherhood under the fatherhood of God'.¹⁵² The charge of crimes against the peace could thus be justified inter alia on the grounds that international society had to be protected from those groups who threatened to harm it. The theological cosmopolitanism adopted here differed from the secular version proposed by De Menthon at Nuremberg but both resort under natural law.¹⁵³

In order to allay fears that the murder charges were contravening legality,¹⁵⁴ Keenan and Brown inter alia submitted that murder was condemned in every legal system. On this logic, the ubiquitous acceptance of the crime established its international authority as well.¹⁵⁵ This ubiquitous argument also appeared at Nuremberg in relation to crimes under the jurisdiction of the IMT.¹⁵⁶ Takanayagi rejected this submission as it 'would provide for a universal domestic crime, which implied the existence of a (non-existent) World State'.¹⁵⁷ For Takanayagi a world-state had not yet been established. A world-state would have involved the disappearance of international law as it existed and seen the establishment of a truly universal law. The existing system, he submitted, was still

¹⁵⁰ See, for e.g., Augustine, 'The City of God against the Pagans' in RW Dyson (tr), *Augustine The City of God against the Pagans* (CUP 2007) IV.4; XI.1; XIV.4-28.

¹⁵¹ De Menthon (n 58) 408.

¹⁵² Keenan and Brown (n 4) 72.

¹⁵³ Augustine (n 150) IV.4; XI.1; XIV.4-28.

¹⁵⁴ See section 3.4.

¹⁵⁵ Boister and Cryer (n 23) 158.

¹⁵⁶ De Menthon (n 58) 372; C Dubost in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg*, Vol. XIX:537; Shawcross (n 57) 448; RA Rudenko in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg*, Vol. XII:149; RA Rudenko in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg*, Vol. XIX:575.

¹⁵⁷ Boister and Cryer (n 23) 162. See Transcript 42 251-42 252.

extremely Eurocentric in character.¹⁵⁸ That Takanayagi's argument resorted more comfortably under legal positivism is apparent from his ostensible rejection of the universal basis of international law, the acceptance of its contingent nature and its connection with state.

The selected post-WWII counsel produced a small dataset regarding cosmopolitanism. However, with the exception of Takanayagi, all other counsel analysed produced consistent natural law arguments. Some internal variety appeared with Jackson implicitly and De Menthon explicitly Kantian. As with the self-reflexive code, Keenan and Brown explicitly adopted theocentric natural law.

Cosmopolitanism appeared relatively infrequently in the IMT judgments, with coding delivering one instance at Nuremberg, none in the Tokyo majority judgment and a handful of instances in the Tokyo dissents. Inter-curial findings on consistency between post-WWII judgments will accordingly be limited, while intra-curial findings at Tokyo will be more prominent.

Cosmopolitanism arguably appeared in the Nuremberg dictum that 'the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state'.¹⁵⁹ This argument separates the duties placed on the individual from the particular state of which the individual was a citizen and those from a larger collective which transcended the state. However, rather than the Stoic ideal where the cosmopolitan duties emerged from humanity's equal share of reason, the cosmopolitan obligations here were vested on the IMT Charter. International law, rather than reason, constituted the normative system of the world-state on this argument. The IMT envisaged a hierarchical relationship between the two levels of obligation within which the duties towards the larger polity enjoyed preference. This was evidenced when the Tribunal submitted that prosecution would not be barred against individuals who were authorised by their states to violate international law.¹⁶⁰ While there is a cosmopolitan dual state idea involved here, the basis thereof is the posited IMT Charter. The envisaged hierarchical duties were based on the social fact which was the Charter. The converse argument is that this is an example of natural law because of the essentialist interpretation given, favouring a hierarchical understanding between the particular law and the (arguably) universal law. Bearing in mind that the statement was made in the context of disallowing state representatives immunity when they violated international duties,

¹⁵⁸ Transcript 42 206, 42 212, 42 244-42 245. This sentiment overlaps with TWAIL, of course, which is discussed in section 5.3.

¹⁵⁹ Judgment in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. I:223.

¹⁶⁰ *Ibid.*

this argument could be seen, at the very least, as a repudiation of Austinian state sovereignty. This argument is probably towards the middle of the natural law/legal positivism spectrum, with it inclining more towards the latter given the posited basis of the duties involved.

Whereas the majority judgment did not engage with it, cosmopolitanism featured in the separate decisions at Tokyo. Jaranilla used cosmopolitanism to support the existence of individual liability for aggressive war in the absence of precedent. In language echoing Diogenes, he found the perpetrators to be ‘citizens of the world’ who, consequently, ‘are subject to international law whether or not that law has been made part of the law of the land’.¹⁶¹ Apart from the explicit cosmopolitan sentiment of Diogenes, Jaranilla can be construed as utilising the global brotherhood argument to circumvent the (traditional positivist) requirement of domestic codification. Transboundary duties, on this view, override domestic obligations. Bernard likewise adopted cosmopolitanism to indicate that ‘crimes committed against the peoples of a particular nation are also crimes committed against members of the universal community’.¹⁶² This view, which echoed the argument of Jackson above, suggested a homogeneous international community where self and other share the same values, concern and respect. Both Jaranilla and Bernard thus used natural law arguments in conjunction with cosmopolitanism.

Röling relied on cosmopolitanism, in a negative sense, to explain why aggressive war was not criminalised by the international community, i.e. for aggressive war to be recognised as criminal ‘a community of nations must have developed [which had not] which no longer tolerates violence between its members, and in which war in a sense acquires the character of civil war’.¹⁶³ Extracurricularly, Röling argued for the need to work from world unity and interdependence of states rather than national unity and independence.¹⁶⁴ The idea of ‘one world’ had become crucial for survival.¹⁶⁵ For him the establishment of ‘one world’ would be to the benefit of all and a moral necessity.¹⁶⁶ These writings reveal the tension between the is and the ought in the judge’s views on cosmopolitanism, while a world-state did not exist, its establishment was desirable. This argument clearly differs with that presented by De Menthon at Nuremberg, which also recognised that a world-state was not yet established, yet actively argued for its realisation through the IMT

¹⁶¹ Jaranilla Opinion 18. See D Laertius (n 131) VI.3.

¹⁶² Bernard Dissent 2.

¹⁶³ Röling Dissent 25. Röling (n 27) vii; Röling, *The Tokyo Trial and Beyond* (n 74) 97 repeated this sentiment extracurricularly. See also Boister and Cryer (n 23) 132.

¹⁶⁴ Röling (n 27) xiii.

¹⁶⁵ Ibid 6-7.

¹⁶⁶ Ibid 126.

proceedings. Pal likewise rejected the existence of a world-state as ‘the international community has not yet developed into “the world commonwealth” and perhaps no particular group of nations can claim to be the custodian of the “common good”’.¹⁶⁷ Pal conceded that the ‘federation of mankind’ was the ‘ideal of the future and perhaps...already pictured in the minds of our generation’.¹⁶⁸ But this ideal did not yet exist and therefore national sovereignty remained the fundamental basis of the international community.¹⁶⁹ While Pal’s anti-colonialism will reappear in section 5.3, he considered notions like the ‘common good’ as dangerous in a pluralist world. Cosmopolitanism focused on objective and universal values, which presupposed a homogeneous world. Therefore, while both Röling and Pal considered cosmopolitanism a normative objective, both rejected the existence of such a world society in fact. At best this suggests a positivist distinction between expository and censorial jurisprudence.¹⁷⁰

Coding for cosmopolitanism thus resulted in a small, inconsistent dataset at the post-WWII IMTs. The single expression of this code at Nuremberg inclined towards positivism, whereas the Tokyo majority omitted cosmopolitanism altogether. The individual opinions at Tokyo revealed more data on the inter-jurist dynamic, but split down the middle as Jaranilla and Bernard accepted a world-state, on the one hand, while Röling and Pal, dismissed it as not yet extant. Röling and Pal, however, noted the progressive development of a global society as important normative aspiration.¹⁷¹ On the Fullerian rule of law, this constituted inconsistency in philosophy on the inter-jurist level. The small dataset precluded independent findings on the other rule of law principles.

Coding for consistency in philosophy regarding cosmopolitanism at the post-Cold War Tribunals produced a moderate dataset, essentially from the ICTY. The ICTR and ICC revealed negligible data. Consequently, intra-curial findings are limited to the ICTY. This also reduces the comparisons for patterns between the post-WWII and post-Cold War institutions to counsel, Tokyo and ICTY.

In the majority of coded post-Cold War cases, cosmopolitanism appeared in conjunction with the argument that the perpetrated crimes not only threatened the individual, but all of humanity. In *Tadić*, the ICTY found that the nature of the alleged offences, if proven, ‘do not affect the interests of one State alone but shock the conscience of mankind’.¹⁷² The AC argued that these ‘norms, due to

¹⁶⁷ Quoted in Boister and Cryer (n 23) 286. See Pal Dissent 151 and the quotes in Kopelman (n 34) 408.

¹⁶⁸ Pal Dissent 125, 146-147; Kopelman (n 34) 415; Nandy (n 34) 62.

¹⁶⁹ Ibid.

¹⁷⁰ Austin (n 17) 278; Bentham (n 17) 98-99.

¹⁷¹ For agreement with Röling and Pal by a post-Cold War role-player, see Cassese (n 36) 164.

¹⁷² *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October

their highly ethical and moral content, have a universal character, not a territorial one..’¹⁷³ This echoed the Kantian sentiment that ‘a violation of laws in one part of the world is felt everywhere’.¹⁷⁴ In *Erdemović*, the TC similarly argued that ‘crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated’.¹⁷⁵ These sentiments were approved by the ICTR in *Kambanda*.¹⁷⁶ On appeal in *Erdemović*, McDonald and Vohrah approvingly quoted Kant on point.¹⁷⁷ Extra-curially, McDonald emphasised respect for the equality of every human being as well as the consequent need for ‘the universal application of justice and of the law’.¹⁷⁸ In *Krštić*, the AC stressed the transboundary effect of genocide, impacting all of humanity by destroying a part of the human heritage.¹⁷⁹ In the *Plavšić* sentencing judgment, the TC took account of the fact that ‘the extent and gravity of such inhumane acts led humanity itself to come under attack and be negated’.¹⁸⁰ At the ICTR, apart from *Kambanda* mentioned above, *Ntakirutimana* argued that genocide and crimes against humanity ‘threaten not only the foundations of the society in which they are perpetrated but also those of the international community as a whole’.¹⁸¹ The consistent dialectic between the individual and the whole of humanity premised on fundamental equality indeed characterised cosmopolitanism from its Stoic inception. In traditional natural law vein the shared interest of mankind overrode sovereignty, the world-state’s concerns surpassed those of the particular state.

Cosmopolitanism also informed Shahabuddeen’s dictum in the *Tadić* AC that the ‘mitigation of war must depend on the parties to it feeling that they belong to a larger whole than their respective tribes or states, a whole in which the enemy too is comprised, so that the duties arising out of that larger citizenship are owed even to him’.¹⁸² The world-state and its concomitant duties which transcend the particular state is evident here. This dictum recalls the cosmopolitan ethic set out by Hierocles in his concentric circle metaphor. In terms of this metaphor, love is stronger in relation to the objects nearest to oneself and becomes gradually weaker the further away an object is. The layers of objects

1995) para 57.

¹⁷³ Ibid quoting 13 March 1950, in *Rivista Penale* 753, 757 (Sup. Mil. Trib., Italy 1950; unofficial translation).

¹⁷⁴ Kant (n 140) 142 and Nussbaum (n 130) 1 for the rendition of ‘Recht’ as ‘law’ rather than as ‘right’.

¹⁷⁵ *Prosecutor v Erdemović* (Sentencing Judgment) IT-96-22-T (29 November 1996) para 28.

¹⁷⁶ *Prosecutor v Kambanda* (Judgment and Sentence) ICTR-97-23-S (4 September 1998) para 15.

¹⁷⁷ *Prosecutor v Erdemović* (Judgment) IT-96-22-A (7 October 1997) Joint Opinion of Judges McDonald and Vohrah para 21.

¹⁷⁸ GK McDonald, ‘The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Laws of War’ (1998) 156 *Military Law Review* 33.

¹⁷⁹ *Prosecutor v Krštić* (Judgment) IT-98-33-A (19 April 2004) para 36.

¹⁸⁰ *Prosecutor v Plavšić* (Sentencing Judgment) IT-00-39&40/1-S (27 February 2003) paras 122, 126.

¹⁸¹ *Prosecutor v Ntakirutimana and Ntakirutimana* (Judgment) ICTR-96-10-T & 96-17-T (21 February 2003) para 771.

¹⁸² *Prosecutor v Tadić* (Judgment) IT-94-1-A (15 July 1999) at 150. The sentiment is Westlake’s expression of Thucydides. For this sentiment in his extra-curial writings, see M Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal A Judge’s Recollection* (OUP 2012) 5.

proceeds from the self, to the immediate family, to the extended family, neighbours, fellow city-dwellers, fellow countrymen and, finally, humanity as a whole. It is the ethical task of the person to bring the level of love felt in relation to those objects furthest away to the same level of intensity as that felt in relation to the closest objects.¹⁸³

Shahabudeen's dictum further recalled the universal brotherhood idea wherein all people are part of the same family even those opposing each other in war. This evidenced the (Stoic) cosmopolitan realisation that politics divided people and that a 'process of emphatic understanding' was necessary to respect the humanity of our enemies.¹⁸⁴ On this latter point Marcus Aurelius similarly argued for the necessity of interpreting another person's conduct with the understanding that comes from entering into their minds.¹⁸⁵ The whole point of Shahabuddeen's dictum, which further tied it with Kant's categorical imperative, was to see enemies as fellow human beings constituting ends unto themselves and not being merely means to an end.¹⁸⁶ By prefacing his separate opinion with this traditional natural law cosmopolitan argument, Shahabuddeen emphasised its importance.

Cosmopolitanism finally surfaced when the *Kupreškić* TC rejected the argument that actions which were legal in terms of domestic law should not be prosecuted before an international forum because it 'does not detract from the fact that these laws were contrary to international legal standards'.¹⁸⁷ On this hierarchical understanding, the international superseded the domestic or, in Stoic parlance, the world-state overruled the city of birth. The acceptance of a higher, normative standard is clear. Arguably this argument inclined towards positivism again, as it was international law which overrode national law. This dictum echoed the sentiment expressed in the Nuremberg IMT.

Although the data was limited, coding for cosmopolitanism at the post-Cold War Tribunals thus led to several consistent instances of natural law justifications. Cosmopolitanism was invoked to attribute the nature of ICL crimes to the fact that they also threatened the global collective and to show that the higher law of ICL overrode state sovereignty.

Coding for cosmopolitanism over all the role-players resulted in a moderate dataset. The

¹⁸³ Hierocles, 'On Appropriate Acts' in I Ramelli and D Konstan (trs), *Hierocles the Stoic: Elements of Ethics, Fragments, and Excerpts* (Society of Biblical Literature 2009) 91-93. For an older version of this metaphor, see Cicero (n 134) I.50-59 and Nussbaum (n 130) 9.

¹⁸⁴ Nussbaum (n 130) 9-10.

¹⁸⁵ Aurelius (n 131) VI.53, XI.18.

¹⁸⁶ See also how this is explored by Nussbaum (n 130) 10-11 in relation to Marcus Aurelius.

¹⁸⁷ *Prosecutor v Kupreškić* (Judgment) IT-95-16-T (14 January 2000) para 614.

prosecutors at both IMTs consistently adhered to natural law while the defence opposed the natural law world-state argument. The Nuremberg IMT produced only one arguable instance of positivist justification in relation to cosmopolitanism while the Tokyo majority refrained from invoking cosmopolitanism at all. In the Tokyo dissents, the judges were split with Bernard and Jaranilla adopting natural law while Röling and Pal opposed the existence of a world-state. At the post-Cold War Tribunals only a few instances appeared, but these overwhelmingly favoured natural law. The trend across all role-players pertaining to cosmopolitan arguments at the ICL judicial bodies thus favoured natural law. Since findings on cosmopolitanism were not strictly necessary to fulfil their mandates, the ICL role-players' reliance thereon revealed the desire for additional moral authority to be afforded to the ICL regime. It also seemed that there was a correlation between the judges' willingness to accept cosmopolitanism and the degree of development of ICL, i.e. the more ICL matured, the more the world-state idea attained a real, non-utopian meaning. The perceived unity was strengthened as ICL developed because at least some principles were (or were perceived to be) accepted by all.

Measured against Fuller's rule of law, the reliance on philosophy in connection with cosmopolitanism was published and public. The retrospective desideratum possibly explained the use of philosophy here as natural law cosmopolitanism was used to justify the new regime. Those opposing cosmopolitanism utilised its absence to explain why certain crimes did not yet exist in international life. A functional use of philosophy suggested itself. Although not uniform, the reliance on natural law in conjunction with cosmopolitanism was essentially stable and rarely contradicted from the post-WWII IMTs to the post-Cold War judiciaries. The other desiderata did not come into play. Overall consistent reliance was placed on natural law which meant, on Fullerian rule of law, the application of law was predictable and foreseeable.

2.5 Policy-oriented jurisprudence

Policy-oriented jurisprudence's affinity to natural law and adversity to positivism will be briefly elucidated to explain its inclusion in this chapter. Policy-oriented jurisprudence argues that international law is a complex process of decision-making aimed at securing the common interest of a community.¹⁸⁸ In sum, 'legality flows not from the rule itself but from the policy considerations leading to the selection of the rule and its application to the particular case'.¹⁸⁹ If choice is so central

¹⁸⁸ R Higgins, *Problems & Process International Law and How We Use It* (OUP 1995) 8; S Wiessner and A Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity' (1999) 93 *American Journal of International Law* 319.

¹⁸⁹ M Shahabuddeen, 'Policy-Oriented Law in the International Criminal Tribunal for the Former Yugoslavia' in LC Vohrah, F Pocar, Y Featherstone *et al* (eds), *Man's Inhumanity to Man Essays on International Law in Honour of*

and choice can inevitably justify reliance on ‘humanitarian, moral and social purposes of law’¹⁹⁰ this approach has much affinity with natural law.¹⁹¹ It also adds a teleological element which is more easily accommodated under natural law (especially if not directed thereto by posited law but rather simply the choice reliant on the purposes of law noted above). Consequently, law is a means to an end as opposed to an end in itself. The teleological aim of policy-oriented jurisprudence is to establish and maintain minimum public order. This public order requires a commitment to human dignity ‘in which access by all to all the values humans desire is maximised’.¹⁹² This universalism again suggests natural law. The achievement of common values are envisaged to the extent of presupposing a united international community.¹⁹³ Viewing policy-oriented jurisprudence as part of natural law has support in literature too.¹⁹⁴

In contrast, positivism has been distinguished from the policy-oriented approach because it relies on policy considerations to interpret and apply the authorised sources of law, on the one hand, while the policy-oriented approach relies on policy as ‘the ultimate determinant of legality and in particular of what is the norm to be applied in any given situation’, on the other.¹⁹⁵ For policy-oriented jurisprudence, reliance on positive laws ‘carries with it even greater chance of obfuscation in that no hint of the necessity of choice among rules or policies need be revealed’.¹⁹⁶ Essentially the policy-oriented approach suggests that discretion is always involved. In contrast, Hartian ILP concedes only a penumbra of doubt where discretion is exceptional and ELP would hold arguments based on discretion to constitute law-making.¹⁹⁷ Positivism is criticised by policy-oriented

Antonio Cassese (Kluwer Law International 2003) 894; Shahabuddeen (n 182) 82-83. For the view that law is a process, see JN Moore, ‘Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell’ (1968) 54 *Virginia Law Review* 667; Higgins (n 188) 7-8.

¹⁹⁰ Higgins (n 188) 5.

¹⁹¹ See comparably, M Koskeniemi, ‘The Politics of International Law’ (1990) 1 *European Journal of International Law* 11; A Orakhelashvili, ‘International Law, International Politics and Ideology’ in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 338-339.

¹⁹² Wiessner and Willard (n 188) 324-326, 334. See also N Duxbury, *Patterns of American Jurisprudence* (OUP 1997) 178, 195-196; WM Reisman, S Wiessner and AR Willard, ‘The New Haven School: A Brief Introduction’ (2007) 32 *Yale Law School Legal Scholarship Repository* 576.

¹⁹³ Higgins (n 188) 1. See also Wiessner and Willard (n 188) 318. For criticism in this regard, see Duxbury (n 192) 183, 196-198.

¹⁹⁴ G Gilmore, *The Ages of American Law* (Yale University Press 1977) 90; Koskeniemi (n 191) 11; Duxbury (n 192) 176. Higgins (n 188) 10 explicitly sees this as a movement away from positivism.

¹⁹⁵ Shahabuddeen (n 189) 892-893; Shahabuddeen (n 182) 82.

¹⁹⁶ Moore (n 189) 679.

¹⁹⁷ On ILP, see Hart (n 9) 130; Van Blerk (n 28) 43; R Cotterrell, *The Politics of Jurisprudence* (2nd ed, OUP 2003) 99. On ELP, see J Raz, ‘Postema on Law’s Autonomy and Public Practical Reasons: A Critical Comment’ (1998) 4 *Legal Theory* 5; B Simma and A Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’ (1999) 93 *American Journal of International Law* 304-305; J Finnis, ‘Natural Law: The Classical Tradition’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP 2002) 8-11; K Himma, ‘Inclusive Legal Positivism’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP 2002) 140; BH Bix, *Jurisprudence: Theory and Context* (7th edn, Sweet & Maxwell 2015) 50.

jurisprudence as ‘fixated on the past’ and insensitive to ‘changing and changed contexts’.¹⁹⁸ For policy-oriented jurisprudence political and social contexts must be considered.¹⁹⁹ Recourse can be taken to factors not necessarily based on the social thesis.²⁰⁰ The policy-oriented approach explicitly rejects a strong understanding of the separability thesis. Policy-oriented approach has been criticised by positivism as conflating law, political science and politics. This results in a confluence of norms and values which ideologizes international law.²⁰¹

Coding for philosophical trends pertaining to the policy-oriented approach in the selected ICL cases resulted in a very small dataset. It was clearly not a popular source of justification for judicial arguments. In fact, the only instances where policy-oriented jurisprudence was utilised were found in the ICTY. This means that no inter-curial comparison for consistency is possible regarding this code. Also, since the coding only revealed three instances of policy-oriented jurisprudence, an in-depth intra-curial analysis is also precluded. Yet its importance as a code for this study is assured as it revealed philosophical beliefs on the inter-and intra-jurist levels. Its inclusion in ICL jurisprudence makes its future invocation in ICL literature and judgments possible.²⁰² Finally, this is the first code which foreshadows the two liberalisms inherent to ICL, viz, criminal law liberalism and human rights (HR) liberalism.²⁰³ Although detailed in section 6.3, the opposition of accused-centric criminal law liberalism to victim-centred HR liberalism already appears under the policy-oriented approach.

Turning to the seminal ICTY case of the policy-oriented approach, *Erdemović*, the AC had to determine whether duress existed as an exculpatory ground in ICL to crimes that involved killing innocents or whether it merely served as a factor to be taken into account during mitigation of punishment.²⁰⁴ While examining the applicable case law, it became apparent that the position was unclear.²⁰⁵ McDonald and Vohrah (who formed a plurality with Li) relied on the policy-oriented approach to find that ‘...the law should not be the product or slave of logic or intellectual hair-

¹⁹⁸ Higgins (n 188) 3; Wiessner and Willard (n 188) 320.

¹⁹⁹ Higgins (n 188) 9.

²⁰⁰ Ibid 10.

²⁰¹ Simma and Paulus (n 197) 305.

²⁰² See, for e.g., M Swart, ‘Judicial Lawmaking at the ad hoc Tribunals: The Creative Use of the Sources of International Law and “Adventurous Interpretation”’ (2010) 70 *ZaōRV* 474.

²⁰³ D Robinson, ‘The Two Liberalisms of International Criminal Law’ in Carsten Stahn and Larissa van den Herik (eds) *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010) 129-135.

²⁰⁴ *Prosecutor v Erdemović* (Judgment) IT-96-22-A (7 October 1997) para 16 and, *ibid*, the Joint Opinion of Judges McDonald and Vohrah para 32. See also A Fichtelberg, ‘Liberal Values in International Criminal Law A Critique of *Erdemović*’ (2008) 6 *Journal of International Criminal Justice* 5.

²⁰⁵ *Prosecutor v Erdemović* (Judgment) IT-96-22-A (7 October 1997) Joint Opinion of Judges McDonald and Vohrah paras 55, 67, 72.

splitting, but must serve broader normative purposes in light of its social, political and economical role'.²⁰⁶ The purpose of international law, on this view was 'the protection of the weak and vulnerable in such a situation where their lives and security are endangered'.²⁰⁷ This was bolstered by the further consequentialist concern 'that...the principles of law to which we give credence have the appropriate normative effect upon soldiers [and] commanders'.²⁰⁸ Extra-curially, McDonald added the potential danger for society which the recognition of duress as defence might have engendered and that justice could be better served by means other than allowing duress as a complete defence.²⁰⁹ For the judges, teleologically rejecting duress enabled compliance with their mandated obligation under the ICTY Statute – which entailed the protection of humankind.²¹⁰ This, moreover, revealed a preference for victim-centric HR liberalism.

Analysing this argument for philosophical category potentially engages natural law and ILP. ILP, through a rule of recognition (RoR) allows validity to be generated or bounded by morality.²¹¹ In *Erdemović* the legal validity of policy considerations was not claimed to be generated by morality, i.e. satisfying some test evaluating its content. Neither was legal validity made dependent on the violation of a moral standard. Of course, policy considerations cannot claim a direct legal pedigree either (which also places it beyond posited law for ELP). On the RoR argument under ILP, the reliance on policy could not constitute positivism. Much more plausible, for ILP, is to understand *Erdemović* as a hard case where discretion was exercised in the common interest. It is possible to see the policy-oriented approach as aimed at the common good (in accordance with Hart²¹²). Where ILP (or ELP) uses discretion in such hard cases, the argument would move beyond posited law. Nowhere was this conceded in *Erdemović*. The arguments about what a judicial body ought to do normatively were used to justify the adoption of the policy arguments. Since the ventured argument purported to exist within the law, this link of law and what are evidently moral considerations constituted natural law.

The better interpretation, then, which complies with Ockham's razor,²¹³ is that this decision was

²⁰⁶ Ibid para 75. The judges even quoted, ibid para 78, from the policy-oriented views of Rosalyn Higgins.

²⁰⁷ Ibid para 75. Repeated extra-curially by McDonald (n 178) 48.

²⁰⁸ Ibid para 75. See also McDonald (n 178) 48.

²⁰⁹ McDonald (n 178) 48.

²¹⁰ *Prosecutor v Erdemović* (Judgment) IT-96-22-A (7 October 1997) Joint Opinion of Judges McDonald and Vohrah para 88.

²¹¹ NJ McBride and S Steel, *Great Debates in Jurisprudence* (Palgrave 2014) 53.

²¹² Hart (n 9) 200; HLA Hart, 'American Jurisprudence through English Eyes: The Nightmare and the Noble Dream' (1977) 11 *Georgia Law Review* 986; R Wacks, *Understanding Jurisprudence An Introduction to Legal Theory* (3rd edn, OUP 2012) 120.

²¹³ Romano (n 10) 709 fn 1.

based on a natural law ‘it stands to reason’ argument premised on the appropriate normative designs of law. Evidently aware that their recourse to policy would be controversial, McDonald and Vohrah pre-emptively argued that it ‘would be naive to believe that international law operates and develops wholly divorced from considerations of social and economic policy’.²¹⁴ Furthermore, the judges submitted that logically there is no reason why criminal law and criminal policy at international level should be any less intertwined than at municipal level.²¹⁵ Indeed, the reliance on policy was inevitable due to the unavoidable ‘relationship between law and politics’.²¹⁶ Their follow-up argument denying duress ‘in accordance with the spirit’ of IHL confirmed the non-positivist source-based thrust of the approach adopted.²¹⁷ Academic literature, furthermore, also argued that the judges adopted a ‘...decidedly anti-positivist, “policy” approach, which, given that it attempts to derive substantive rules from abstract principle, is more in the deductive/naturalist line of thinking than the inductive, positivist school’.²¹⁸

The position of Cassese in *Erdemović* shows the contrast of the plurality with a positivist approach. Cassese reverted to positivism to criticise this policy approach as ‘...extraneous to the task of our Tribunal’ as well as in conflict with the [legality] principle.²¹⁹ Cassese concluded, and Shahabuddeen agreed extra-curially,²²⁰ that an international court ‘must apply *lex lata*, that is to say, the existing rules of international law as they are created through the sources of the international legal system. If it has instead recourse to policy considerations or moral principles, it acts *ultra vires*’.²²¹

For Cassese, barring a specific rule prohibiting the defence of duress in cases of murder, the general rule (that duress can be plead) must apply.²²² Fichtelberg ascribed a Dworkinian position to Cassese here which focused on principle albeit clothed in a broader positivist tone.²²³ However, even

²¹⁴ *Prosecutor v Erdemović* (Judgment) IT-96-22-A (7 October 1997) Joint Opinion of Judges McDonald and Vohrah para 78.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ *Ibid* para 80. For a critique of the policy-oriented approach in this case from a Dworkinian perspective, see Fichtelberg (n 204) 14.

²¹⁸ *Ibid* para 75. See also Cryer (n 47) 247.

²¹⁹ *Prosecutor v Erdemović* (Judgment) IT-96-22-A (7 October 1997) Dissenting Opinion of President Cassese para 11, 49. See also R Cryer, ‘One Appeal, Two Philosophies, Four Opinions and a Remittal: The Erdemović Case at the ICTY Appeals Chamber’ (1997) 2 *JACL* 193, 201-205.

²²⁰ Shahabuddeen (n 189) 890-891.

²²¹ *Prosecutor v Erdemović* (Judgment) IT-96-22-A (7 October 1997) Dissenting Opinion of President Cassese para 49.

²²² R Cryer, ‘International Criminal Tribunals and the Sources of International Law Antonio Cassese’s Contribution to the Canon’ (2012) 10 *Journal of International Criminal Justice* 1051. Cassese’s approach was adopted in Rome Statute art. 31(1)(d). See also Cryer (n 47) 249.

²²³ Fichtelberg (n 204) 15-18.

Cassese's approach was arguably not devoid of policy as it 'takes account of social expectations more than the rule suggested by the Prosecution and that propounded by the majority. Law is based on what society can reasonably expect of its members. It should not set intractable standards of behaviour'.²²⁴ This approach, ostensibly, showed sympathy with the accused's position, conforming to criminal law liberalism.

The difference between McDonald and Cassese on the inter-jurist dynamic is evident. McDonald adopted a natural law argument (the policy-oriented approach) which rendered the protection of those vulnerable in armed conflicts superior to the rights of the accused. Cassese considered people *qua* human beings worthy of protection (whether they are accused or victims) and this informed his view of the judicial function.²²⁵ Arguably, the difference between McDonald and Cassese can be found in several philosophical binaries, including the rights of the collective versus the individual, policy versus principle (which recalls Dworkin's argument to this effect²²⁶). These binaries, focused on utilitarianism (maximising the victims) or deontology (imposing punishment for wrong done), were also reflective of the two liberalisms which pervade ICL, viz, HR liberalism and criminal law liberalism.²²⁷ While it is revisited in section 6.3, it appeared that McDonald favoured the cause of the victims whereas Cassese tended towards the rights of the accused.

The final instance of the policy-oriented approach occurred much later.²²⁸ The *Strugar* TC investigated whether the prohibition of attacks on civilian objects also applied to non-international armed conflicts (NIACs).²²⁹ After the resolution of the jurisdictional question as to whether these provisions were enforceable by the ICTY, the TC provided little support for the extrapolation of these rules from international armed conflicts (IACs) to NIACs. However, in a footnote, the TC quoted from the *fons et origo* of the policy-oriented approach, McDougal and Wiesner:

“The physical characteristics of exercises of violence and their effects upon people and resources are of course the same, assuming violence of comparable proportions, in an internal as in an international conflict. It would thus seem fairly obvious that (...) a fundamental policy of minimum unnecessary destruction is

²²⁴ *Prosecutor v Erdemović* (Judgment) IT-96-22-A (7 October 1997) Dissenting Opinion of President Cassese para 47. See also Cryer (n 219) 193, 204.

²²⁵ Cryer (n 222) 1048. See also WA Schabas, 'Interpreting the Statutes of the Ad Hoc Tribunals' in LC Vohrah, F Pocar, Y Featherstone et al (eds), *Man's Inhumanity to Man Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 887-888.

²²⁶ R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 82.

²²⁷ Robinson (n 203) 129-135. This also confirms that legal practitioners have a choice of style to achieve a particular aim, see M Koskeniemi, 'Letter to the Editors of the Symposium' (1999) 93 *American Journal of International Law* 356.

²²⁸ *Prosecutor v Jelisić* (Judgment) IT-95-10-A (5 July 2001) Partial Dissenting Opinion of Judge Wald para 14 rejected a decision on 'policy grounds', but this echoed Dworkin (n 226) rather than the policy-oriented approach.

²²⁹ *Prosecutor v Strugar* (Judgment) IT-01-42-T (31 January 2005) paras 224-228.

equally vital and applicable in one as in the other type of conflict”²³⁰.

Although this invocation of the policy-oriented approach was relegated to a footnote and thus not so prominent as in *Erdemović*, relying on this approach in justification of a position again revealed natural law. The argument stood to reason (or policy) rather than posited authority. Such a decision was not made on legal grounds or through RoR direction thereto.

Coding for consistency in philosophy under the policy-oriented approach was precluded by a very small dataset, which was limited to the ICTY. However, congruent with part (ii) of SCA, the identification of philosophy is itself a finding on the current thesis. That the policy-oriented approach, when invoked, was based on natural law was shown. It included normative, teleological concerns – all dealing with the *lex ferenda* in excess of *lex lata*. Its use in *Erdemović* seemed aimed at ensuring the vindication of victims and the prosecution of the accused (i.e. a functional use favouring HR liberalism) although this was opposed on behalf of the accused’s rights (i.e. criminal law liberalism). This matter will be revisited in section 6.3 in conjunction with liberalism. Its consistent absence from later jurisprudence (apart from one footnote reference) indicated that it did not gain a foothold in Tribunal jurisprudence. Possibly its use could be seen as an isolated instance – an aberration in the chain novel which did not serve the ambitions of the judges, to use Dworkin’s metaphor.²³¹ However, its existence in ICTY jurisprudence could result in subsequent ICL judicial bodies invoking it despite its controversial nature.

The small dataset precluded further measurement against the Fullerian rule of law for this study. In principle, however, extensive use of the policy-oriented approach might have undermined the rule of law directly as it requires decisions made on policy grounds, which can be seen as the usurpation of the lawmaker’s function.²³²

2.6 Conclusion on historical philosophical codes

Coding for overtly philosophical codes within the broader natural law/positivism framework at the selected ICL judicial bodies revealed four, namely self-reflexive statements, just war theory, cosmopolitanism and the policy-oriented approach. While just war theory resulted in a large dataset, cosmopolitanism produced a moderate dataset and self-reflexive statements as well as the policy-

²³⁰ Ibid para 228 footnote 777 quoting MS McDougal and S Wiessner, *The International Law of War; Transnational coercion and world public order* (Martinus Nijhoff Publishers 1994) 535. See similarly, Wiessner and Willard (n 188) 318.

²³¹ R Dworkin, *Law’s Empire* (Harvard University Press 1986) 228-232.

²³² Van Blerk (n 28) 88.

oriented approach resulted in small datasets. In respect of the judiciaries, it was especially the Tokyo IMT and the ICTY which produced large datasets on the codes.

Specific inter-and intra-curial trends regarding consistency were identified across the selected role-players. The selected post-WWII prosecutors tended towards natural law (albeit sometimes Grotian) while defence arguments were consistently positivist and anti-natural law. These positions seemed congruent with their respective functions of prosecution and defence. The post-WWII IMTs produced consistent datasets both on self-reflexive statements (which was Grotian natural law) and on just war (positivist), but an inconsistent dataset appeared on cosmopolitanism. The Nuremberg judicial component was absent in all but one instance (cosmopolitanism). At the post-Cold War judiciaries, the ICTY delivered large datasets on just war and cosmopolitanism which revealed consistent positivism and natural law to the respective codes. The policy-oriented approach was negligible and, consequently, not testable for consistency. Self-reflexive statements were limited, but consistently based on natural law. Neither the ICTR nor the ICC produced noteworthy data under these codes.

The overall inter-and intra-curial trends can now be identified for the individual codes under historical philosophical justifications. Self-reflexive statements, on the judicial level, tended towards a Grotian approach favouring natural law. It was, however, a small dataset only and post-WWII dominant. The limited data suggests that it was exceptional to explicitly state one's philosophical allegiance, to be done when it differed from the dominant thinking. Its subsequent decline in appearance could therefore suggest acceptance of the dominant (positivist) approach. Due to lack of data this is speculative, but logic suggests it is compelling. Either way, its limited use diminishes its threat for rule of law considerations. Just war was not directly addressed by the post-WWII IMTs in their majority decisions, however, the individual pronouncements thereon were consistently positivist. The ICTY showed consistent opposition to the *ex iniuria non ius oritur* and *tu quoque* maxims traditionally associated with natural law. The ICTY also consistently supported the separation of the *ius ad bellum* and the *ius in bello* based on posited sources. Through this juxtaposition of its rejection of traditional natural law conflation and reliance on posited sources, the ICTY data is best construed as positivist. Cosmopolitanism revealed mixed arguments post-WWII with Nuremberg and Tokyo (the latter especially in the dissents) divided down the middle. In the post-Cold War period, however, the data revealed consistency bordering on uniformity in favour of natural law. Cosmopolitanism was often used to add rhetorical legitimacy to positions. Finally, support for the policy-oriented approach was inconsistent. This must be offset against its limited use

and appearance at the ICTY only. The understanding afforded to policy seemed functional depending on the preference among the two competing liberalisms involved in ICL.²³³

On first impression, the use of philosophy identified in this chapter was inconsistent, contradictory and unstable (of course, all of which are Fullerian requirements for rule of law) as Grotian natural law (under the self-reflexive code) vied with positivism (under just war) which vied with natural law (under cosmopolitanism) again and ended with a mixed argument (i.e. the policy-oriented approach). However, it is suggested that the SCA undertaken in this study untangles the data and shows the importance of analysing the philosophies relative to the codes which reveal them. In sum, the codes ensure the greatest possible degree of systematisation. This also contextualises the suggestions regarding the impact these philosophies have made on the rule of law.

Coding systematised the philosophical justifications and revealed overall consistency in three, namely self-reflexive statements, just war theory, cosmopolitanism, and inconsistency in one negligibly small code – the policy-oriented approach. Since they appear in different contexts and pursue different objectives, it is difficult to compare these arguments inter se. Yet predictability and foreseeability are ensured relative to each code which in turn confirms the rule of law. Only policy-oriented jurisprudence can ostensibly undermine these tests (failing the non-contradiction test of Fuller), but its small dataset offsets the possible threat this might hold for the overall rule of law in ICL judiciaries. It is probably better seen as an aberration in the chain novel of ICL jurisprudence.²³⁴ A final pronouncement on the compliance of natural law and legal positivism with the rule of law must await the end of the next chapter, which concludes the discussion on these theories.

²³³ The liberalisms are discussed in section 6.3.

²³⁴ Dworkin (n 231) 228-232.

Chapter 3

Philosophical justifications in material ICL: Sources, crimes, fundamentals of responsibility and interpretation

3.1 Introduction

Philosophical justifications also appeared in connection with substantive international criminal law (ICL), namely sources doctrine, substantive crimes, legality as principle of individual criminal responsibility and interpretation techniques. These codes engaged with the ‘nature of laws’ and the ‘relationship of law to...morality’ in relation to the material jurisdiction of ICL judicial bodies.¹ Like chapter 2, this chapter must be understood cognisant of the part A preface on natural law and legal positivism. The question into consistency of philosophical justification, as is relevant on Fuller’s rule of law standard, remains the main organising principle of the data whereafter the rest of Fuller’s principles will be tested if engaged. While this chapter’s codes are conceptually distinct, in practice, they were not hermetically sealed. Some overlap between them was unavoidable.

As was the case with the policy-oriented approach,² the tension in ICL between its two constituent liberalisms, viz, accused-centric criminal law liberalism and victim-centric human rights (HR) liberalism were relevant for the legality and interpretation codes. This tension will be noted in this chapter before being detailed in section 6.3.

3.2 ICL sources

Questions about which sources are legally relevant and their theoretical underpinnings are by definition philosophical.³ Natural law and legal positivism could both be construed as directed to such ontological questions about what the law is.⁴ This section considers the patterned use of natural law and positivism in the selected ICL role-players’ pronouncements on ICL sources, including their founding instruments, treaties, customary international law (CIL), general principles of law as well as other sources of law. Not every invocation of these sources was philosophically relevant. This section omits bare references to sources as authority without any accompanying theoretical

¹ Compare the definition of MDA Freeman, *Lloyd’s Introduction to Jurisprudence* (9th edn, Thomson Sweet Maxwell 2014) 2 discussed in section 0.2. See, similarly, R Wacks, *Understanding Jurisprudence An Introduction to Legal Theory* (3rd edn, OUP 2012) 1.

² See section 2.5.

³ Wacks (n 1) 1.

⁴ BH Bix, *Jurisprudence: Theory and Context* (7th edn, Sweet & Maxwell 2015) 79.

elucidation.⁵ Coding for sources as per part (ii) of systematic content analysis (SCA) required evidence of theorisation regarding the foundation, justification and application of the sources used. The resultant dataset was modest with role-players steering clear from philosophical pronouncements in relation to sources generally. The coding is presented here per role-player rather than per type of source.

The overwhelming majority of data coded at the post-WWII IMTs under sources revolved around the founding instruments. Thus, Jackson invoked the posited framework of the Nuremberg Charter to establish the legitimacy of the IMT. He emphasised the almost universal consensual basis of the Charter.⁶ Consent is of course congruous with the creation of law according to human agency under positivism. While natural law might accept laws based on consent, that is not the final source of law (as it could be for positivism) since the overarching principles of natural law emanate from non-human elements.⁷ Jackson had something different in mind, however, as the Charter was also the embodiment of universal wisdom, justice and will of an overwhelming majority of civilised people.⁸ While such external normative systems suggested natural law, it was presented as only part of the basis of the Charter alongside consent. The better reading appears to be the mixed, Grotian argument with positivism and natural law both providing the underpinnings of the Charter.⁹ In contrast, Jackson later used common sense substantively, in typical natural law vein,¹⁰ to justify the extension of law's full force from the domestic to the international sphere.¹¹

At Tokyo, Keenan and Brown were slightly more eclectic in their philosophical justifications regarding ICL sources. They argued that the vitality of the founding instruments flowed not from mutual consent but from the will of the victor, which was only constrained by the 'moral and juridical restrictions of the natural law'.¹² Thus, it was the law of nations and natural law which limited the IMT. Indeed, these trials rendered the international moral order the cause rather than the

⁵ LV Prott, *The Latent Power of Culture and the International Judge* (Professional Books 1979) 177.

⁶ R Jackson in the *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. II:143.

⁷ W Morrison, *Jurisprudence* (Cavendish 1997) 4-5, 15-178; A van Blerk, *Jurisprudence an Introduction* (Butterworths Lexisnexis 1998) 6; BH Bix, 'On the Dividing Line Between Natural Law Theory and Legal Positivism' (2000) 75 *Notre Dame Law Review* 1614-1615; R Cotterrell, *The Politics of Jurisprudence* (2nd edn, OUP 2003) 115; D Meyerson, *Understanding Jurisprudence* (Routledge 2007) 33-36; R Cryer, T Hervey, B Sokhi-Bulley with A Bohm, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 35, 37; Bix (n 4) 69.

⁸ Jackson (n 6) 143.

⁹ H Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 *The British Year Book of International Law* 21.

¹⁰ Bix (n 4) 145.

¹¹ Jackson (n 6) 99.

¹² JB Keenan and BF Brown, *Crimes against International Law* (Public Affairs Press 1950) 26, 31.

effect of positive law. Morality and law were intertwined and any attempt to isolate them was ‘a symptom of juridical schizophrenia caused by the separation of the brain of the lawyer from that of the human being’.¹³ While these arguments suggested a preference for natural law, they constituted a mixed Grotian argument. Like Jackson, Keenan and Brown also invoked reason as substantive source in law, adding that it would have been illogical if crimes were prevented when they occurred on the domestic level but not on the international one.¹⁴

The, ostensibly natural law-favoured, Grotian approach also provided the contours of the following argument. Keenan and Brown first invoked posited sources to confirm the principle of individual responsibility for violations of the laws and customs of war.¹⁵ Then using analogy, and implicitly invoking the natural law ‘it stands to reason’, they submitted that because individuals had been held criminally liable for violations of the laws and customs of war it followed that individuals who contravened other areas of international law, such as the laws of peace and humanity, should also be held accountable.¹⁶ This natural law had an antecedent in the Nuremberg IMT, which the prosecutors invoked, where the Tribunal found that ‘for many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention’.¹⁷ The source for the law’s expanded scope in these cases stood to reason, not posited reason, and therefore constituted natural law thinking.¹⁸ By using posited sources, on the one hand, and expanding the scope of law on the grounds of reason, on the other hand, these arguments again furnished evidence of a Grotian approach. Bearing in mind that ICL was still rudimentary at this point, the recourse to substantive reason without posited direction thereto conceded the lack of a relevant RoR in this scenario. ILP was thus not applicable here. Also, if discretion was allowed whenever the law did not contain a desired provision, it will make nonsense of the institution of law and its ‘core of certainty’.¹⁹ The prosecutors did not purport to be working outside of the law here, which would have been necessary for a finding of ILP or ELP hard discretion.

¹³ Ibid vi.

¹⁴ Ibid 5-6.

¹⁵ Ibid 123-124 refers to *Ex parte Quirin* 317 US 1; *Yamashita* 327 US 1; Treaty of Versailles of 1919 and the *Llandovery Castle* case.

¹⁶ Keenan and Brown (n 12) 124.

¹⁷ Judgment in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. I:221; Keenan and Brown (n 12) 124-125.

¹⁸ See, for e.g., R Cryer, ‘The Philosophy of International Criminal Law’ in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 246-247.

¹⁹ HLA Hart, *The Concept of Law* (OUP 1961) 130; van Blerk (n 7) 43; Cotterrell (n 7) 99.

The final two instances of philosophical justifications by the selected Tokyo prosecutors pertained to CIL and the Martens clause respectively. Keenan and Brown vested CIL's power to bind not solely on consent, but also natural law directly.²⁰ They held that natural law played a significant part in the ambit and scope of a CIL rule. If a treaty rule concretized a universal natural law principle then that consequent CIL rule would be general in scope, otherwise the treaty rule would only apply between the signatories.²¹ This exhibits the traditional distinction between natural law and positivism, i.e. universality versus contingency. Both were accepted as foundation of CIL which confirmed their Grotian approach.

Finally, Keenan and Brown relied on the Martens clause as reflective of an ethical juridical order which could serve as a touchstone to determine whether an unforeseen action not expressly covered by the laws and customs of war breached that body of law and, likewise, whether the waging of an unjust war had breached an international law rule.²² This argument used the Martens clause as a normative source of international law and not merely as an aspiration. Although this predates Hartian ILP, in exemplary ILP fashion, a posited source incorporated morality. Law, on this argument, could be generated by morality.²³ While morality was the source of war crimes for Keenan and Brown anyway,²⁴ they still worked through the posited source to refer back thereto.

The only coded instance of philosophical argument in the statements of defence counsel pertaining to sources at the IMTs, occurred at Tokyo. Takanayagi denied that the Potsdam Declaration provision that 'stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners of war', required the subsequent criminalisation in the Tokyo Charter of crimes against peace or humanity without a specific pronouncement thereto.²⁵ This applied *mutatis mutandis* to the Moscow Declaration of 1943 and the Nuremberg Charter as well.²⁶ This argument was positivist, i.e. if criminalisation was not explicitly provided for then it cannot be subsequently inferred from the founding instruments. However, if the Charters were taken as the point of departure, the criminalisation of the disputed crimes would be ensured on posited grounds.

²⁰ Keenan and Brown (n 12) 72-73.

²¹ *Ibid* 76-77.

²² *Ibid* 83. For the Martens clause, see A Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 *European Journal of International Law* 193; A Cassese, *International Law* (OUP 2001) 122.

²³ Cryer, Hervey, Sokhi-Bulley with Bohm (n 7) 37; NJ McBride and S Steel, *Great Debates in Jurisprudence* (Palgrave 2014) 53. Cf. BH Bix, 'Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate' (1999) 12 *Canadian Journal of Law and Jurisprudence* 20-21. See also Hart (n 19) 199; S Shapiro, 'Was Inclusive Legal Positivism Founded on a Mistake?' (2009) 22 *Ratio Juris* 327; Wacks (n 1) 42, 110-111.

²⁴ Keenan and Brown (n 12) 83.

²⁵ Transcript of Proceedings 3 March 1948, 42 122-42 123.

²⁶ *Ibid*.

Takanayagi turned to those instruments which preceded and informed the Charters, to also rely on positivism in an attempt to circumvent the crimes posited in the Charters.

Coding for consistency of philosophy in ICL sources used by IMT counsel revealed Jackson as split between natural law and a Grotian approach (which are, of course, not incongruous). Keenan and Brown were also eclectic, with their arguments pertaining to sources ranging from natural law through ILP to Grotian. While their arguments consistently looked beyond the posited law, they often still included posited sources in their arguments. Their arguments are accordingly probably best counted as Grotian, since positivism and natural law were used independently and together.²⁷ Takanayagi delivered the only defence instance of this code which, consistent with prior codes, embodied positivism. Findings on consistency between counsel were difficult given the small datasets involved. At the least, the prosecutors appeared consistent with their expansive arguments considered in chapter 2, while the defence again relied on positivism. Foreseeability and predictability of justifications were thus assured.

Philosophical justifications pertaining to ICL sources were rare in the jurisprudence of the post-WWII judiciaries. No instances were coded at Nuremberg apart from the natural law ‘it stands to reason’ argument noted above in conjunction with Keenan and Brown. The Tokyo IMT ventured some notable findings regarding its founding instruments which led to several responses from the dissents. While Jaranilla, Bernard and Röling only responded to the position pertaining to founding instruments, Pal ventured additional philosophical comments on treaties and CIL.

The Tokyo majority was quick to point to the several declarations underpinning it as they provided a posited basis for its creation.²⁸ The IMT considered its Charter as point of departure. Thus, ‘the law of the Charter is decisive and binding on the Tribunal...In this trial its members have no jurisdiction except such as is to be found in the Charter’.²⁹ Adopting a position more assertive than the majority, Jaranilla held a judge’s authority to be derived exclusively from the Charter and consequently that a finding of invalidity pertaining to the Charter would *ipso facto* void the judge’s ability to pronounce judgment.³⁰ While posited authority (and its attendant directives) can be

²⁷ Lauterpacht (n 9) 21.

²⁸ The Tokyo Majority Judgment 2-6 lists the Potsdam Declaration of 1945, the Instrument of Surrender of 1945 and the Moscow Conference of 1945. This was supported by Webb Opinion 1. See also N Boister and R Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008) 20-25.

²⁹ Tokyo Majority Judgment 23. See also Boister and Cryer (n 28) 278 for the view that the majority adopted a formalistic approach.

³⁰ Boister and Cryer (n 28) 39. For criticism of Jaranilla’s views see *ibid.* See Jaranilla Concurring Opinion 28-31.

conclusive for positivism, traditional natural law will postulate a higher normative system as well. Both the IMT and Jaranilla clearly accepted the posited authority as determinative.

Three judges revealed a less positivist understanding of their judicial function by rejecting the necessity of their acceptance of the law of the Charter merely due to their appointments.³¹ Bernard, invoking a domestic law analogy, rejected the notion that judicial appointment compelled him to agree with the entire substantive law which he was tasked to apply. Hence, questions pertaining to the law had to be entertained.³² Röling likewise found that precluding judges from questioning the law ‘seems to be not only dangerous for the future but incorrect at this moment’.³³ In his dissent, Pal submitted that they were ‘to find out, by the application of the appropriate rules of international law, whether the acts constitute any crime under the already existing law, dehors the Declaration, the Agreement or, the Charter’.³⁴ These positions suggested that the judicial function should not be solely bound by the law as posited. Otherwise the whole enterprise would be the mouthpiece for whoever was in power. In sum, these arguments implied a shift from ‘will’, with its answers consequent to choice and decision of the person empowered to enact the posited law, to ‘reason’ which entails answers emanating from analysis showing them to be ‘right’.³⁵ Although will and reason both play a role under natural law and positivism, it has been suggested that will resorts more with positivism and reason with natural law.³⁶ Bernard, Röling and Pal appeared to accept reason rather than the will of the lawmaker as final determinant of their judicial function.

Hereafter, Pal ventured his theoretical understanding pertaining to treaties and CIL. For Pal a ‘rule of law, once created, must be binding on the states independently of their will, though the creation of the rule was dependent on its voluntary acceptance by them’.³⁷ With the Kellogg-Briand Pact, states were the arbiters of whether their action violated the duty under the Pact.³⁸ Consequently, the obligation under the Pact was dependent on the subjects’ right to self-preservation. This removed the Pact from the realm of law for Pal.³⁹ In the absence of a vertical authoritative structure with overwhelming power, only equal states, guided by their self-interest, determined their own compliance with the Pact.⁴⁰ Pal conceded that the rule of law in the international community was

³¹ Boister and Cryer (n 28) 37-40.

³² Bernard Dissent 9-10. See also Boister and Cryer (n 28) 38.

³³ Röling Dissent 4-5.

³⁴ Pal Dissent 26, 34-36, 1004.

³⁵ Bix (n 4) 143.

³⁶ Ibid 144-145 and fn 5.

³⁷ Pal Dissent 91, 222.

³⁸ Ibid 91.

³⁹ Ibid 91-96.

⁴⁰ Explicitly conceded, *ibid*, at 1008, 1012.

often threatened because the binding force of law emanated from the will of the subjects of the very same law destined to apply to them. For law to be created, the subjects thereof should not be the ‘sole judge of the applicability of any individual rule to its case’.⁴¹ In classic Austinian fashion, it became necessary to have a conceptual distinction between sovereign and subject to have a working system of law.⁴² This also tied into Pal’s views on realism which are discussed in section 6.2.

In relation to CIL, Pal rejected the argument, which later reappeared at the post-Cold War Tribunals, that CIL could crystallise due to common popular conviction. For him, CIL only become law relevant to a court if there was usage as well.⁴³ Possibly this also suggested a reason/will divide.⁴⁴ On this construction *opinio iuris* represents ‘reason’ and *usus* ‘will’. If, as noted earlier,⁴⁵ natural law follows reason and positivism follows will generally, Pal’s argument refrains from subordinating will to reason. Simply, he refused to entertain a more flexible approach to sources than what was allowed under traditional posited international law.

Across the post-WWII judiciaries, inconsistency thus appeared in their philosophical justifications relating to sources. The selected prosecutors were arguably Grotian with an inclination to favour natural law. The defence counsel produced a negligible dataset, but what appeared was positivist. The IMTs were inconsistent, with the majorities delivering negligible (contradictory on the inter-curial dynamic) datasets and the individual judges at Tokyo split down the middle (the inter-jurist dynamic). Accordingly, no pattern appeared. Possibly, there was an ostensible instrumentalism at work as the arguments were functionally aimed at legitimating the charges (Nuremberg IMT, Keenan and Brown) and the IMTs (Jackson, Keenan and Brown, Tokyo majority, Jaranilla) or testing their legitimacy (Bernard, Röling, Pal). This somewhat lessened the adverse impact of inconsistency on the rule of law for the post-WWII judicial bodies. The other Fullerian principles were not involved.

Coding for compliance with rule of law in the philosophical justifications pertaining to ICL sources at the post-Cold War judiciaries resulted in a dataset essentially limited to the ICTY. *Akayesu* at the ICTR was a possible exception, since using the *travaux préparatoires* to conclude that the Genocide Convention protected all stable and permanent groups could be construed as a natural law approach hidden with positivist argumentation. However, since the decision relied on an incorrect

⁴¹ Pal Dissent 101-102.

⁴² J Austin, *The Province of Jurisprudence Determined* (John Murray 1832) 267-269. See also Van Blerk (n 7) 32.

⁴³ Pal Dissent 126-128.

⁴⁴ Bix (n 4) 143.

⁴⁵ Ibid 144-145 and fn 5.

understanding of the Convention this was not counted for coding purposes.⁴⁶ The relevant arguments at the ICTY revolved around the substantive use of reason, CIL, the Martens clause and general principles of law.

Whereas the selected post-WWII counsel relied on reason to justify the scope of crimes justiciable beyond war crimes, the issue confronting the post-Cold War world related to the difference in regulation between international armed conflicts (IACs) and non-international armed conflicts (NIACs). This tension was addressed by the ICTY's reliance in *Tadić* upon 'elementary considerations of humanity' and 'common sense' to conclude that '[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife'.⁴⁷ Cassese took recourse to reason arguing:

'Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State?'⁴⁸

Although the sentiment was bolstered by reference to state practice vis-a-vis human rights post-WWII, the underlying sentiment was undeniably shaped by natural law.⁴⁹ The justification stood to reason rather than to posited legal authority. This justification was echoed in an extra-judicial context when McDonald submitted that there 'is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities committed in internal conflicts more leniently than those engaged in international wars'.⁵⁰ These conclusions, although possibly morally correct, relied on a natural law argument, '...i.e. one based purely on reason, rather than the traditional sources of international law'.⁵¹ Cassese admitted that they 'were breaking new ground. You go beyond the black letter of the law because you look at the spirit of the law'.⁵² The positivist response to this line of argument might be that logically speaking it could be difficult to justify

⁴⁶ See Cryer (n 18) 251 on *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) para 561. See also WA Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 105.

⁴⁷ *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para 119. See also Cryer (n 18) 247. The language, of course, recalls the Martens clause, but it was not invoked.

⁴⁸ *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para 97.

⁴⁹ R Cryer, 'International Criminal Tribunals and the Sources of International Law Antonio Cassese's Contribution to the Canon' (2012) 10 *Journal of International Criminal Justice* 1050.

⁵⁰ GK McDonald, 'The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Laws of War' (1998) 156 *Military Law Review* 37.

⁵¹ Cryer (n 18) 246-247.

⁵² A Cassese, 'The Judge: Interview with Antonio Cassese' in Heikelina Verrijn Stuart and Marlise Simons, *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese: Interviews and Writings* (Amsterdam University Press 2009) 53.

different legal regimes to address IACs and NIACs but that this was the route followed by states in the relevant treaties.⁵³

The post-Cold War Tribunals, in particular, have been held to eschew *usus* in favour of *opinio iuris* in the traditional two-pronged determination of CIL.⁵⁴ While such a development might arguably have become the conventional manner in which to establish CIL,⁵⁵ the post-Cold War role-players showed that, on their understanding, this exceeded posited law. Indeed, prior to his judicial appointment at the ICTY, Meron observed a trend to elevate ‘noble humanitarian principles’ to rules of CIL even in the case of scant supporting state practice. Such an approach conflated the ought with the is, the *lex ferenda* with the *lex lata*:

‘The teleological desire to solidify the humanizing content of the humanitarian norms clearly affects the judicial attitudes underlying the “legislative” character of the judicial process. Given the scarcity of actual practice, it may well be that, in reality, tribunals have been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law’.⁵⁶

The juxtaposition of teleology, conflation of *lex ferenda* and *lex lata* and the degree of offensiveness of an act to human dignity all suggest moral considerations in excess of positivism. The possible argument, ventured under Pal above, that ‘will’ and ‘reason’ attach to *usus* and *opinio iuris* respectively and that ‘will’ was subsumed by ‘reason’ can also be ventured here. Again, ‘will’ reverberates more with positivism and ‘reason’ more with natural law.⁵⁷

This more flexible understanding of CIL, based on ‘the degree of offensiveness’ of the act in question, influenced the *Kupreškić* case. However, here the Tribunal emphasised *opinio iuris* and downplayed *usus* by invoking the Martens clause.⁵⁸ While Keenan and Brown anticipated ILP at

⁵³ Cryer (n 18) 247. This culminated in a substantive war crimes provision in the Rome Statute, see Schabas (n 46) 124-125.

⁵⁴ M Swart, ‘Judicial Lawmaking at the ad hoc Tribunals: The Creative Use of the Sources of International Law and “Adventurous Interpretation”’ (2010) 70 *ZaöRV* 464. See, for e.g., *Prosecutor v Dragomir Milošević* (Judgment) IT-98-29/1-A (12 November 2009) Partly Dissenting Opinion of Judge Liu Daqun para 10.

⁵⁵ B Simma and A Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’ (1999) 93 *American Journal of International Law* 306-310.

⁵⁶ T Meron, ‘The Geneva Conventions as Customary Law’ (1987) 81 *American Journal of International Law* 361. See also T Meron, ‘The Humanization of Humanitarian Law’ (2000) 94 *American Journal of International Law* 244; L.M Nicholls, ‘The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law’ (2006) 17 *Duke Journal of Comparative & International Law* 247.

⁵⁷ Bix (n 4) 144-145 and fn 5.

⁵⁸ *Prosecutor v Kupreškić* (Judgment) IT-95-16-T (14 January 2000) para 527. See also A Nell, *International Humanitarian Law against the background of custom and humanity* (LL.M Research dissertation at the University of the Free State 2010) 201-203.

Tokyo, at the ICTY (which post-dated Hart) law could be generated, on ILP, through moral directives embodied in the Martens clause. Despite scant state practice, the *Kupreškić* TC found reprisals against the civilian population to be unlawful based on the Martens clause and elementary considerations of humanity.⁵⁹ The principles of humanity and dictates of public conscience, contained in the clause, could crystallise *opinio iuris* when *usus* was insufficient.⁶⁰ For Meron, the Martens clause epitomized the humanitarian and humanizing strand in IHL. This clause's rhetorical language and ethical sentiment 'exerts a strong pull towards normativity'.⁶¹ However, Meron criticised Cassese for invoking the Martens clause in the particular circumstances of *Kupreškić* to wholly circumvent a lack of *usus* and crystallise *opinio iuris* despite 'diverse views of states and commentators'.⁶² Writing prior to his appointment to the ICTY, Meron's own views are obscured behind reportage and critique. However, he clearly noted the extent *Kupreškić*'s ILP exceeded posited law.

In contrast to these decisions, the ICTY adhered to a maligned positivism in *Vasiljević* by maintaining that only CIL could vest criminal liability (which was incorrect vis-a-vis the authority at the Tribunal⁶³):

'If [CIL] does not provide for a sufficiently precise definition of a crime listed in the Statute, the Trial Chamber would have no choice but to refrain from exercising its jurisdiction over it, regardless of the fact that the crime is listed as a punishable offence in the Statute. This is so because,... anything contained in the statute of the court in excess of existing [CIL] would be a utilisation of power and not of law'.⁶⁴

Besides reason and CIL, general principles of law revealed philosophy at the ICTY. In a separate opinion, Sidhwa reflected that mostly '[international law] seeks to keep itself free of rigid, strict and inflexible national rules and principles where they tend to be dogmatic or obstruct a fair, liberal or equitable approach to a problem...'.⁶⁵ Evidently, international law was to be guided by normative

⁵⁹ *Prosecutor v Kupreškić* (Judgment) IT-95-16-T (14 January 2000) paras 524-536. Arts. 63/62/142/158 respectively of the four Geneva Conventions of 1949 contain the clause. See also Cryer (n 49) 1052-1054.

⁶⁰ *Prosecutor v Kupreškić* (Judgment) IT-95-16-T (14 January 2000) paras 525-527. See also MN Hayashi, 'The Martens Clause and Military Necessity' in Howard Hensel (ed), *The Legitimate Use of Military Force The Just War Tradition and the Customary Law of Armed Conflict* (Ashgate Publishing Limited 2008) 147-148.

⁶¹ Meron, 'The Humanization of Humanitarian Law' (n 56) 245. See also T Meron, 'The Martens Clause, Principles of Humanity and Dictates of Public Conscience' (2000) 94 *American Journal of International Law* 79; M Swart, 'Is There a Text in This Court? The Purposive Method of Interpretation and the ad hoc Tribunals' (2010) 70 *ZaöRV* 770.

⁶² Meron, 'The Humanization of Humanitarian Law' (n 56) 250.

⁶³ See, for e.g., *Prosecutor v Galić* (Judgment) IT-98-29-A (30 November 2006) paras 83-98; A Cassese, 'Black Letter Lawyering v. Constructive Interpretation The *Vasiljević* Case' (2004) 2 *Journal of International Criminal Justice* 265; Cryer (n 18) 250-251.

⁶⁴ *Prosecutor v Vasiljević* (Judgment) IT-98-32-T (29 November 2002) para 202.

⁶⁵ *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) Separate Opinion of Judge Sidhwa para 11.

considerations as fairness and equity overrode rigid regulation. Non-positivist values held sway over positivist sources in traditional natural law vein. Likewise, in an attempt to clarify the question of consent in relation to rape charges, *Kunarac* ostensibly embraced a ‘spirit of law’ notion as it would ‘...not...identify a specific legal provision which is adopted by a majority of legal systems but to consider...whether it is possible to identify certain basic principles or...“common denominators”, in those legal systems which embody the principles which must be adopted in the international context’.⁶⁶ This argument favoured the essence above the form. The TC found the underlying principle which united the various legal systems to be the penalising of violations of sexual autonomy.⁶⁷ The more malleable principle thus searched for recalled the common denominators central to the Roman *ius gentium*.⁶⁸ This argument could also be construed as Dworkinian based on the centrality of principle as opposed to rule.⁶⁹ In sum, general principles are a recognised positive source of international law, but here the argument was for something less concrete and rather more abstract and universal without RoR direction thereto.

Although the dataset was modest, coding for philosophical justifications pertaining to sources at the ICTY revealed a somewhat more consistent pattern in favour of natural law than at the post-WWII IMTs. It has been suggested that ‘perfect positivism is impossible where [CIL] remains an integral source of ICL’.⁷⁰ This is arguably borne out from the ICTY data. The coded instances suggested a desire for greater flexibility surrounding sources in order to ensure material jurisdiction and greater protection for victims.

The overall dataset was not very large, yet the reliance on sources was abundant – this shows that Tribunals rarely bolstered their understanding of sources through philosophy. The post-WWII IMTs’ data was mixed with both natural law and positivism used. Neither approach enjoyed a clear ascendancy under the judiciaries but the general trend between the prosecutors and defence as one between natural law and positivism remained intact (albeit with the prosecutors increasingly favouring natural law alongside positivism in a Grotian approach). At the post-Cold War Tribunals, which meant essentially the ICTY, the utilisation of sources – where philosophy was undoubtedly present – revealed mostly natural law. Issues never adjudicated previously arose before the ICTY

⁶⁶ *Prosecutor v Kunarac, Kovač and Vuković* (Judgment) IT-96-23-T (22 February 2001) para 439. The ‘common denominators’ notion is from *Prosecutor v Furundžija* (Judgment) IT-95-17/1-T (10 December 1998) para 178.

⁶⁷ *Prosecutor v Kunarac, Kovač and Vuković* (Judgment) IT-96-23-T (22 February 2001) paras 440-457.

⁶⁸ See DH van Zyl, *Justice and Equity in Cicero* (Academica 1991) 90-93.

⁶⁹ R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 22-28.

⁷⁰ B Van Schaak, ‘*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals’ (2008) 97 *Georgetown Law Journal* 138. See also F Pocar, ‘Criminal Proceedings before the International Criminal Tribunals for the Former Yugoslavia and Rwanda (2006) 5 *Law and Practice of International Courts and Tribunals* 91.

which invited the coalescing of *lex lata* and *lex ferenda*. The overall trend under this code when viewed holistically from the post-WWII IMTs to the ICTY was therefore mixed, but slanted more towards natural law (especially when including counsel). To sum up the coded data against Fuller's desiderata: philosophical category was established and made public. Some degree of philosophical contradiction existed at the post-WWII IMTs, whereas the position in the ICTY was more consistent. The desideratum of non-contradiction could be addressed, however, by noting the code's rarity (whether at the IMTs or the ICTY) and its consistent functional objective to justify institutional legitimacy or to ensure material jurisdiction through broad understandings of the sources to be applied. Some degree of predictability and foreseeability thus existed. None of the other desiderata had a noteworthy impact on the coded data.

3.3 Substantive crimes

Coding now turns toward the ICL role-players' understanding of the philosophical underpinnings of the crimes they deal with. This code considers the patterned use of philosophical arguments regarding the nature and basis of these crimes. Like the previous code on sources, substantive crimes delivered a small dataset. It will also be structured around the post-WWII IMTs and the post-Cold War Tribunals as respective clusters.

From the Nuremberg counsel, only Shawcross and De Menthon ventured philosophical understandings of crimes. Shawcross invoked posited sources to suggest aggression's criminality in international law. However, conceding that the criminality was not as well established as the forbidden nature thereof, he additionally resorted to natural law to argue that the criminalisation was fully consistent with justice, common sense and the overarching aims of international law.⁷¹ This ostensibly was a belt and braces justification as aggression was considered criminal in terms of posited sources, but in case of doubt natural law also supported it. The cumulative use of natural law and positivism suggested a Grotian approach.

De Menthon requested that the Nuremberg IMT 'qualify juridically as crimes, both the war of aggression itself and those acts in violation of the morality and of the laws of all civilized countries'.⁷² The calculated and malevolent violation 'against spirit', which flowed naturally from

⁷¹ H Shawcross in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. III:94-104 for sources cited.

⁷² F de Menthon in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. V:370.

Nazi ideology, underpinned the Nazi crimes.⁷³ De Menthon also included a discussion on ‘crimes against the human status’.⁷⁴ For him, turning human beings into means rather than ends resulted from the animalistic understanding of man proposed by the Nazis.⁷⁵ Although vaguely these ‘criminal acts were committed in violation of...[especially] the Hague Convention’,⁷⁶ the posited basis thereof was negligible in comparison to the exposure to the wicked regime which abused man and saw a return to barbarism. The resultant inhumanity, premised on race, became a principle or ‘a doctrine of disintegration of modern society’ necessarily leading to aggressive war and systematic criminality therein.⁷⁷ The implication was that the violation of civilisation’s basic values was unacceptable and represented a strong (natural law) basis to justify jurisdiction over the crimes of aggression and humanity. Implicit in this argument is the natural law notion that by proving the sin, one proves the crime as the crime inevitably follows the sin.⁷⁸

At Tokyo, in addition to the IMT Charter, Keenan relied on the Kellogg-Briand Pact and Hague Conventions of 1899 and 1907 to establish the posited illegality of aggression. Like the Nuremberg argument, the broader interpretation needed to show illegality exceeded strict positivism.⁷⁹ Keenan and Brown expressly argued that natural law is ‘essential to afford materials for a satisfactory definition’.⁸⁰ They suggested that criminality could be ascertained by establishing which nation wrongfully, ‘in a moral sense’, began to assault another thereby threatening the common good of international society.⁸¹ The defence, per Takanayagi, analysed the posited sources, relied on by the prosecutors, to prove that their provisions did not support said criminalisation.⁸² The natural law-positivism dialectic between the prosecutors and defence was thus perpetuated on this argument at Tokyo.

Although genocide was not charged in the post-WWII trials and the Genocide Convention was only created in 1948, it was debated by persons who had participated in the post-WWII trials. Interestingly, Brown, juridical consultant at Tokyo, presented testimony on the Convention in 1950 and continued, as was done at Tokyo, to stress the natural law basis of international law. For him, the basis of genocide was found in the writings of scholastic natural lawyers. This crime was to be

⁷³ Ibid 373-375.

⁷⁴ Ibid 406.

⁷⁵ Ibid 406-412.

⁷⁶ Ibid 412.

⁷⁷ Ibid 378.

⁷⁸ Ibid 378-379.

⁷⁹ Boister and Cryer (n 28) 120-121. See also Transcript of Proceedings 4 June 1946, 415-419.

⁸⁰ Keenan and Brown (n 12) 58.

⁸¹ Ibid.

⁸² Transcript of Proceedings 3 March 1948, 42 144-42 159.

understood based on the ‘concept of the spiritual, mental, biological, and moral solidarity of the human race, and on the ideal of the Brotherhood of Man’.⁸³ Injustice arose because the persons targeted for destruction were innocent in terms of natural law. It was the ‘inviolable sacredness of the human beings’ which led to the moral and juridical values of the group which were to be protected in terms of the Convention.⁸⁴

Congruent with earlier codes, therefore, the post-WWII prosecutors showed consistent preference for natural law in their arguments pertaining to sources. The selected defence counsel also remained consistently positivist in their argumentation. On the rule of law argument pursued here, such consistency ensured predictability and foreseeability of position adopted by the respective parties. However, the small dataset meant that these are limited findings.

Turning to the IMTs, as noted under the just war code,⁸⁵ the Nuremberg IMT attempted to base the crime of aggression on the posited Kellogg-Briand Pact. The IMT’s conclusion that ‘the solemn renunciation of war as an instrument of national policy necessarily involves [the illegality and criminality thereof]’,⁸⁶ suggested an interpretation in excess of strict positivism. Moving from renunciation to illegality to criminality without explicit posited provisions to that effect, inclined the basis for this crime towards natural law despite reliance on a posited source.

The Tokyo majority primarily directed its philosophical justifications under the code of crimes towards aggression. It found itself bound by its Charter and, siding with the prosecution (and Nuremberg judgment), ascribed the illegality of aggression to the Kellogg-Briand Pact based on an expansive reading.⁸⁷ The majority, however, seemed to depart further from positivism as it omitted to furnish a clear definition of aggression, apparently amenable to the suggestion that a judge can easily function in the absence of a precise definition.⁸⁸ Pal responded to this in a way which juxtaposed the philosophies at play:

‘One of the most essential attributes of law is its predictability. It is perhaps this predictability which makes justice according to law preferable to justice without law,—legislative or executive justice. The excellence of justice according to law rests upon the fact that judges are not free to render decision based purely upon their

⁸³ Keenan and Brown (n 12) 164-165 presenting testimony to the Subcommittee on Genocide of the Senate Foreign Relations Committee. Cf. A Augustine, ‘The City of God against the Pagans’ in RW Dyson (tr), *Augustine The City of God against the Pagans* (CUP 2007) IV.4, XI.1, XIV.4-28 on the world-state.

⁸⁴ Keenan and Brown (n 12) 166.

⁸⁵ See section 2.3.

⁸⁶ Tokyo Majority Judgment 25.

⁸⁷ Ibid 120-121.

⁸⁸ Ibid 122-124.

personal predilections and peculiar dispositions, no matter how good or how wise they may be. To leave the aggressive character of war to be determined according to “the popular sense” or “the general moral sense” of the humanity is to rob the law of its predictability.’⁸⁹

Pal’s argument favoured predictability rather than the moral sense of humanity. This sentiment opposes the common sense and morality usually associated with natural law as substantive sources of law. It could be seen as favouring the *lex lata* rather than the *lex ferenda*. More generally, Pal rejected the crime of aggression on the ‘appeals to the developed character of international community, to the laws of nature as also to a widening sense of humanity’ because they still had ‘to pass through some adequate social process in order to develop into law’.⁹⁰ Pal doubted whether the claim of natural law ‘that its doctrines should be accepted as positive law is at all sustainable’.⁹¹ Finally, after a thorough review of the relevant extant posited law, Pal concluded that the criminality of the charge was not established during the impugned period.⁹² Pal’s clear positivism contributes to delineating the natural law argument of the majority because it sharpens the contrast between them.

The other dissenting judges were not homogeneous in their findings on the criminal basis of aggression either. As Webb found the Kellogg-Briand Pact too indeterminate to conclude that aggression was a crime, he turned to natural law. In a draft of his reasons for judgment, relying on Cicero, he considered aggression to be contrary to ‘the dictates of right reason’.⁹³ In his final draft judgment, however, he considered the justiciability of aggression during the time in question not to be unequivocal. He began by basing the aggression charges on declarations of the Assembly of the League of Nations and the Sixth Pan-American Conference, before adopting a broad interpretation of the Kellogg-Briand Pact, to conclude that the illegality of aggression was intended.⁹⁴ In his separate opinion, he followed the majority vesting criminalisation on the Pact as well as Japan’s agreement to the criminalisation. Still ambiguous, he reiterated his draft judgment view that the criminality of aggression could be based on natural law.⁹⁵ This dialectic between posited sources and natural law suggested a Grotian approach.

For Bernard the foundations of the crime of aggression were in natural law. In a draft document he ascribed the condemnation of aggressive wars (which predated WWII) and liability for punishment

⁸⁹ Pal Dissent 234-235.

⁹⁰ Ibid 131, 133. See also Boister and Cryer (n 28) 131.

⁹¹ Pal Dissent 150. See also Boister and Cryer (n 28) 131.

⁹² Boister and Cryer (n 28) 285. See *ibid* at 121-124 for his views on the Kellogg-Briand Pact. See also Pal Dissent 69-153.

⁹³ Boister and Cryer (n 28) 130 and the sources in footnote 138.

⁹⁴ Webb Separate Opinion 3.

⁹⁵ Boister and Cryer (n 28) 130 and footnote 139. See also Webb Separate Opinion 6.

of the perpetrators to universal conscience.⁹⁶ In his dissent, he based the criminality of aggression on the fact that ‘war is and always has been a crime in the eyes of reason and universal conscience – expressions of natural law upon which an international tribunal can and must base itself to judge the conduct of the accused’.⁹⁷

In contrast to both Webb and Bernard, yet in agreement with Pal, Röling relied on positivism to establish whether crimes against peace had become justiciable. Therefore, the judge inquired whether various international instruments and institutions changed the position of positive international law, which had historically accepted war as legitimate.⁹⁸ On his analysis these instruments did not establish criminality. The crime against peace was found to have developed only after 1943⁹⁹ and culminated in the provisions of the London Agreement of 1945.¹⁰⁰

The post-WWII judiciaries thus delivered an inconsistent dataset. The Nuremberg IMT delivered a negligible dataset while the Tokyo IMT produced an inconsistent dataset with natural law, the Grotian approach and positivism all supported. Sense could possibly be made of the inconsistency by noting that the natural law and Grotian arguments attempted to legitimate the crime of aggression (majority, Webb and Bernard) while the positivist arguments tended to undermine the legal status of this crime (Röling and Pal). Added to this, the small dataset must be noted too.

Like the sources code, only the ICTY amongst the post-Cold War bodies delivered data on crimes. While the majority of data pertained to crimes against humanity, a single justification on genocide was also ventured. The dataset was accordingly very small. The subsequent discussion will follow the genocide and crimes against humanity arguments as respective focal points.

The *Stakić* AC questioned whether the group targeted for genocide could be defined negatively as was done in *Jelisić*.¹⁰¹ The approach of the majority can be illuminatingly contrasted with the dissent of Shahabuddeen. The majority, reliant on posited materials and a literal interpretation of Article 4 of the ICTY Statute, rejected the negative definition.¹⁰² Consequently, genocide could not

⁹⁶ Boister and Cryer (n 28) 130 and footnote 143.

⁹⁷ Bernard Dissent 10.

⁹⁸ Röling Dissent 11-14.

⁹⁹ During which Stalin gave a speech commemorating the 26th anniversary of the Revolution, the Cairo Conference Statement was issued and the Report of Commission I of the London International Assembly was handed down.

¹⁰⁰ Röling Dissent 17-33, 41-44.

¹⁰¹ See *Prosecutor v Jelisić* (Judgment) IT-95-10-T (14 December 1999) para 71 which based its finding on the purpose of the Genocide Convention and the Final Report of the Commission of Experts established under SC Res. 780 (1992) para 96.

¹⁰² *Prosecutor v Stakić* (Judgment) IT-97-24-A (22 March 2006) paras 20-22.

be committed against non-Serbs, but rather had to be proven against Bosnian-Muslims and Bosnian-Croats separately.¹⁰³ Shahabuddeen exceeded these posited materials and invoked a purposive argument. ‘Belonging to a “group” *other than that* of the perpetrator’ was sufficient for Shahabuddeen, despite the drafting history of the Genocide Convention which pointed towards specific groups, as it would better facilitate the liberation of mankind from the scourge of genocide.¹⁰⁴ Reliance on such teleology without RoR direction thereto and, seemingly, contrary to posited materials suggested natural law.¹⁰⁵ This approach also clearly contrasts with the majority.

In *Stakić*, wherein Schomburg presided, the TC revisited the displacement across a national border requirement of deportation under Article 5(d) of the ICTY Statute. In the process, the TC relied on the dictionary meaning of the term as well as Roman law to base the reason for criminal responsibility in ‘forcibly removing...individuals from the territory...in which they have been lawfully present...and not the destination resulting from such a removal’.¹⁰⁶ Aware of its departure from earlier ICTY jurisprudence, the TC further argued that persisting with the national border requirement ‘would not sufficiently take into account the broader meaning of the word, the initial concept, the legislator’s purpose and the sense and spirit of the norm’.¹⁰⁷ Before the AC could render judgment on *Stakić*, the *Brđanin* TC rejected the reliance on these policy considerations rather than on law:

‘While [*Stakić*]...may advance excellent policy arguments in favour of dispensing with a cross-border element for the crime of deportation, the [TC] is not convinced that this reflects [CIL] as it stood at the relevant time. It is [CIL], and not policy, which the [TC] is bound to apply’.¹⁰⁸

The *Stakić* AC responded by considering extant treaties, case law and CIL to find that deportation required the crossing of a *de jure* or, in certain cases, a *de facto* border. It rejected the TC submission that crossing ‘constantly changing front-lines’ might constitute deportation for want of evidence under CIL.¹⁰⁹ The policy arguments adopted by the *Stakić* TC were thus critiqued by both the AC and *Brđanin* TC because it ostensibly exceeded posited legal sources.

¹⁰³ Ibid para 36.

¹⁰⁴ *Prosecutor v Stakić* (Judgment) IT-97-24-A (22 March 2006) Partly Dissenting Opinion of Judge Shahabuddeen paras 11-13, 17 also supporting the Final Report of the Commission of Experts (n 101) para 96.

¹⁰⁵ RWM Dias, *Jurisprudence* (3rd edn, Butterworths 1970) 381; BH Bix, ‘Natural Law: The Modern Tradition’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP 2002) 66, 98. See also Hart (n 19) 184-188.

¹⁰⁶ *Prosecutor v Stakić* (Judgment) IT-97-24-T (31 July 2003) paras 674-677.

¹⁰⁷ Ibid para 684.

¹⁰⁸ *Prosecutor v Brđanin* (Judgment) IT-99-36-T (1 September 2004) para 542.

¹⁰⁹ *Prosecutor v Stakić* (Judgment) IT-97-24-A (22 March 2006) paras 300-302. However, see the opposite view, *ibid*, Partly Dissenting Opinion of Judge Shahabuddeen paras 56, 69-72.

Two months after judgment in the *Stakić AC*, Schomburg revisited the matter in his dissent in *Naletilić and Martinović*. Continuing from his earlier arguments, he noted that the formal cross-border requirement would practically impede deportation's existence in the former Yugoslavia.¹¹⁰ For Schomburg the crime had 'to take into account social developments in a globalized world and should not be based on a formalistic-historical understanding of jurisprudence'.¹¹¹ Posited authority was thus again circumvented in favour of teleological and policy considerations. Although strictly part of the interpretation code, it bears noting that Schomburg invoked the Vienna Convention on the Law of Treaties (VCLT) to substantiate his understanding of deportation on a teleological, literal, systematic and value-oriented construction thereof.¹¹² While the initial argument inclined to natural law, the latter reliance on the VCLT to refer to values suggested ILP. However, given his earlier argument in the *Stakić TC*, this recourse to the VCLT seemed presentational at best. This was therefore a consistently natural law argument in excess of posited sources which was finally bolstered through a posited source on interpretation techniques.

The dataset at the ICTY was small and, on mere numbers, ostensibly evenly split. However, the data revealed consistent support for positivism from the majorities. The exception occurred in the *Stakić TC* wherein Schomburg presided. The natural law arguments appeared in dissents (of which Schomburg was one thereby confirming some intra-jurist consistency).

Overall, coding for philosophical justifications in relation to substantive crimes produced a small dataset which was inconsistent for purposes of the rule of law. The post-WWII IMTs again essentially repeated the familiar pattern between the selected prosecutors and defence counsel as between natural law and positivism respectively. This cannot be overstated though as the datasets were small. In both IMT judgments aggression was based on a natural law reading of posited sources. The separate opinions at Tokyo, however, were evenly split between positivism and natural law. The post-Cold War dataset was extremely small and ostensibly revealed contradictory justifications. On the intra-jurist level Schomburg consistently used natural law, while, on the inter-jurist level Shahabuddeen was consistent with Schomburg. Sense can be made of the mixed results if one recognises that the majority decisions consistently favoured positivism whereas the dissents favoured natural law.

¹¹⁰ *Prosecutor v Naletilić and Martinović* (Judgment) IT-98-34-A (3 May 2006) Separate and Dissenting Opinion of Judge Schomburg paras 16-18.

¹¹¹ *Ibid* para 19. See also *Prosecutor v Simić, Tadić and Zarić* (Judgments) IT-95-9-T (17 October 2003) para 130.

¹¹² *Prosecutor v Naletilić and Martinović* (Judgment) IT-98-34-A (3 May 2006) Separate and Dissenting Opinion of Judge Schomburg paras 22-29.

Considering the ICL jurisprudence against the Fullerian requirements overall, naturally the justifications were established and public. The dataset was, however, somewhat contradictory whether intra-curially (Tokyo IMT; possibly ICTY) or inter-curially (post-WWII measured against post-Cold War). Although these positions were not quickly changed, they did vary from time to time. The other desiderata did not apply. Bearing in mind the total amount of ICL jurisprudence, judiciaries rarely utilised philosophy in connection with substantive crimes, which removes much of its threat for the rule of law. The contradictory views might be understood on the basis that the Tokyo role-players were confronted by a charge with a tenuous basis in posited law. The contradictions in the ICTY can be understood mindful of the majority-minority divide. If the majority views are considered there is a broadly consistent support for positivism. In sum, while they exerted some pressure on the rule of law, these justifications did not undermine predictability and foreseeability in ICL.

3.4 Legality as principle of international criminal responsibility

Legality is directly relevant under Fuller's rule of law desideratum against retrospectivity which necessitated coding for philosophy used in conjunction with it.¹¹³ The legality principle consists of *nullem crimen sine lege* and *nulla poena sine lege*, i.e. criminalisation and penalisation prior to criminal prosecution (hereafter 'legality' or 'NCSL').¹¹⁴ NCSL protects against arbitrary, retrospective accusations and has, unsurprisingly, often been invoked by the defence at ICL judicial bodies.¹¹⁵ The first codification of this principle in international law occurred in the Universal Declaration of Human Rights (UDHR) in 1948, i.e. after the Nuremberg and Tokyo judgments.¹¹⁶ Subsequent international human rights (IHR) instruments also adopted the rule.¹¹⁷ Apart from the ICC Statute, the legality principle is absent from ICL statutes. Thus, although contained in many domestic legal systems as well as IHR instruments, its full incorporation into ICL is yet to be attained.¹¹⁸ The lack of a robust legality rule in ICL has been attributed to the dawn of the field

¹¹³ LL Fuller, *The Morality of Law* (Yale University Press 1969) 51-62.

¹¹⁴ Van Schaak (n 70) 121. See also SL Paulson, 'Classical Legal Positivism at Nuremberg' (1975) 4 *Philosophy & Public Affairs* 151; M Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?' (2004) 2 *Journal of International Criminal Justice* 1008.

¹¹⁵ See, for e.g., *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) paras 139-141; *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) Separate Opinion of Judge Sidhwa para 72; *Prosecutor v Delalić, Mučić, Delić and Landžo* (Judgment) IT-96-21-A (20 February 2001) paras 107-115; 173.

¹¹⁶ Article 11(2).

¹¹⁷ E.g. the International Covenant on Civil and Political Rights (ICCPR) Article 15(1).

¹¹⁸ Van Schaak (n 70) 122-123. Contrast ICC Statute art. 22(1) and 24(2) with the pronouncement in *Prosecutor v Delalić, Mučić, Delić and Landžo* (Judgment) IT-96-21-T (16 November 1998) para 403.

when charters were laying down new rules of law.¹¹⁹ Because the legality principle itself is a rather recently posited rule and not ubiquitous in ICL instruments, the Tribunals' understanding of its foundation and nature often revealed philosophy. Furthermore, how its imperatives were dealt with was also important, i.e. were they complied with strictly or circumvented. Both the principle of NCSL itself and the reaction to its directives were revelatory of positivism and natural law. This code, like policy and interpretation,¹²⁰ will also be shown to anticipate the two liberalisms in ICL, namely victim-centred (HR liberalism) and accused-centred (criminal law liberalism).¹²¹ The analysis will be per jurisdiction due to the size of the respective datasets.

At Nuremberg, Jackson premised his arguments on the authoritative nature of the Charter (which for Rudenko was conclusive¹²²) yet anticipated the charge that the Charter embodied law which was not 'authoritatively declared at the time [the accused] did the acts it condemns'.¹²³ Bearing in mind that NCSL was not yet codified in international law at this stage, Jackson used the defendants' disregard for and abuse of law as justification for removing them from the ambit of NCSL.¹²⁴ This suggested a natural law *tu quoque* sentiment.¹²⁵ For Jackson retrospective law hindered people to 'be protected in relying upon the law at the time they act'.¹²⁶ Accordingly, because the Nazi accused did not follow the law, they could not enjoy the protection of the law at the time of their actions.¹²⁷ By considering the underlying purpose of legality, Jackson removed the accused from the ambit of NCSL.

In contrast, Jackson also suggested that: 'The refuge of the defendants can be only their hope that international law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law'.¹²⁸ Implicit here, the law-as-it-is may differ from the law-as-it-ought-to-be in traditional positivist vein.

Lastly, Jackson noted (ostensibly anticipating the Hartian development from primitive to full legal

¹¹⁹ Van Schaak (n 70) 123.

¹²⁰ See sections 2.5 and 3.5 respectively.

¹²¹ See section 6.3 and D Robinson, 'A Cosmopolitan Liberal Account of International Criminal Law' (2013) 26 *Leiden Journal of International Law* 148-149.

¹²² RA Rudenko in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. XII:148.

¹²³ Jackson (n 6) 143.

¹²⁴ *Ibid* 144.

¹²⁵ For *tu quoque* as natural law defence, see H Grotius, *De Iure Belli ac Pacis Libri Tres* (Francis Kelsey tr, Clarendon Press 1925) II.XX.III at 465-466.

¹²⁶ Jackson (n 6) 144.

¹²⁷ *Ibid* 144. See also KC Moghalu, *Global Justice The Politics of War Crimes Trials* (Stanford Security Studies 2008) 37.

¹²⁸ Jackson (n 6) 155.

system through secondary rules of adjudication¹²⁹) that the Nuremberg Charter marked a transition where ‘men ceased to punish crime by “hue and cry” and began to let reason [and evidence and law] and inquiry govern punishment’.¹³⁰ Simply, such a development – where law and reason overrode force – overruled the matter of whether the Charter originated or merely recorded crimes.¹³¹ This suggested that new law was better than no law or force. In the process arguments of retrospectivity were weakened. Retrospectivity faced a chicken and egg problem here since retrospectivity had to be in conjunction with something and so receded when that something was being established (and was perceived as an improvement of the *status quo*). This argument, which emphasised the development of ICL beyond its primitive state into a more sophisticated form, strongly anticipated Hart. The most balanced interpretation of Jackson’s overall argument is thus the mixed, Grotian approach, wherein natural law and positivism are both used, but here inclining towards positivism.

Shawcross likewise anticipated Hart as rather than create a new crime or penalty, the Nuremberg Charter merely enabled a competent court to pronounce judgment where the international machinery was previously lacking. Moreover, if this was retroactive lawmaking, Shawcross still approved it as ‘fully consistent with...higher justice’ and an emanation of ‘the world’s sense of justice’.¹³² This argument also looked to the increased sophistication of the ICL system whilst bolstering such development with natural law concerns. Again this argument could be construed as Grotian because it anticipated Hartian positivism while additionally invoking natural law.

Criticisms of the ‘lack of written texts to justify the penal [provisions to be applied by the IMT]’ moved De Menthon to argue that crimes against humanity were essentially common crimes, recognised by the laws of all states, which were merely directed at political objectives and undertaken in a systematic manner.¹³³ This argument was echoed by Dubost, Shawcross and Rudenko.¹³⁴ Emphasising the universal nature of the crimes to circumvent the lack of their posited basis pointed to natural law. This is especially clear when the opposition to such universality of

¹²⁹ Hart (n 19) 89-96.

¹³⁰ R Jackson in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. XIX:398.

¹³¹ Ibid.

¹³² Shawcross (n 71) 106.

¹³³ De Menthon (n 72) 372.

¹³⁴ C Dubost in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. XIX:537; H Shawcross in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. XIX:448; Rudenko (n 122) 149; RA Rudenko in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. XIX:575.

domestic crimes from defence counsel is borne in mind.¹³⁵

The Nuremberg IMT engaged with legality in connection with the crime of aggression. The defence contended that no sovereign had criminalised aggressive war at the time of WWII, that no legal instrument defined the crime nor prescribed the penalty for its perpetration and that no judicial body had been appointed for its vindication.¹³⁶ The IMT responded that NCSL ‘is not a limitation of sovereignty, but is in general a principle of justice’.¹³⁷ Legality was not a posited principle compelling compliance. Still, congruent with NCSL directives, the IMT investigated whether aggression had become criminalised in posited international law. It relied on its own Charter to confirm the criminality and illegality thereof before considering the extent to which aggression was considered a crime prior to the London Agreement.¹³⁸ The IMT invoked various posited sources, but then proceeded to read them in a very flexible manner where logic dictated the constructed meanings.¹³⁹ The IMT further referred to several ‘posited’ instruments which, however, were either not ratified, only at draft stage or merely declarations.¹⁴⁰ The reading afforded to these sources also exceeded the confines the text allowed. In sum, if the philosophical position of the IMT can be called positivist in this regard, it is at best only presentational positivism. The IMT supported this notional positivism with explicit natural law when it argued that it is just to punish those who attack neighbouring countries in violation of treaties and assurances because ‘the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished’.¹⁴¹ The IMT thus used an ‘it stands to reason’ argument in addition to its presentational positivism to dictate the necessity of punishment for perpetrators of aggression. Finally, the Tribunal reasoned by analogy to indicate that despite the absence of criminalising provisions, the rules contained in the Hague Convention had been enforced by military tribunals and, consequently, ‘those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention’.¹⁴² This type of analogical reasoning would hardly commend itself to a strict positivist and is therefore counted here as natural law.¹⁴³

¹³⁵ Boister and Cryer (n 28) 162. See Transcript 42 251-42 252.

¹³⁶ Judgment in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. I:219.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid 219-221.

¹⁴⁰ Ibid 221-222.

¹⁴¹ Ibid 219. See also T Meron, *The Making of International Criminal Justice A View From the Bench Selected Speeches* (OUP 2011) 94, 111.

¹⁴² Judgment in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. I:221. See also Van Schaak (n 70) 128.

¹⁴³ For agreement, see Moghalu (n 127) 35.

In sum, counsel fell into the usual natural law-positivist divide as has been the case with previous codes. The Nuremberg IMT relied, in positivist fashion, on its own charter, a qualification of NCSL as a principle of justice (which implied it might be overridden as not formally posited) and through a perusal of extant posited codifications such as the Kellogg-Briand Pact to support the prohibition of aggression. However, natural law underpinned the IMT's approach as substantive reason justified punishment and the posited sources invoked were, in some cases, not yet authoritative and, in other cases, read in a flexible, expansive manner which rendered this positivism merely presentational. Overall, the Nuremberg data thus confirmed consistent natural law justifications in conjunction with NCSL. While this ensured compliance with Fuller's non-contradiction principle, the 'Hartian' arguments of Jackson and Shawcross best explains why this loose understanding of NCSL did not undermine retrospectivity for rule of law purposes: the Nuremberg proceedings constituted the secondary rules needed to mature a primitive system into a full legal system.¹⁴⁴

Natural law also shaped the argument of Keenan and Brown at Tokyo. For them the prohibition against retroactive law did not allow the leaders of any nation to perpetrate a 'criminally unjust war'.¹⁴⁵ A criminally unjust war was *mala in se* and thus prosecutable. This quintessential natural law subordinated strict legality to substantive justice.¹⁴⁶ Legality concerns were also partly responsible for the (unprecedented) murder charges. By arguing that murder was universally condemned in legal systems everywhere, and therefore by analogy applied to the international sphere, the prosecution relied on the contention that murder was a ubiquitous rather than a contingent rule to justify its inclusion.¹⁴⁷

Keenan conceded that individual responsibility for violations of international law perpetrated by persons in an official capacity was without precedent. However, the necessity of such trials was justified on the basis that the very existence of civilisation was at stake.¹⁴⁸ This, coupled with Keenan's claims that 'the art of destruction has proceeded to such a state that the world cannot wait upon the debating of legal trivialities' and 'the first universally recognised doctrine is that self-preservation is the first law of nature', confirmed his natural law.¹⁴⁹ The IMT was cast as defender

¹⁴⁴ Hart (n 19) 89-96.

¹⁴⁵ Keenan and Brown (n 12) vi.

¹⁴⁶ A Cassese, *International Criminal Law* (OUP 2003) 22, 139-145.

¹⁴⁷ See Transcript of Proceedings 4 June 1946, 424. See also Boister and Cryer (n 28) 158.

¹⁴⁸ Transcript of Proceedings 4 June 1946, 459.

¹⁴⁹ Ibid 460-461. See T Hobbes, *Leviathan* (R Tuck tr, Cambridge University Press 2007) 91; T Aquinas, 'Summa Theologiae' in RW Dyson (tr), *Aquinas Political Writings* (Cambridge University Press 2008) IaIIae 94.2 for self-preservation in natural law arguments.

of the self-preservation of the international community and this justified its jurisdiction despite lack of positive law.

Keenan and Brown added that NCSL was not contravened at Tokyo. In the absence of a world constitution, for them, the Charter could not have contravened any express or implicit constitutional provision dealing with NCSL. They reiterated that NCSL was not yet a rule of positive law in the international community at this stage as it existed on the 'juridical or natural law plane'.¹⁵⁰ On their natural law the issue was whether a particular act was criminal in terms of 'ius, custom and the objective moral order' at the time of its commission. Because the accused contravened these normative systems, the subsequent criminalisation and penalisation of their actions would be legitimate. Natural law regarded 'the substance and not the shadow'. It sought to attain the purpose behind NCSL which was to protect the innocent from injustice.¹⁵¹ Legality, on this view, emerged only to redress the resultant inequity when morals were separated from law.¹⁵² In sum, the positivism adopted by the defence was criticised for taking pre-existing *lex* as its cue for the application of NCSL, whereas the prosecution's natural law took pre-existing *ius* as its cue.¹⁵³ While there is arguably a Grotian suggestion here with *lex* and *ius* coexisting, the argument is clearly in favour of *ius*, as opposed to the defence emphasis on *lex*, to circumvent NCSL. Such preference for *ius* is completely congruous with traditional natural law.

Even when Keenan completed his argument by mentioning the posited recognition of the illegality of Article 5 crimes, he undercut it by suggesting that regardless of the form by which this state of affairs was created, 'it was with the full realisation that the dictates of humanity and the requirements of civilisation demanded that these offences be recognised as such and placed beyond the pale of civilised conduct'.¹⁵⁴ The posited form of the crimes was downplayed in an argument implicitly premised on the Martens clause and thus anticipating ILP. Even if the reliance on the Martens clause is fully credited as ILP, undercutting the posited form of the crimes is congruent with the overwhelming earlier natural law arguments.

Consistent with earlier codes, the defence adopted a strict positivist approach when it noted that the universal (domestic) criminalisation of murder did not transform it into a separate international

¹⁵⁰ Keenan and Brown (n 12) 47.

¹⁵¹ Ibid 47-49.

¹⁵² Ibid 51.

¹⁵³ Ibid 56.

¹⁵⁴ Transcript of Proceedings 4 June 1946, 395-396.

crime.¹⁵⁵ Takayanagi argued that justice was ‘to be administered by established legal rules and principles, not according to the sense of right and justice of the judge, however good or wise he may be’.¹⁵⁶ This positivism emphasised the *lex lata* over the *lex ferenda* and law over morality. Takayanagi’s final address pertaining to NCSL reiterated this:

‘Criminal law is a common consciousness of obligation coupled with an obligation to suffer penalties if it is disregarded...The absence, *as a patent fact* of any such common penal consequences, prevents the existence of such a penal law. Whether there ought or ought not to be such a consciousness of penal liability is irrelevant. In the absence of such a law, the imposition of such a law, the imposition of such penalties would be nothing but unlawful violence’.¹⁵⁷

In the absence of explicit penal provisions for what had hitherto been unjustifiable political action, there was no ‘common consciousness of obligation to suffer the arbitrary penalties of military law in case the obligations of international law are broken’.¹⁵⁸ Takayanagi argued that NCSL was crucial for the proper administration of justice.¹⁵⁹ As its incorporation into ICL was questionable, Takayanagi also recognised the utility of vesting the NCSL rule on a universalist basis. Seemingly Takayanagi accepted that NCSL should have been, rather than was, part of international law.¹⁶⁰ This was confirmed by his admission that NCSL was not a technical rule but rather one vested on ‘natural and universal justice’.¹⁶¹ Thus, while he based NCSL on natural law by emphasising its universal, pre-positated yet binding nature, its directive moved Takayanagi into positivism, i.e. no crime nor punishment without posited provisions to this effect.

The Tokyo IMT, like its Nuremberg counterpart, understood NCSL to be merely a principle of justice.¹⁶² Patrick, MacDougall and Northcroft adopted a natural law understanding of the NCSL principle as ‘rules of policy or law susceptible of variation or modification according to the circumstances within the limits of justice’.¹⁶³ Bernard likewise jettisoned a strict positivist understanding of NCSL since the principle, in his view, served as a guideline in a system lacking a constitutional order where retrospective laws were possible.¹⁶⁴ Röling found NCSL to be ‘a rule of

¹⁵⁵ Boister and Cryer (n 28) 161.

¹⁵⁶ Transcript of Proceedings 3 March 1948, 42 129. This reminds of Aristotle’s rejection of Plato’s philosopher-king for which see AH Chroust, ‘Aristotle’s Criticism of Plato’s “Philosopher-King”’ (1968) 111 *Rheinisches Museum für Philologie Neue Folge* 16-22. See similarly Pal Dissent 234-235 discussed above under substantive crimes in section 3.3.

¹⁵⁷ Quoted in Boister and Cryer (n 28) 275-276. See also Transcript of Proceedings 3 March 1948, 42 111-42 112 reveals ‘unlawful’ to have been ‘lawless’.

¹⁵⁸ Transcript of Proceedings 3 March 1948, 42 111-42 112. For Hart’s views on obligation, see Hart (n 19) 79-88.

¹⁵⁹ Transcript of Proceedings 3 March 1948, 42 129-42 132.

¹⁶⁰ Ibid 42 133; 42 224.

¹⁶¹ Ibid 42 224.

¹⁶² Tokyo Majority Judgment 25-26.

¹⁶³ Quoted in Boister and Cryer (n 28) 138.

¹⁶⁴ Boister and Cryer (n 28) 138. See also Bernard Dissent 11 for an implicit rejection of NCSL from a natural law point

policy, valid only if expressly adopted’ and ‘an expression of political wisdom, not necessarily applicable in present international relations...[which may] if circumstances necessitate it, be disregarded’.¹⁶⁵ Jaranilla decided to address the NCSL principle by distinguishing domestic law from international law and submitting that the two should not be equated. Accordingly, even in the absence of legislation Jaranilla found that a court may justifiably ‘punish acts universally accepted as contrary to the law of nations’.¹⁶⁶ That he was adopting natural law was confirmed by his reliance on cosmopolitanism to conclude that the law should apply irrespective of territorial acceptance or not.¹⁶⁷

In contrast, Pal regarded the IMT obligated to ‘disregard the provisions of the Charter if they diverged from pre-existing international law’.¹⁶⁸ A tribunal which jettisoned NCSL would represent a manifestation of power:

‘The so-called trial held according to the definition of crime *now* given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus proscribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It does not correspond to any idea of justice’.¹⁶⁹

Pal explicitly considered the (natural law) issue of whether immorality should be equated with criminality. Clearly Japan’s conduct in Manchuria would ‘not...be applauded by the world’, yet Pal found in light of the prevailing international law that ‘it would be difficult to condemn the [conduct] as criminal’.¹⁷⁰ Immorality and criminality were clearly separate on this view which revealed a predilection for traditional positivism against traditional natural law.

Overall at Tokyo, Keenan and Brown, Takanayagi and the majority vested the basis of NCSL consistently on justice, i.e. it was not yet a posited rule. Whereas Keenan and Brown and the majority also rejected rigid reliance on positivist sources in compliance with NCSL’s directives, Takanayagi and Pal suggested the converse. The overall consistent approach was to accept NCSL as a flexible principle which was subservient to the need to punish conduct *mala in se*. Morality thus dictated whether reliance would be placed on NCSL. The natural law of the Tokyo IMT was

of view.

¹⁶⁵ Röling Dissent 44-45. See also BVA Röling, *The Tokyo Trial and Beyond Reflections of a Peacemonger* (Antonio Cassese ed, Polity Press 1993) 68-69.

¹⁶⁶ Jaranilla Concurring Opinion 18.

¹⁶⁷ Ibid.

¹⁶⁸ Van Schaak (n 70) 132.

¹⁶⁹ Pal Dissent 37.

¹⁷⁰ Pal Dissent 483.

consistent with that adopted at Nuremberg. On the post-WWII inter-curial dynamic, predictability and foreseeability was ensured even though natural law was constantly used – the functional aim to ensure jurisdiction remained consistent throughout. The Hartian maturation of the ICL system could still explain why the Tokyo IMT did not contravene the retrospective desideratum of Fuller.¹⁷¹ The overarching support for natural law meant the vindication of victims' rights (i.e. HR liberalism) whereas the positivism of the defence and Pal ensured greater protection for the accused (i.e. criminal law liberalism). Liberalism will be revisited in section 6.3.

Moving the scrutiny of NCSL as a code for philosophical position to the post-Cold War judicial bodies, it needs reiteration that NCSL was codified in IHR instruments such as the UDHR in 1948 and the ICCPR in 1966. In ICL, as stated above, it was only in the 1998 ICC Statute that this principle was codified. It is against this backdrop that the pronouncements of the judicial bodies of this period have to be understood. Also the dataset does not purport to include every reference to NCSL ventured by the role-players, but it embodies those justifications where philosophy was involved. Of course, consistency in philosophy remains the main structuring element.

The *Erdemović* TC raised legality on own initiative while considering Article 24(1) of the ICTY Statute pertaining to sentencing. The TC utilised an argument in favour of substantive justice rather than strict legality when it found that '...there is nothing absolute in that principle [of legality]. Its operation may be affected by other principles whose recognition concerns equally important interests of justice'.¹⁷² Clearly, by supporting such a position, the TC echoed the positions of the post-WWII IMTs. Legality was merely part of several principles applicable to give effect to justice without definitive posited authority thereto.

In *Delalić*, the defence argued that vesting criminal responsibility on common article 3 of the Geneva Conventions of 1949 would violate NCSL under Article 15 of the ICCPR. Despite uncertainty 'to what extent [NCSL had] been admitted as part of international legal practice, separate and apart from the existence of the national legal systems',¹⁷³ the TC inter alia relied on Article 15(2) of the ICCPR to argue that the 'purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognise the criminal

¹⁷¹ Hart (n 19) 89-96.

¹⁷² *Prosecutor v Erdemović* (Sentencing Judgment) IT-96-22-T (29 November 1996) para 38 quoting *Rauter* 16 *ILR*, 1949, 526 at 542-3 (Special Appeals Court, Netherlands).

¹⁷³ *Prosecutor v Delalić, Mučić, Delić and Landžo* (Judgment) IT-96-21-T (16 November 1998) para 403.

nature of the acts alleged in the Indictment'.¹⁷⁴ Evidently, the posited basis of NCSL in ICL was not yet attained and, based on posited materials from IHR, the TC subordinated the form of the principle to its purpose. This approach to NCSL was supported on appeal with additional corroboration from the posited Nuremberg IMT dicta that NCSL was a principle of justice and that the obviousness of the wrong committed justified the punishment.¹⁷⁵ Posited sources, which could be construed as merely presentational, thus justified a departure from legality's directives.

In *Krnojelac*, the TC did not address the basis of legality, but accepted that its directives prevented the introduction of a new and additional prohibited purpose pertaining to torture on the teleological grounds that "the primary purpose of humanitarian law is to safeguard human dignity".¹⁷⁶ This finding implicitly suggested that *Furundžija* and *Kvočka* exceeded legality on this point, the former utilising teleology and the latter relying on the posited precedent thus established.¹⁷⁷ In the context of crimes against humanity, *Mrkšić* also subordinated teleological expansion to the requirements of legality.¹⁷⁸ These arguments suggest a preference for the *lex lata* above the *lex ferenda* which is traditionally more typical of positivism. Yet, this approach was not consistently maintained in ICTY jurisprudence. Not long after *Krnojelac*, the TC (in a decision) relied on teleology to circumvent NCSL. Consequently the object and purpose of ICL was invoked to prioritize accountability for violations of international law against a NCSL argument that liability for superiors for acts of their subordinates in NIACs was not yet established.¹⁷⁹ However, this approach was criticised by the defence:

'The protection of humanity and preservation of world order as the overriding aims of IHL cannot serve as a basis to criminalise behaviour beyond the existing law. There would be no limits on the scope of IHL if the only guiding criterion was whether the prosecution was broadly in the interests of the spirit of IHL. Where the rights of the accused in a criminal trial are concerned, utmost respect for legality, for certainty and foreseeability of the law is required'.¹⁸⁰

¹⁷⁴ Ibid paras 311-313. For the same argument in a different context, see *Prosecutor v Stakić* (Judgment) IT-97-24-A (22 March 2006) Partly Dissenting Opinion of Judge Shahabuddeen para 67.

¹⁷⁵ *Prosecutor v Delalić, Mučić, Delić and Landžo* (Judgment) IT-96-21-A (20 February 2001) 293 footnote 1398 referring to Judgment in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg*, Vol. I:219. See also *Prosecutor v Milutinović, Sainović & Ojdanić* (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction: Joint Criminal Enterprise) IT-99-37-AR72 (21 May 2003) para 37; Van Schaak (n 70) 140 for a comparable finding.

¹⁷⁶ *Prosecutor v Krnojelac* (Judgment) IT-97-25-T (15 March 2002) para 186 quoting the purpose from *Prosecutor v Furundžija* (Judgment) IT-95-17/1-T (10 December 1998) para 162.

¹⁷⁷ *Prosecutor v Furundžija* (Judgment) IT-95-17/1-T (10 December 1998) para 162; *Prosecutor v Kvočka* (Judgment) IT-98-30/1-T (2 November 2001) paras 141, 152, 157.

¹⁷⁸ *Prosecutor v Mrkšić, Radić and Šljivančanin* (Judgment) IT-95-13/1-T (27 September 2007) para 460.

¹⁷⁹ Van Schaak (n 70) 141-145; *Prosecutor v Hadžihasanović, Alagić & Kubura* (Decision on Joint Challenge to Jurisdiction) IT-01-47-PT (12 November 2002) paras 62-64, 97-101, 112-119, 172-73.

¹⁸⁰ See *Prosecutor v Hadžihasanović, Alagić & Kubura* (Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction) IT-01-47-PT (27 November 2002) para 25. See also Van Schaak (n 70) 144.

This argument evidenced the tension between the rights of the accused and those of the victims. These two aspects of liberalism are revisited in section 6.3. Here existing posited law was held to be necessary for the protection of accused rights while expansive teleological arguments, based on a common morality, were downplayed. Positivism was preferred above natural law.

In later ICTY cases a tendency developed to show a degree of deference to the directives of NCSL. As mentioned above, under sources, the *Vasiljević* TC incorrectly premised criminal liability on prior criminalisation in customary law.¹⁸¹ Moreover, criminalisation could only occur if the CIL prohibition was sufficiently precise and accessible at the particular time.¹⁸² Thus, although it was identified in the Statute, the TC rejected the charges for ‘violence to life and person’ for lack of CIL support. To enforce ‘anything contained in the statute of a court in excess of existing [CIL] would be a utilisation of power and not of law’.¹⁸³ The *Blaškić* AC continued in the same vein that NCSL, which was based on IHR sources, required a crime to be proscribed at the time of its commission by a rule of CIL above and beyond its existence in the ICTY Statute.¹⁸⁴ Although the criminalisation of the crime of terror was accepted by both the *Galić* AC and the *Dragomir Milošević* AC, the posited basis of these findings were questioned in the dissents of Schomburg and Daqun respectively. Thus Schomburg held in the *Galić* AC: ‘It would be detrimental not only to the Tribunal but also to the future development of [ICL] and international criminal jurisdiction if our jurisprudence gave the appearance of inventing crimes – thus highly politicizing its function – where the conduct in question was not without any doubt penalized at the time when it took place’.¹⁸⁵ For Daqun terror could not be criminalised merely because it was serious: “‘it is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most stridently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime’”.¹⁸⁶ Clearly siding with positivism, *lex lata* rather than *lex ferenda*, Daqun submitted that despite ‘the need for such a crime, I cannot agree that the offence has been criminalised under [CIL]’.¹⁸⁷

¹⁸¹ Section 3.2.

¹⁸² *Prosecutor v Vasiljević* (Judgment) IT-98-32-T (29 November 2002) paras 193-198.

¹⁸³ *Ibid* paras 202-204.

¹⁸⁴ *Prosecutor v Blaškić* (Judgment) IT-95-14-A (29 July 2004) para 141.

¹⁸⁵ *Prosecutor v Galić* (Judgment) IT-98-29-A (30 November 2006) Separate and Partially Dissenting Opinion of Judge Schomburg para 21.

¹⁸⁶ *Prosecutor v Dragomir Milošević* (Judgment) IT-98-29/1-A (12 November 2009) Partly Dissenting Opinion of Judge Liu Daqun paras 1-5 quoting *Prosecutor v Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction Child Recruitment) SCSL-2004-14-A (31 May 2004) para 12.

¹⁸⁷ *Prosecutor v Dragomir Milošević* (Judgment) IT-98-29/1-A (12 November 2009) Partly Dissenting Opinion of Judge Liu Daqun para 29 footnote 59.

Despite its dearth of judgments to date, the ICC produced one coded instance revealing philosophy under NCSL. In *Katanga*, the TC vested NCSL on its Statute and argued NCSL's directives to emphasise the law-as-it-is rather than law-as-it-ought-to-be:

'Contrary to the founding texts of the ad hoc international criminal tribunals, the Statute explicitly enshrines the principle of legality...The primary task of the bench in criminal cases is the application and interpretation of the law but, under no circumstances, creation of the law, since the sole purpose of the bench's interpretative activity is to impart meaning to *existing* law'.¹⁸⁸

This argument was congruous with the later ICTY judgments emphasising the *lex lata* rather than the *lex ferenda*. This positivism was further confirmed when any teleological interpretation 'to create a body of law extraneous to the terms of the treaty' was rejected.¹⁸⁹ Added here was the posited basis of the legality principle in the ICC Statute.

The SCSL also engaged with legality and will be briefly considered.¹⁹⁰ In the *Norman Child Soldiers* opinion, the AC gave a brief overview of state practice to indicate that enlisting or recruiting child soldiers was a war crime under CIL prior to its adoption in the Rome Statute in 1998. The majority indicated that the prohibition reflected (what might be construed as natural law¹⁹¹) 'important values', yet still attempted to base the prohibition on positive law.¹⁹² In a dissenting opinion, Robertson argued that NCSL should not be circumvented to 'criminalise conduct which [judges] regard as seriously anti-social or immoral, but which have not been outlawed by legislation or by established categories of common-law crimes'.¹⁹³ For the majority, therefore, morality played a role as to criminality, whereas Robertson rejected such a view as in excess of positive law.

For purposes of this exposition all the post-Cold War ICL institutions are considered together for consistency of argument as they all adjudicated under the IHR codifications of NCSL and the limited dataset from the ICC did not necessitate a separate finding. The ICTY showed an internal shift from (natural law) substantive justice to (posited) strict legality.¹⁹⁴ Its earlier cases tended to

¹⁸⁸ *Prosecutor v Germain Katanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) paras 51-52.

¹⁸⁹ *Ibid* paras 54-55.

¹⁹⁰ See section 1.2.1.

¹⁹¹ As, for e.g., does Cryer (n 18) 252.

¹⁹² *Prosecutor v Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction Child Recruitment) SCSL-2004-14-A (31 May 2004) paras 10-24, 28-29.

¹⁹³ *Prosecutor v Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction Child Recruitment) SCSL-2004-14-A (31 May 2004) Dissenting Opinion of Judge Robertson para 12.

¹⁹⁴ Cassese (n 146) 22, 139-145.

reflect on the non-positivist basis of the principle and, consequently, to not strictly comply with its directives. This shifted under later jurisprudence which increasingly reflected the positivist basis of the principle, albeit under IHR, and advocated strict(er) compliance with its directives. This culminated in the ICC finding in *Katanga* wherein its positivist statutory commitment to NCSL was acknowledged. No data was coded from the ICTR and the inconsistent dataset from the SCSL was only illustrative. As with the post-WWII IMTs, the circumvention of NCSL tended to favour victims through easier findings of guilt (HR liberalism) while strict compliance tended to favour accused (criminal law liberalism).

Coding for Fullerian consistency in philosophical category through NCSL produced a large dataset. Although the principle of NCSL has been described as the defence's strongest suit,¹⁹⁵ matters are complicated in the international arena where NCSL was only codified after the IMTs in IHR and only codified in ICL in 1998. Therefore, both justifications regarding the nature of NCSL as principle and justifications regarding its directives revealed philosophy. Several trends emerged from ICL jurisprudence. The basis of NCSL as principle was consistently vested on justice (not based on any RoR) throughout the post-WWII IMTs (including selected prosecutors, defence counsel and judges). This justification dovetailed the lack of codification of the principle in ICL at the time. It also continued in the early cases of the ICTY before giving ground, in later cases, to arguments emphasising its positivist status (albeit in IHR). Regarding its directives, NCSL was often subordinated in the post-WWII IMTs to substantive justice. Only the Tokyo defence and Pal required the utmost compliance with its directives. Also the IMT majorities took account of the directives, but natural law and presentational positivism, which ensured flexible readings of extant sources, circumvented them. At the ICTY there was an initial continuation of this flexible approach to the NCSL directives.¹⁹⁶ This showed that modern judicial bodies, at times, equated the 'historical international condemnation of a practice with its criminalisation'.¹⁹⁷ However, the ICTY jurisprudence increasingly adopted stricter understandings of the directives of NCSL with later cases consistently respectful thereto. This culminated in the ICC which also adopted a strict positivist understanding of both the basis of NCSL and its directives.

This code directly engaged Fuller's requirement of retrospectivity which takes on added importance in the case of criminal law.¹⁹⁸ While retrospectivity was clearly not in issue from the later ICTY

¹⁹⁵ Cryer (n 18) 254.

¹⁹⁶ See, for e.g., Van Schaak (n 70) 140-158.

¹⁹⁷ Van Schaak (n 70) 150.

¹⁹⁸ Fuller (n 113) 57-60.

judgments on, the tension for this desideratum revolves around the post-WWII IMTs and the earlier ICTY jurisprudence with their reliance on natural law. Jackson's argument may be repeated that the Nuremberg Charter marked a transition where 'men ceased to punish crime by "hue and cry" and began to let reason and inquiry govern punishment'.¹⁹⁹ Even if, for argument's sake, these endeavours constituted retrospective law, new law was better than no law or force. Retrospectivity can only be in conjunction with something, not when that something is being created. The IMTs and early ICTY were essentially involved in establishing ICL. This development, in conjunction with the increased – and later consistent – deference to NCSL, does not fall foul of the retrospectivity desideratum although it does pressure it. On Hartian grounds these developments could be construed as the emergence of secondary rules which, along with the primary rules of obligation, indicated the maturation of a legal system.²⁰⁰ None of the other rule of law principles were problematic in this case. The change in philosophical trend that occurred happened gradually and was thereafter consistently adopted. As was indicated throughout, the flexible understanding of NCSL favoured HR liberalism while the strict understanding thereof supported criminal law liberalism.²⁰¹

3.5 Interpretation

Certain interpretation techniques can resonate with different philosophies thereby necessitating coding for them in this study.²⁰² ELP, which holds morality to always be extra-legal, would tend to rely on interpretation techniques that ostensibly did not require interpretation of morality. This would give effect to the *lex lata* rather than legislating afresh.²⁰³ For ILP, which could consider morality part of the law through RoR direction thereto, techniques of interpretation more amenable to using morality would be appealing.²⁰⁴ ILP and natural law could coincide, but natural law could invoke morality even without any posited authority thereto.²⁰⁵ Interpretation, therefore, revealed philosophy at times. This code overlapped with sources and substantive crimes, but a case is made here for a conceptual distinction between the three. This code, like NCSL, also exhibited the two liberalisms because it tended to follow victim-or accused-centric approaches. While the post-WWII IMTs produced no instances of this code beyond the expansive (natural law) interpretation,

¹⁹⁹ Jackson (n 130) 398.

²⁰⁰ Hart (n 19) 89-96.

²⁰¹ See section 6.3.

²⁰² L Du Plessis, *Re-Interpretation of Statutes* (LexisNexis 2002) 89-119; Van Blerk (n 7) 217-230.

²⁰³ Bix (n 23) 32.

²⁰⁴ Ibid.

²⁰⁵ Dias (n 105) 383; D Beyleveld and R Brownsword, 'The Practical Difference between Natural-Law Theory and Legal Positivism' (1985) 5 *Oxford Journal of Legal Studies* 4; B Reynolds, 'Natural Law versus Positivism: The Fundamental Conflict' (1993) 13 *Oxford Journal of Legal Studies* 448; Cotterrell (n 7) 115; Meyerson (n 7) 43; Wacks (n 1) 10, 32.

discussed above, afforded to posited materials in the criminalisation of aggression, the post-Cold War judicial bodies produced significant datasets. Subsequently, the ICTY and ICTR are discussed together and the ICC separately for inter-curial comparison.

At the post-Cold War Tribunals, philosophical underpinnings of interpretation were visible around several cluster arguments, namely general explanations of interpretation, interpretation built on human dignity, interpretations revolving around the protected person requirement and interpretations about JCE. The discussion on consistency of philosophy at the ICTY and ICTR will follow these clusters rather than jurisprudence chronology for argumentative coherence.

The first cluster pertains to general explanations of interpretation. Reliant on domestic case law, the literal, golden and mischief rules of interpretation were noted by the *Delalić* TC.²⁰⁶ The TC favoured teleology since a ‘reasonable as well as a purposive interpretation,’ which frequently adjusts to the ever-changing forms of criminal conduct, was required.²⁰⁷ Although strict construction was the starting point, it was ‘not violated by giving the expression its full meaning or the alternative meaning which is more consonant with the legislative intent and best effectuates such intent’.²⁰⁸ Since this approach was vested on posited domestic case law, it is coded as positivist.

In his *Alekšovski* TC dissent, Rodrigues adopted a literal interpretation of Article 2 of the ICTY Statute, pertaining to grave breaches, to reject the international nature of the armed conflict as a prerequisite element. While the protected person and property requirements, which emanated from the Geneva Conventions, were expressly included in the Statute, the international nature of the conflict was not. *A contrario* if it was not written it was not required.²⁰⁹ The judge supported this position through its congruence with the objectives of the ICTY to prosecute persons in ‘accordance with the provisions imposed upon it by the Statute and not by any other legislative instrument’.²¹⁰ This extremely positivist approach (i.e. only what was explicitly written in the ICTY Statute was to be followed) resulted – in this instance – in an increased likelihood of conviction (since less elements were required).

²⁰⁶ *Prosecutor v Delalić, Mučić, Delić and Landžo* (Judgment) IT-96-21-T (16 November 1998) paras 161-165, 170.

²⁰⁷ *Ibid* para 170.

²⁰⁸ *Ibid* para 412. See also WA Schabas, ‘Interpreting the Statutes of the Ad Hoc Tribunals’ in LC Vohrah, F Pocar, Y Featherstone *et al* (eds), *Man’s Inhumanity to Man Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 852-855.

²⁰⁹ *Prosecutor v Alekšovski* (Judgment) IT-95-14/1-T (25 June 1999) Dissenting Opinion of Judge Rodrigues paras 29-43.

²¹⁰ *Ibid* para 43, 54.

In contrast to these positivist arguments, the *Alekšovski* AC stated that when it interpreted a provision, ‘it is merely identifying what the proper interpretation of that provision has always been, even though not previously expressed that way’.²¹¹ This was approved and followed by a series of ICTY and ICTR cases.²¹² It revealed the modernist belief in an enduring single true interpretation despite prior misunderstandings. The language used is reminiscent of Finnis’ comparison of natural law principles with mathematics principles which are perennial even though not always correctly understood.²¹³ This gives the interpreter significant leeway to shape a provision which could easily exceed ILP and venture into natural law territory. The general principle here was not based on any posited support either and is coded as natural law.

Finally under the first cluster, in *Akayesu*, the prosecution raised issues which would not have impacted the verdict reached by the TC. In a dissent, Nieto-Navia rejected the majority’s argument that it possessed ‘discretionary power to entertain such appeals’.²¹⁴ In his opinion Article 24 of the ICTR Statute was clear:

‘According to [Articles 31 and 32 of the VCLT], the text of a treaty (in this case, the Statute) must be presumed to be *the authentic expression of the intent of the parties*. Consequently, the ‘interpreter’ cannot set aside the text of the document, with a view to consulting its ‘spirit,’ nor read into it “what [it] do[es] not, expressly or by implication contain”’.²¹⁵

This approach could be construed as ELP to favour a stricter interpretation and critique the majority’s broader one. Any consideration in excess of the treaty’s text would be unacceptable. This approach sees teleology as an exception rather than the rule in contrast to *Delalić* wherein teleology was preferred,²¹⁶ but in conformity with Rodrigues in *Alekšovski*, where the Statute’s provisions were conclusive.²¹⁷ These general explications on interpretation revealed inconsistent natural law

²¹¹ *Prosecutor v Alekšovski* (Judgment on Appeal) IT-95-14/1-A (24 March 2000) para 135. See Shahabuddeen (n 114) 1012-1013.

²¹² *Prosecutor v Delalić, Mučić, Delić and Landžo* (Judgment) IT-96-21-A (20 February 2001) paras 575-576; *Prosecutor v Vasiljević* (Judgment) IT-98-32-T (29 November 2002) para 196; *Prosecutor v Milutinović, Sainović & Ojdanić* (Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction: Joint Criminal Enterprise) IT-99-37-AR72 (21 May 2003) para 37; *Prosecutor v Kordić & Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) para 310; *Prosecutor v Stakić* (Judgment) IT-97-24-A (22 March 2006) Partly Dissenting Opinion of Judge Shahabuddeen paras 35-39; *Prosecutor v Ntagerura, Bagambiki and Imanishimwe* (Judgment) ICTR-99-46-A (7 July 2006) para 127. See also M Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal A Judge’s Recollection* (OUP 2012) 73.

²¹³ J Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) 24.

²¹⁴ *Prosecutor v Akayesu* (Judgment on Appeal) ICTR-96-4-T (1 June 2001) Dissenting Opinion of Judge Nieto-Navia para 5.

²¹⁵ *Ibid.*

²¹⁶ *Prosecutor v Delalić, Mučić, Delić and Landžo* (Judgment) IT-96-21-T (16 November 1998) para 170.

²¹⁷ *Prosecutor v Alekšovski* (Judgment) IT-95-14/1-T (25 June 1999) Dissenting Opinion of Judge Rodrigues paras 29-43.

and positivism.

The next cluster of philosophical justifications of interpretation revolved around the principle of human dignity and its protection. The *Furundžija* TC argued that the ‘fundamental principle of protecting human dignity...favours broadening the definition of rape’.²¹⁸ Human dignity (which the TC emphasised as the ‘basic underpinning and indeed the very *raison d’être* of [IHL and IHR]’²¹⁹) was the value, the protection of which served as the normative standard through which the particular rules of IHL had to be understood and interpreted. Since there was no posited reference to this principle, this approach seemed in excess of posited authority (and thus not ILP). This suggested natural law. The *Delalić* AC continued the preference for teleology, by considering the purpose of the Geneva Conventions to protect human dignity, to support the dissolution of the IAC versus NIAC distinction. In contrast to its TC, under the first cluster argument, the AC ventured no posited sources for this argument apart from a throwaway reference to Article 15(2) of the ICCPR aimed at the general basis of the relevant crimes.²²⁰ Comparably, the *Alekšovski* TC’s analysis of common Article 3 used the underlying purpose of the Geneva Conventions, i.e. ‘the humanitarian one of protecting the individual *qua* human being’ as the qualifying standard for the right of humane treatment, which was not elaborated, thereby vesting the rule (humane treatment) on a particular goal (protecting the individual in its capacity as human being).²²¹ This teleological understanding of the Convention was also not based on any posited authority. The *Kupreškić* TC argued that broad definitions of ‘civilian’ and ‘population’ were intended in the context of the rules prohibiting crimes against humanity. These rules purported to ‘safeguard basic human values by banning atrocities directed against human dignity’.²²² The TC expanded these safeguards beyond civilians since ‘these rules may be held to possess a broader humanitarian scope and purpose than those prohibiting war crimes’.²²³ For the TC this justified a broad interpretation of Article 5, notwithstanding the explicit limitation laid down in it, since the ‘limitation in Article 5 constitutes a departure from [CIL]’.²²⁴ By extending these protections to combatants, the TC reiterated its humanitarian objectives – combatants were also human beings with value. On strict posited law, the drafters of the Statute could have intended the more limited protection. In the *Akayesu* appeal, the Tribunal attempted to clarify the ambit of civilian responsibility for violations of IHL in terms of Article 4 through a

²¹⁸ *Prosecutor v Furundžija* (Judgment) IT-95-17/1-T (10 December 1998) para 184.

²¹⁹ *Ibid* para 183.

²²⁰ *Prosecutor v Delalić, Mučić, Delić and Landžo* (Judgment) IT-96-21-A (20 February 2001) paras 173-172.

²²¹ *Prosecutor v Alekšovski* (Judgment) IT-95-14/1-T (25 June 1999) para 49. See J Hospers, *An Introduction to Philosophical Analysis* (3rd edn, Routledge 1990) 350.

²²² *Prosecutor v Kupreškić* (Judgment) IT-95-16-T (14 January 2000) para 547.

²²³ *Ibid*.

²²⁴ *Ibid*.

teleological construction of its progenitor provision, namely common article 3 of the Geneva Conventions. A reading of the ICRC Commentaries led to the finding that the ‘protection of victims is...the core notion of common Article 3’ and led to the AC arguing that ‘the minimum protection provided for victims under common Article 3 implies necessarily effective punishment on persons who violate it’.²²⁵ The AC utilised the VCLT to justify its investigation into purpose,²²⁶ which renders this approach ILP. The second cluster of interpretation arguments was consistently based on natural law, with only Akayesu reflecting ILP. This revealed an underlying concern for the protection of victims which embodied HR liberalism.

The third cluster of philosophical arguments about interpretation, revolved around the protected person requirement under Article 2 of the ICTY Statute pertaining to the grave breaches of the Geneva Conventions. Article 4(1) of the Geneva Conventions defined protected persons as those persons who ‘find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals’. However, crucially for the *Tadić* AC ‘in modern inter-ethnic armed conflicts...new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance...In such conflicts,...the text and the drafting history..., and more importantly, the Convention’s object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test’.²²⁷ This expansive argument, wherein substance surpassed form, was subsequently followed and repeated in a series of cases.²²⁸ In the absence of posited RoR direction thereto, this argument suggested natural law. Moral considerations dictated the legal position without a basis thereof in posited legal materials. This was ostensibly confirmed

²²⁵ *Prosecutor v Akayesu* (Judgment on Appeal) ICTR-96-4-T (1 June 2001) paras 432-443. This approach was followed with approval in *Prosecutor v Musema* (Judgment) ICTR-96-13-T (27 January 2000) para 274 as well as *Prosecutor v Semanza* (Judgment) ICTR-97-20-T (15 May 2003) para 360.

²²⁶ *Prosecutor v Akayesu* (Judgment on Appeal) ICTR-96-4-T (1 June 2001) para 433 footnote 799. Ostensibly, *Prosecutor v Nyiramasuhuko et al* (Judgment) ICTR-98-42-A (14 December 2015) para 2137 used the VCLT to consider ordinary and contextual meaning in Article 3 of the ICTR Statute, but *Prosecutor v Nyiramasuhuko et al* (Judgment) ICTR-98-42-A (14 December 2015) Dissenting and Separate Opinions of Judge Agius para 33 found neither to have been used.

²²⁷ *Prosecutor v Tadić* (Judgment) IT-94-1-A (15 July 1999) para 166. See generally also, *ibid*, paras 164-169.

²²⁸ Although it must be noted that this argument was already pursued in *Prosecutor v Rajić* (Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-95-12-R61 (13 September 1996) paras 35-37. Cases that followed included, *Prosecutor v Delalić, Mučić, Delić and Landžo* (Judgment) IT-96-21-T (16 November 1998) paras 259-266; *Prosecutor v Jelisić* (Judgment) IT-95-10-T (14 December 1999) para 70; *Prosecutor v Blaškić* (Judgment) IT-95-14-T (3 March 2000) paras 125-145; *Prosecutor v Aleksovski* (Judgment on Appeal) IT-95-14/1-A (24 March 2000) paras 150-152; *Prosecutor v Delalić, Mučić, Delić and Landžo* (Judgment) IT-96-21-A (20 February 2001) paras 73-83; *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-T (26 February 2001) paras 152-154; *Prosecutor v Naletilić and Martinović* (Judgment) IT-98-34-T (31 March 2003) paras 205-207; *Prosecutor v Brđanin* (Judgment) IT-99-36-T (1 September 2004) para 125; *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) paras 322-331; *Prosecutor v Naletilić and Martinović* (Judgment) IT-98-34-A (3 May 2006) Separate and Dissenting Opinion of Judge Schomburg para 20; *Prosecutor v Prlić et al* (Judgment Volume 1 of 6) IT-04-74-T (29 May 2013) para 100.

when Meron ascribed the more flexible interpretation to the ‘respect for human rights and for a humanitarian interpretation’ which overrode a ‘literal and legalistic approach’.²²⁹ The subsequent cases, however, relied on their predecessors for posited support despite embodying such expansive arguments. The underlying expansive argument continued the support for the victims of international crimes (HR liberalism).

Finally, coding for philosophy through interpretation delivered results in conjunction with JCE as a form of criminal responsibility under Article 7(1) of the ICTY Statute. Through a syllogistic argument based on the purpose of the ICTY Statute, the *Tadić* AC ‘read in’ a further form of criminal participation. The AC submitted that ‘the Statute intends to extend the jurisdiction of the International Tribunal to...all those who have engaged in serious violations of [IHL], whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations’.²³⁰ The AC equated the moral blameworthiness of such participants in JCEs with those persons actually performing the impugned acts.²³¹ Although these arguments exceeded posited sources, the AC bolstered its findings with CIL.²³² The outcome of the argument suggested a Grotian approach, considering both natural law and posited sources, at most. Once the precedent was created by *Tadić*, the subsequent cases simply relied on their posited predecessor.²³³ The *Tadić* reasoning was implicitly reiterated when the *Krajišnik* AC rejected the defence contention that JCE had no textual basis in the ICTY Statute because they neglected to address the teleological interpretation of the Statute. The fact that this ground of liability was also, in the ACs view, found in CIL assured its applicability.²³⁴

The support intra-curially for JCE was not unanimous. Although it recognised the existence of JCE, the *Stakić* TC was clearly uncomfortable with the concept and rather opted for co-perpetratorship.²³⁵ The *Stakić* AC, however, rejected co-perpetratorship as neither vested on CIL nor on the Tribunal’s

²²⁹ Meron (n 141) 53.

²³⁰ *Prosecutor v Tadić* (Judgment) IT-94-1-A (15 July 1999) paras 189-190. See also Robinson (n 121) 119-124.

²³¹ *Prosecutor v Tadić* (Judgment) IT-94-1-A (15 July 1999) para 191.

²³² *Ibid* paras 194-220.

²³³ See, for e.g., *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-T (26 February 2001) paras 394-398; *Prosecutor v Martić* (Judgment) IT-95-11-T (12 June 2007) paras 123-126; *Prosecutor v Martić* (Judgment) IT-95-11-A (8 October 2008) para 80. See also *Prosecutor v Kvočka* (Judgment) IT-98-30/1-T (2 November 2001) para 246 and *Prosecutor v Kvočka et al* (Judgment) IT-98-30/1-A (28 February 2005) paras 79-86. This was also cited and approved in *Prosecutor v Krnojelac* (Judgment) IT-97-25-A (17 September 2003) para 29 and footnote 28. See also *Prosecutor v Vasiljević* (Judgment) IT-98-32-A (25 February 2004) para 95 and footnote 169 which merely reiterates this position in a statement of fact. See *Prosecutor v Tolimir* (Judgment) IT-05-88/2-T (12 December 2012) para 887; *Prosecutor v Prlić et al* (Judgment Volume 1 of 6) IT-04-74-T (29 May 2013) para 210.

²³⁴ *Prosecutor v Krajišnik* (Judgment) IT-00-39-A (17 March 2009) para 655.

²³⁵ *Prosecutor v Stakić* (Judgment) IT-97-24-T (31 July 2003) para 438.

jurisprudence. The AC found JCE to be established thus.²³⁶ Schomburg, who presided over the *Stakić* TC, again argued for the inclusion of co-perpetratorship in a separate opinion in the *Simić et al* AC. The appeal for the inclusion of this mode of liability relied on a belt and braces approach still concerned with the posited pedigree of JCE, since ‘co-perpetratorship suits the needs of [ICL] particularly well’ and ‘reflects existing law at least since the point in time when both *ad hoc* Tribunals were vested with jurisdiction *ratione temporis*’.²³⁷ In the *Martić* AC, Schomburg again noted the lack of posited basis for JCE in the Statute. He submitted that interpretation in excess of the ‘explicit and exhaustive wording of Article 7’ could be construed as a contravention of NCSL.²³⁸ For Schomburg, a disservice is done to international justice when forms of individual responsibility lack ‘the necessary explicit basis in the Statute of the [ICTY]’.²³⁹ In *Šešelj*, Antonetti likewise expressed scepticism of JCE as he rejected group responsibility.²⁴⁰ He favoured strict construction rather than the crafting of constructs to fill a void of prosecutorial investigation.²⁴¹ These views juxtapose with the majorities who adopted JCE. It clearly shows that JCE reasoning was held by several judges to exceed the posited law and be problematic because of this fact.²⁴² The contrast between *Tadić*’s Grotian approach and the positivism in the later cases is evident. While the overall data may be counted as positivist, the initial argument upon which the later cases relied was expansive and controversial. Subsequent cases, purporting to rely on the original argument as a posited progenitor, merely perpetuated this expansive argument. These differences again reflected the divide in ICL between human rights liberalism and criminal law liberalism as more expansive interpretation (which JCE was) would tend to vindicate the rights of victims while stricter interpretation would tend to look after accused rights more.²⁴³

Coding for consistency of philosophical justification in interpretation techniques at the ICC delivered a moderate dataset. The majority of cases adopted a plain meaning approach to

²³⁶ *Prosecutor v Stakić* (Judgment) IT-97-24-A (22 March 2006) para 62.

²³⁷ *Prosecutor v Simić, Tadić and Zarić* (Judgments) IT-95-9-A (28 November 2006) Dissenting Opinion of Judge Schomburg paras 16-17.

²³⁸ *Prosecutor v Martić* (Judgment) IT-95-11-A (8 October 2008) Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić paras 4-5.

²³⁹ *Ibid* para 10.

²⁴⁰ *Prosecutor v Šešelj* (Judgment) IT-03-67-T (31 March 2016) Concurring Opinion of Presiding Judge Jean-Claude Antonetti p 155-159. See also *Prosecutor v Prlić et al* (Judgment Volume 6 of 6) IT-04-74-T (29 May 2013) Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti p 100-182; *Prosecutor v Tolimir* (Judgment) IT-05-88/2-A (8 April 2015) Separate and Partially Dissenting Opinion of Judge Antonetti p 96.

²⁴¹ *Ibid* p 181-182. See also *Prosecutor v Tolimir* (Judgment) IT-05-88/2-A (8 April 2015) Separate and Partially Dissenting Opinion of Judge Antonetti p 102.

²⁴² *Prosecutor v Tolimir* (Judgment) IT-05-88/2-T (12 December 2012) para 886 for the defence view thus.

²⁴³ Robinson (n 121) 129-135. See also GP Fletcher and JD Ohlin, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’ (2005) 3 *JICJ* 548-550. See section 6.3.

interpretation.²⁴⁴ In a few instances this was contextualised against the object and purpose of the provision.²⁴⁵ In one instance the ICC, reliant on the VCLT, welded these considerations together so that ‘ordinary meaning...context...object and purpose...form a whole’.²⁴⁶ While this suggested ILP, the court denied that the aim of the Statute allowed extraneous law in excess of literal interpretation.²⁴⁷ Moreover, while the object and purpose could be considered, it was further limited by NCSL.²⁴⁸ In two instances teleological reasoning was rejected in favour of plain meaning. Thus, in a decision, the reliance on ‘social alarm’ by the TC was found without posited basis and in *Ngudjolo*, Van Den Wyngaert subjected teleology to strict construction for criminal responsibility.²⁴⁹ Only one instance was coded where teleology was preferred. This was Odio Benito’s argument that the prohibition of child recruitment ought to hold regardless of the nature of the group performing the recruitment. This was in conflict with the majority who restated the posited statutory framework of the ICC to reiterate the separation of IAC and NIAC.²⁵⁰ Teleology was clearly not very popular at the ICC thus far. The Court has tended to favour the plain meaning approach. Subordinating teleology to plain meaning seemed to suggest a positivist (possibly even ELP) rather than a natural

²⁴⁴ *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) paras 600-608, 979; *Prosecutor v Mathieu Ngudjolo Chui* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-02/12 (18 December 2012) Concurring Opinion of Judge Christine Van Den Wyngaert para 11; *Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 A 5 (1 December 2014) Separate Opinion of Judge Adrian Fulford paras 7, 13; *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06 A 5 (1 December 2014) para 277; *Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06 A 5 (1 December 2014) Partially Dissenting Opinion of Judge Sang-Hyun Song paras 3-9; *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against the “Decision on Sentence pursuant to Article 76 of the Statute”) ICC-01/04-01/06 A 4 A 6 (1 December 2014) paras 62-64; *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/08 (21 March 2016) para 75; *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/08 (21 March 2016) Separate Opinion of Judge Kuniko Ozaki para 27.

²⁴⁵ *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) paras 601, 979; *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06 A 5 (1 December 2014) para 277; *Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06 A 5 (1 December 2014) Partially Dissenting Opinion of Judge Sang-Hyun Song paras 3-9; *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/08 (21 March 2016) para 75; *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/08 A (8 June 2018) Concurring Separate Opinion of Judge Eboe-Osuji paras 110-116, 139.

²⁴⁶ *Prosecutor v Germain Katanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) para 45.

²⁴⁷ *Ibid* paras 54-55.

²⁴⁸ *Ibid* paras 43-51. See, *ibid*, at para 1122 for interpretation encompassing the purpose and object of Statute. See also *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/08 (21 March 2016) para 77.

²⁴⁹ *Judgment on the Prosecutor’s appeal against the decision of Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’* ICC-01-04 (13 July 2006) para 66, 72; *Prosecutor v Mathieu Ngudjolo Chui* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-02/12 (18 December 2012) Concurring Opinion of Judge Christine Van Den Wyngaert paras 16-19. See also Cryer (n 18) 256-257.

²⁵⁰ *Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) para 539; *Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) Separate and Dissenting Opinion of Judge Odio Benito para 13.

law (or even ILP) approach.²⁵¹ By favouring stricter adherence to plain meaning, the rights of accused seemed to be preferred (i.e. criminal law liberalism). For rule of law purposes here, the favouring of posited law was consistent.

Interpretation as code revealed a large dataset at the ICTY and ICC. The ICTR revealed a negligible dataset. The query into consistency for rule of law will thus revolve around the ICTY and ICC data. In the ICTY, pronouncements on interpretation were often made to justify exceeding the bounds of the text. Teleological interpretation was ubiquitous. Literal interpretation was occasionally invoked to oppose expansive strategies argued for by colleagues. Based on the explicit pronouncements, it would be safe to agree with Van Schaak's submission that the ICTY, at times, '...evince a "normative bias" visible in other forms of international legal discourse favouring "international legal completeness, predictability, coherence, and dynamism" at the expense of strict textualism or deference to the prior intentions of states. This quest for coherence often leads to decisions that render [ICL] a more comprehensive and holistic body of law'.²⁵² Underpinning all the ICTY data was a victim-centred, expansive interpretation. While the general understandings of interpretation were mixed, human dignity as principle and the expansive interpretations afforded to 'protected persons' and JCE consistently favoured the victims (HR liberalism).

In contrast, the ICC revealed consistent support for literal interpretation. This was not uniform, however, and a few instances of broader, holistic interpretations appeared. The contrast between the ICC and the ICTY (on the inter-curial dynamic) was, however, stark. The ICTY was much more amenable to expansive natural law (protecting victims) whereas the ICC was more circumspect and strictly positivist (ensuring greater protection for the accused). Bearing in mind the limited natural law in the interpretation of the post-WWII IMTs, the overall shift in philosophy under this code was from expansive (victim-centric) natural law (both the IMTs and ad hoc Tribunals) to stricter (accused-centric) positivism (at the ICC).

Formally on Fuller's rule of law considerations, these instances were articulated and public. As with the legality code, early expansive arguments gave way to consistent positivism (in particular inter-curially from the ICTY to the ICC). The shift was not rapid or frequent, thereby complying with Fuller's principle to this effect. Expansive interpretation pressurised the retrospective principle

²⁵¹ Bix (n 23) 32.

²⁵² Van Schaak (n 70) 155. See also Schabas (n 208) 886-887. See, for example, *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) paras 97, 119 and 126.

initially. This coincided with greater concern for the victims of international crimes (i.e. HR liberalism). However, as the trend increasingly moved towards strict construction (especially at the ICC), greater protection was afforded to the accused (i.e. criminal law liberalism) thereby undermining some of the initial tension exerted on the retrospective desideratum. Throughout foreseeability and predictability of law's application was attained provided the respective support for victims and accused was understood.

3.6 Conclusions on material ICL

Coding for consistency of philosophy in material ICL within the broader natural law/positivism framework at the selected ICL judicial bodies revealed four codes, namely ICL sources, substantive crimes, NCSL and interpretation. While NCSL and interpretation resulted in large datasets, sources and crimes produced moderate datasets at best. Both the Tokyo IMT and the ICTY provided large datasets. The ICTR dataset was negligible in contrast possibly because its material jurisdiction resulted in more evidence-based findings as opposed to legal-theoretical discussion.

Specific inter-and intra-curial trends in consistency per role-player under material ICL were identified. Congruent with the historical philosophical codes in chapter 2, the selected post-WWII prosecutors and defence counsel consistently utilised natural law and positivism respectively. While the defence were essentially uniform in their positivism, the prosecutors' natural law was more often interspersed with Grotian arguments than was the case under the historical philosophical codes. The post-WWII IMTs produced an inconsistent dataset with the Nuremberg judicial component negligible in all but two instances (NCSL and interpretation). At the post-Cold War judiciaries the ICTY delivered large datasets on NCSL and interpretation which showed initial support for natural law before settling into positivism (albeit with later interpretation relying on earlier expansive constructions as posited authority). Crimes delivered an inconsistent dataset while sources revealed natural law. The ICC only delivered a noteworthy dataset regarding interpretation which embodied consistent positivism.

The overall inter-and intra-curial trends for the individual codes under material ICL can subsequently be identified. Looking at the selected role-players holistically, substantive crimes produced an inconsistent dataset. Philosophical justifications pertaining to substantive crimes remained inconsistent whether the post-WWII IMTs and post-Cold War bodies (which, for this code, was limited to the ICTY) were considered together (inter-curially) or separately (intra-curially). Possibly at the ICTY consistency could be found in the respective support for positivism

and natural law from the majorities and dissents. ICL sources revealed a trend from inconsistency at the post-WWII IMTs to more generally consistent natural law arguments at the ICTY. While philosophical pronouncements were ventured on substantive crimes and ICL sources, given the frequent invocation of crimes and sources in ICL, the datasets were limited. Limited datasets could explain the ensuing inconsistencies. The NCSL and interpretation codes revealed dynamism as both suggested a trend in ICL jurisprudence from natural law to positivism. Such dynamism can be explained on the basis of the new field of law which was being fleshed out. This also corresponds to Cassese's dictum that substantive justice was gradually giving way to strict legality in ICL.²⁵³ As was noted, especially regarding NCSL and interpretation, the movement from natural law to positivism (already within the ICTY under NCSL and from the ICTY to the ICC under interpretation) also appeared to suggest a shift from victim-centric to accused-centric sensitivities. These two liberalisms are detailed in section 6.3.

The inconsistent arguments surrounding ICL sources and substantive crimes arguably did not undermine the rule of law. Consistency is difficult to establish in moderate or small datasets. The arguments adopted could, moreover, have been foreseeable on functional grounds, i.e. to ensure jurisdiction through a particular source, over a crime or to undermine it depending on the role-player involved. Whether the first expansive arguments under NCSL and interpretation were foreseeable is debatable and thus exerted some pressure on the rule of law (especially the retrospective principle). This was somewhat curtailed with later Tribunals decisions either consistently following earlier ones (e.g. interpretation at the ICTY) in line with predictable victim-centred concerns or because stricter accused-centred sensitivities became the norm (e.g. interpretation from ICTY to ICC or the maturation of NCSL in the ICTY or its inclusion in the ICC Statute).

3.7 Conclusions on the philosophical categories of natural law and legal positivism under part A

The scrutiny next turns to the impact natural law and legal positivism as philosophical categories in ICL jurisprudence made on the rule of law. Whether one agrees with the distinction between natural law and positivism in the abstract or not,²⁵⁴ the coded data showed two different ways of thinking in ICL jurisprudence – one reliant on posited authority as final, the other looking towards higher, external values without posited authority thereto. Thus, coding suggested that in a newer legal

²⁵³ Cassese (n 146) 142-143.

²⁵⁴ For which see preface to part A.

system, such as ICL, the theoretical distinction between natural law and positivism might still be vital and have something to contribute to juxtapose and label different justifications.

Coding for natural law and positivism in ICL jurisprudence revealed that both were invoked from time to time individually or together in a Grotian manner. Positivism appeared in the guises of ILP and ELP. SCA enabled a systematisation of natural law and positivist justifications in ICL jurisprudence. Absent a method of systematisation these justifications would otherwise just have presented a jumble of philosophies. Questions into consistency, rule of law and, eventually, legitimacy would not be possible in relation to such an unordered mixture of data. This is true for the overarching philosophies considered in this study as well as natural law and positivism under part A. The argument throughout this thesis is that consistency and its corollary inquiries are only intelligible pursuits relative to some systematisation. For natural law and positivism, consistency is better understood relative to individual codes as coding made the data intelligible through systematisation.

Overall findings can now be ventured on the consistency of use of natural law and positivism as philosophical categories intra-and inter-curially in ICL jurisprudence. The post-WWII prosecutors adopted consistent natural law (with some Grotian leanings to use both natural law and positivism) on just war and NCSL, consistent natural law on cosmopolitanism and substantive crimes and a consistent Grotian approach to ICL sources. Self-reflexive statements produced a negligible dataset. Overall, the evidence suggested that the post-WWII prosecutors favoured natural law with some reliance on a Grotian approach. The post-WWII defence counsel utilised consistent, almost uniform, positivism and opposition to natural law throughout the self-reflexive, just war, cosmopolitan, ICL sources, substantive crimes and NCSL codes. Only the acceptance of the natural law basis of NCSL prevented complete positivism. The dialectic between the selected prosecutors and defence counsel as between natural law and legal positivism was thus evidenced. Their respective functional aims to prosecute or defend ostensibly explained their respective positions.

On the intra-jurist level, over all the codes, Jackson mainly adopted a Grotian approach with a slant towards natural law. Keenan and Brown firmly favoured natural law with a slant towards a Grotian approach. Shawcross adopted a Grotian approach with some natural law. Arguably this position was influenced through Sir Hersch Lauterpacht's involvement with the British Prosecution.²⁵⁵ De

²⁵⁵ K Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2011) 21 *European Journal of International Law* 1087 discussed the collaboration between Shawcross and Lauterpacht as well.

Mention consistently adopted natural law arguments. Finally, prosecutors Dubost and Rudenko produced negligible datasets. Despite the overarching consistency in the defence arguments, Jahreiss' positivism was based on a small dataset whereas Takanayagi was consistently positivist over a much larger dataset (only conceding the natural law basis of NCSL).

Collectively the Nuremberg and Tokyo IMTs, including dissents, relied on consistent natural law arguments pertaining to NCSL and interpretation (which was a small dataset). A Grotian approach leaning towards natural law appeared in relation to self-reflexive statements. The IMTs adopted positivism regarding just war. Hereafter, inconsistent arguments pertaining to cosmopolitanism and substantive sources appeared. ICL crimes also appeared inconsistent but another small dataset was at play. On closer analysis of ICL crimes, both IMT majorities adopted natural law (in isolated instances) with the Tokyo dissents offering inconsistent arguments. Tokyo dominated the post-WWII datasets on the natural law/positivism codes and the preceding findings could be presented as the Tokyo position too. Nuremberg's data was insufficient to change the Tokyo data when compared inter-curially. Nuremberg only revealed isolated instances of natural law, under ICL sources, interpretation and substantive crimes, and arguably positivism under cosmopolitanism. Only on NCSL did Nuremberg reveal a trend favouring natural law. Separating the IMTs into their respective majority findings did not repay effort as neither produced datasets in excess of a few isolated instances. The holistic reading is therefore most comprehensive and shows the arguments to be generally inconsistent.

On the inter-and intra-jurist level across all codes, several consistency findings could be ventured at Tokyo with its number of self-contained dissents. Bernard and Jaranilla consistently favoured natural law. Webb, in turn, consistently utilised the Grotian approach. Röling oscillated between natural law and positivism (proving the finding of Boister and Cryer to this effect²⁵⁶). On the chapter 2 and 3 codes, Pal consistently invoked positivism (which proves part of Kopelman's thesis²⁵⁷). This did not exhaust his philosophical musings, however, and his reliance on TWAIL follows in section 5.3.

Overall at the post-Cold War bodies, the ICTY adopted consistent natural law regarding self-reflexive statements, ICL sources and cosmopolitanism. Cosmopolitanism was almost uniformly

²⁵⁶ Boister and Cryer (n 28) 283-285; Cryer (n 18) 243.

²⁵⁷ E Kopelman, 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial' (1991) 23 *New York University Journal of International Law and Politics* 411-418. See also A Nandy, 'The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability' (1992) 23 *New Literary History* 60.

natural law. Just war was essentially based on uniform positivism. Inconsistent arguments accompanied the policy-oriented approach, but this was a small dataset. ICL crimes were ostensibly also inconsistent. However, another small dataset was involved of which sense can be made cognisant that the majorities consistently used positivism and the dissents consistently favoured natural law. Two codes at the ICTY suggested dynamic trends. NCSL began with isolated natural law instances but was thereafter consistently positivist while interpretation revealed a trend from natural law to ostensible positivism. The fact persisted, on interpretation, that later positivism furthered the earlier expansive natural law interpretation. The ICTR produced a negligible dataset on natural law and positivism. Not too much can be read into its findings as they did not constitute trends. Isolated instances under just war, NCSL and interpretation advised against pronouncements on trends. However, multiple instances of natural law were coded under cosmopolitanism. The ICC produced noteworthy datasets under only NCSL and interpretation. On both counts the approach was consistently positivist.

While the study does not purport to investigate individual post-Cold War trends, the intra-and inter-jurist arguments pertaining to Cassese and McDonald are ventured here as illustrative for future research. Accordingly, the desire to humanise ICL may explain and clarify some of the ostensible inconsistencies in the *Erdemović* and *Tadić* judgments of Cassese.²⁵⁸ In *Erdemović*, Cassese argued that the accused should at least be able to plead duress. He utilised positivism and rejected McDonald and Vohrah's policy-oriented approach. In *Tadić*, on the other hand, he supported the conflation of ICL applicable to IACs and NIACs through natural law. Again the humanization of the law suggested this extension of protection. This ties into the tension between accused-centred and victim-centred forms of ICL liberalism, which are discussed in section 6.3. Suffice it here to note Cassese exhibited sensitivity to both branches, while McDonald and Vohrah's approach inclined towards the victims. Apart from the policy code, NCSL and interpretation (with their shift from expansive natural law to stricter positivism) also reflected a movement from victim-centric liberalism to accused-centric liberalism in ICL.

Over all the ICL role-players, coding revealed that philosophical justifications pertaining to the self-reflexive, just war, cosmopolitan, ICL sources, NCSL and interpretation codes were significant. The policy-oriented and substantive crimes datasets were too small for purposes of overall findings. What follows focuses on the judiciaries rather than the selected prosecutors and defence counsel

²⁵⁸ *Prosecutor v Erdemović* (Judgment) IT-96-22-A (7 October 1997) Dissenting Opinion of President Cassese paras 11, 49; *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) paras 97, 119. For Cassese's role in *Tadić*, see Cassese (n 52) 53 and Cryer (n 49) 1048-1057.

since they were clearly divided into a natural law versus positivism divide. Accordingly, the self-reflexive code consistently revealed Grotian natural law (albeit in a small dataset), just war was consistently positivist, cosmopolitanism and ICL sources were mixed to natural law, NCSL and interpretation were dynamic with early natural law giving way to consistent later positivism.

Although mixed, the general trend in ICTY justifications seemed to follow Cassese's dictum that substantive justice was gradually giving way to strict legality in ICL.²⁵⁹ While natural law was often used in early jurisprudence, there was a gradual shift to positivism as the body of ICL was established. Perhaps it is significant that later ICTY jurisprudence produced very little data on the part A codes – philosophy tended to appear proportionately to the newness of the regime.

Despite the overall mixed use of natural law and positivism across the various codes, it is suggested that the rule of law was not thereby undermined. The most important Fullerian desiderata under part A of the study into natural law and positivism apart from non-contradictory justifications were retrospectivity and frequent change. This study's coded data under natural law and legal positivism proves that ICL jurisprudence was mostly predictable and foreseeable provided the legal subject understood which codes (or synonymously 'indicators' or 'arguments') might apply to his case. Predictability was also possibly assured early on due to consistent natural law-based support for HR liberalism, i.e. protecting victims. Just because the present systematisation might not have been ventured before does not mean that it cannot make sense of the justifications offered. The trends intra-code were consistent enough (regarding the larger datasets) to ensure foreseeability and predictability of law. The justifications did thus not change too fast as required by Fullerian rule of law. This was confirmed with the separate testing of each coded use of philosophy against the rule of law desiderata. The finding pertaining to legitimacy will await the overall conclusion.

²⁵⁹ Cassese (n 146) 142-143.

Part B

Utilitarianism and Deontology as philosophical categories for coding in the selected international criminal law role-players

This preface to chapter 4 briefly explains the substantive understanding afforded to the ethical theories coded for consistency in this study and contextualises them.¹ As a point of departure, ethics can be subdivided into virtue ethics, which focuses on the character of an individual, and ethics pertaining to conduct.² Coding revealed that the theories pertaining to conduct, whether the nature or consequences thereof, rather than virtue ethics, dominated ICL discourse. Ethical theories pertaining to conduct may be divided along two lines of inquiry, namely the study of the good and the study of the right.³ This division reflects where the locus of value may be placed, namely in the consequences of an act or in the act itself.⁴

The study of the good investigates which objectives are to be pursued and attempts to justify its selection. For the study of the good, the good is primary and right actions are those that promote the initially established good. This view is teleological and right action becomes a means to an end.⁵ Such theories are consequentialist as right follows from the consequences of an act. Consequentialism can be subdivided depending on the axiology informing it. Utilitarianism is a form of consequentialism.⁶ Utilitarianism shifts the focus from the welfare of the individual to that of society as a whole. The aim is to maximise utility (encapsulated in the maxim ‘pursuing the greatest good for the greatest number’).⁷ Utilitarianism thus comprises two aspects, namely a consequentialist principle and a utility principle. The consequentialist principle means that the rightness or wrongness of an act is determined through its consequences while the utility principle

¹ This chapter will collectively refer to deontology and utilitarianism as ‘ethical theories’. See LP Pojman (ed), *Moral Philosophy: A Reader* (Hackett Publishing 1993) xi; BH Bix, *Jurisprudence: Theory and Context* (7th edn, Sweet & Maxwell 2015) 125 footnote 1.

² J Hospers, *An Introduction to Philosophical Analysis* (3rd edn, Routledge 1990) 349-350; Pojman (n 1) xiv.

³ Hospers (n 2) 350. See also LP Pojman (n 1) 112.

⁴ Pojman (n 1) 112; J Deigh, ‘Ethics’ in Robert Audi (ed), *The Cambridge Dictionary of Philosophy* (2nd edn, CUP 2001) 287.

⁵ Hospers (n 2) 350; Pojman (n 1) xiv; Deigh (n 4) 287. See also R Cryer, H Friman, D Robinson and E Wilmshurst, *An Introduction to International Criminal Law and Procedure* (CUP 2014) 29; Bix (n 1) 125.

⁶ Although it was not necessary on the data to adopt the distinction here, for the subdivision of utilitarianism into rule and act utilitarianism, see LP Pojman (n 1) 113; R Wacks, *Understanding Jurisprudence An Introduction to Legal Theory* (3rd edn, OUP 2012) 214; M Freeman, *Lloyd’s Introduction to Jurisprudence* (9th edn, Thomson Sweet Maxwell 2014) 197 footnote 12. For utilitarianism as consequentialist, see Hospers (n 2) 357; D Meyerson, *Understanding Jurisprudence* (Routledge 2007) 119-120; Bix (n 1) 128.

⁷ See generally JS Mill, *Utilitarianism* (Parker, Son and Bourn 1863) 24; Hospers (n 2) 354; Deigh (n 4) 287; J Bentham, *An Introduction to the Principles of Morals and Legislation* (Dover 2007) 1.II-III, 1.VI; N Dower, *The Ethics of War and Peace Cosmopolitan and Other Perspectives* (Polity Press 2009) 75; Bix (n 1) 128.

means a particular type of state (such as pleasure or happiness⁸) is the only thing good in itself.⁹ Utilitarianism is notorious because it is often impossible to accurately anticipate the consequences of a particular action as it requires.¹⁰

Conversely, the study of the right is concerned with determining the right and wrong actions of the individual and provides justifications for its findings.¹¹ The study of the right first establishes what an individual may or may not do and the good follows (or may follow) from this. Hence, achieving the good is either the result of right actions or incidental to them. This view is deontological as it is duty driven.¹² While two types of deontology have been identified, namely intuitionism and rationalism, for coding in ICL jurisprudence only rationalist deontology will be considered. This is the version which uses a second-order principle to generate first-order principles, e.g. the categorical imperative of Kant.¹³ Kant's categorical imperative entails that the individual should act so that 'the maxim of your action...could become a universal rule of human conduct'.¹⁴ Kant presented a second formulation, namely that every rational being exists as an end and must never be treated as a mere means alone. Because each person is to be respected as an autonomous agent, right and wrong actions are not entirely dependent on the particular action's consequences (as is the case with utilitarianism).¹⁵ Respect should be afforded to every human being on the basis of their rational capacity. Justice is an important corollary notion. It confirms that people should be treated as they deserve and in accordance with their just deserts. To be justly treated is more important than to maximise happiness (contrary to utilitarianism). Punishment, for example, is inflicted because it is deserved and not because others would be happier seeing it inflicted.¹⁶

The relationship between these ethical theories and the other philosophies in this thesis requires brief consideration. Historically, utilitarianism has been utilised in conjunction with legal positivism.¹⁷ However, it remains analytically independent from positivism and is coded

⁸ For the distinction between eudaimonistic utilitarianism (pleasure) and hedonistic utilitarianism (happiness), see Pojman (n 1) 112-113.

⁹ Pojman (n 1) 112.

¹⁰ Hospers (n 2) 354-357. See generally Dower (n 7) 74; Wacks (n 6) 216; Cryer, Friman, Robinson and Wilmschurst (n 5) 32.

¹¹ Hospers (n 2) 35; Pojman (n 1) xiv; Bix (n 1) 125.

¹² Hospers (n 2) 350; Deigh (n 4) 287; Wacks (n 6) 214.

¹³ Pojman (n 1) 155.

¹⁴ I Kant, *Fundamental Principles of the Metaphysics of Morals* (Dover 2005) 38. See also Hospers (n 2) 356-357; Dower (n 7) 75-76.

¹⁵ Kant (n 14) 45-46. See also Hospers (n 2) 357; CR Snyman, *Criminal Law* (4th edn, Butterworths 2002) 18; Dower (n 7) 75-76; Bix (n 1) 126.

¹⁶ Hospers (n 2) 358. See also Snyman (n 15) 18; Meyerson (n 6) 124; Cryer, Friman, Robinson and Wilmschurst (n 5) 30.

¹⁷ A van Blerk, *Jurisprudence an Introduction* (Butterworths Lexisnexis 1998) 27; Freeman (n 6) 196-198. See

accordingly. Deontology and utilitarianism are also relevant for the discussion on liberalism as systemic philosophy in section 6.3. As was noted under the policy-oriented, NCSL and interpretation codes,¹⁸ ICL liberalism consists of human rights (HR) liberalism and criminal law liberalism. Whereas the former focuses more on the position of victims, the latter focuses on the accused.¹⁹ Utilitarianism tends to consider communal (inclusive of victims') interests rather than that of the perpetrator and so often revealed HR liberalism. Deontology focuses on the just deserts and moral autonomy of the accused which usually inclines towards criminal law liberalism.

Since consistency in philosophical argument remains the pivotal (albeit not exclusive) rule of law requirement in this thesis, the interrelationship between utilitarianism and deontology is important. While it was argued in part A that natural law and legal positivism exist on a spectrum, deontology and utilitarianism do not exist on an unbroken spectrum. Natural law and legal positivism are able to assimilate aspects of the other while the ethical theories' coexistence is a matter of compatibility (which is comparable to the coexistence of natural law and positivism under the Grotian tradition).²⁰ The compatibility of utilitarianism and deontology has been convincingly argued by Hart who separated the levels on which these principles function in relation to sentencing in particular. Thus, the benefit to society in enforcing certain rules of law (i.e. utilitarianism) serves as the general justifying aim of punishment whereas deontology serves the principle of distribution (i.e. determining who deserves punishment).²¹ Coding for compliance with the rule of law desideratum of non-contradiction necessarily took place against this possibility of compatibility regarding sentencing.

generally Bentham (n 7); J Austin, *The Province of Jurisprudence Determined* (John Murray 1832).

¹⁸ See sections 2.5, 3.4 and 3.5 respectively.

¹⁹ D Robinson, 'The Two Liberalisms of International Criminal Law' in Carsten Stahn and Larissa van den Herik (eds) *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010) 129-135. See also GP Fletcher and JD Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' (2005) 3 *JICJ* 540, 544.

²⁰ See, for e.g., Hospers (n 2) 368; Snyman (n 15) 22-23.

²¹ HLA Hart, *Punishment and Responsibility* (Oxford 1968) 9. See also Snyman (n 15) 22-23; Cryer, Friman, Robinson and Wilmshurst (n 5) 29-30 on the combination theory.

Chapter 4

Ethical theories in ICL jurisprudence: Self-reflexive statements and purposes of sentencing

4.1 Introduction

Coding for consistency of utilitarianism and deontology in this study occurred through self-reflexive justifications and through sentencing purposes. Since the dataset was moderate in comparison with that under part A, coding in such a manner also ensured a more coherent narrative and presentation. Combining the sentencing purposes, in particular, meant the Hartian compatibility between the theories could be better reflected while still juxtaposing them and measuring them against the Fullerian rule of law in the broader context of foreseeability and predictability. Consistency of philosophy remained the organising principle of the data.

4.2 Self-reflexive statements on ethical theories

Utilitarianism and deontology appeared in several justifications relying on characteristic aspects of each respective theory. These explicit arguments, like those under part A, are consolidated here under the self-reflexive code. As was noted in section 2.2, conceptually this code may reveal any philosophy. Coding for utilitarianism in ICL judgments revealed justifications relating to the greater good for the greater number, maximising utility, treating persons as means to ends,¹ and the consideration of outcomes and consequences. Deontology, on the other hand, was coded from arguments treating persons as ends unto themselves and concerns about moral agency. Due to a small dataset, the post-WWII IMTs were considered together, while the ICTY was the only post-Cold War role-player to contribute data. Once consistency is determined per role-player, patterns inter-curially will be analysed.

At Nuremberg, Jackson utilised both utilitarianism and deontology to support the IMT's legitimacy and counter the charge, related to Fullerian rule of law, of retrospectivity of the proceedings. Firstly, adopting utilitarianism:

'The rule of law in the world, flouted by the lawlessness incited by these defendants, had to be restored at the cost to my country of over a million casualties, not to mention those of other nations. I cannot subscribe to the perverted reasoning that society may advance and strengthen the rule of law by the expenditure of morally innocent lives but that progress in the law may never be made at the price of morally guilty lives'.²

¹ Which reappears under dehumanisation, discussed in section 6.3.

² R Jackson in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. II: 147.

On this justification, the teleological objective to maximise utility, which would be rendered by advancing the international rule of law, determined the action advocated for. The balancing of moral guilty against innocent lives evidenced an argument in excess of treating individuals as ends unto themselves as required by deontology.³

In contrast to this utilitarianism, Jackson also justified the proceedings by suggesting that ‘fair and dispassionate hearings’ are the ‘best-known protection to any man with a defense worthy of being heard’.⁴ Law was preferable to summary executions.⁵ These statements implicitly recognised that justice would be better served through the recognition of the dignity and liberty of the accused. Humans were to be treated as ends unto themselves. Jackson indicated that the defendants had a chance to defend themselves before the Tribunal in contrast to how they curtailed the similar right of their fellow countrymen.⁶ Effectively, the IMT extended to the defendants that which they had not afforded others. Moreover, Jackson conceded that ‘the record on which we judge these defendants today is the record on which history will judge us tomorrow’.⁷ The Allies had to treat the defendants the same way they would want for themselves. The IMT, therefore, represented the first categorical imperative of Kant.⁸

The only other post-WWII instance of self-reflexive ethical theories was coded from Jaranilla at Tokyo. In his concurring opinion, Jaranilla responded to the defence argument that the actions of the accused paled in comparison to the use of the atomic bombs by the Allies. Jaranilla replied that the end justified the means. In the absence of the atomic bombs, the war, he argued, would have been prolonged, leading to more destruction and death as compared to the situation after the use of the atomic bomb. In sum, any means was justified to bring about the end of the war.⁹ The utilitarian greater good for the greater number was visible in this argument.¹⁰ In consequentialist fashion, the

³ J Hospers, *An Introduction to Philosophical Analysis* (3rd edn, Routledge 1990) 358. See also D Meyerson, *Understanding Jurisprudence* (Routledge 2007) 124; R Cryer, H Friman, D Robinson and E Wilmshurst, *An Introduction to International Criminal Law and Procedure* (CUP 2014) 30.

⁴ Jackson (n 2) 102.

⁵ Ibid.

⁶ Ibid.

⁷ Jackson (n 2) 101. See the similar contours of justice in *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/08 A (8 June 2018) Concurring Separate Opinion of Judge Eboe-Osuji para 24.

⁸ I Kant, *Fundamental Principles of the Metaphysics of Morals* (Dover 2005) 38. See also Hospers (n 3) 356-357; N Dower, *The Ethics of War and Peace Cosmopolitan and Other Perspectives* (Polity Press 2009) 75-76.

⁹ Jaranilla Concurring Opinion 25.

¹⁰ JS Mill, *Utilitarianism* (Parker, Son and Bourn 1863) 24; J Bentham, *An Introduction to the Principles of Morals and Legislation* (Dover 2007) 1.II-III, 1.VI. See generally Hospers (n 3) 354; J Deigh, ‘Ethics’ in Robert Audi (ed), *The Cambridge Dictionary of Philosophy* (2nd edn, CUP 2001) 287; Dower (n 8) 75; BH Bix, *Jurisprudence: Theory*

objective determined the correct course of action.¹¹ This finding jettisoned the second formulation of Kant's categorical imperative to treat humans as ends unto themselves.¹²

Coding for self-reflexive justifications in ethical theories at the post-WWII IMTs thus resulted in a small dataset. The size of the dataset precluded firm findings on consistency for rule of law purposes. Jackson used both utilitarianism and deontology while Jaranilla utilised utilitarianism. Jackson's reliance on both philosophies appeared to be inconsistent. As will be discussed in section 6.3, Jackson's inconsistency can be viewed as a manifestation of the victim-centric versus accused-centric approaches in HR and criminal law liberalism.¹³ His aim to add rhetorical support for the IMT's legitimacy at least revealed a common objective underpinning both positions.

While more instances of self-reflexive ethical theories appeared in the post-Cold War judgments, they were essentially limited to the ICTY. The coded data pertained to the plea of duress as a defence; the pronouncements on the possible hierarchy in the crimes over which the ICTY exercised jurisdiction as well as responsibility for crimes. The subsequent discussion revolves around consistency of philosophy within these clusters for ease of narrative.

The plea of duress as a defence to the killing of innocents in *Erdemović* was addressed through ethical theories.¹⁴ Cassese resorted in part to utilitarianism, when he considered the acceptability of duress as defence. Although he conceded that proportionality might 'never be satisfied where the accused is saving his own life *at the expense* of his victim...: how can a judge satisfy himself that the death of one person is a lesser evil than the death of another?', he foresaw duress as a plausible defence in cases where the victim would have died regardless of the perpetrator's actions.¹⁵ Cassese's reasoning revealed a consequential query, concerned with a numerical (and moral) balancing between one person's life and another. Stephen, likewise, argued that 'where resistance to the demand will not avert the evil but will only add to it, the person under duress also suffering that evil, proportionality does not enter into the equation'.¹⁶ For Stephen, a doctrinaire rejection of

and Context (7th edn, Sweet & Maxwell 2015) 128.

¹¹ Hospers (n 3) 350. See also LP Pojman (ed), *Moral Philosophy: A Reader* (Hackett Publishing 1993) xiv; Deigh (n 10) 287; Cryer, Friman, Robinson and Wilmshurst (n 3) 29; Bix (n 10) 125.

¹² Kant (n 8) 45-46. See also Hospers (n 3) 357; Dower (n 8) 75-76; Bix (n 10) 126.

¹³ In section 6.3 the opposing aims, on systemic level, will be discussed. See D Robinson, 'The Two Liberalisms of International Criminal Law' in Carsten Stahn and Larissa van den Herik (eds) *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010) 129-135.

¹⁴ In addition to the policy argument considered in section 2.5.

¹⁵ *Prosecutor v Erdemović* (Judgment) IT-96-22-A (7 October 1997) Dissenting Opinion of President Cassese para 42. [Emphasis in original.]

¹⁶ *Prosecutor v Erdemović* (Judgment) IT-96-22-A (7 October 1997) Separate and Dissenting Opinion of Judge Stephen paras 61-62.

duress in cases involving the killing of innocents could potentially deny justice, which was troublesome.¹⁷ Stephen's objective to avert evil determined the action to allow the defence of duress to the accused. This conforms to the study of the good associated with utilitarianism.¹⁸

Conversely, McDonald and Vohrah argued, in response to what they saw as their counterparts' utilitarianism, that their approach did 'not involve a balancing of harms for and against killing but rests upon an application in the context of [international humanitarian law (IHL)] of the rule that duress does not justify or excuse the killing of an innocent person'.¹⁹ If the judges' earlier policy-oriented argument is taken into account,²⁰ it seems that their invocation here of what seems like positivism, in opposition to Cassese and Stephen's utilitarianism, is problematic. By invoking the policy-oriented approach the judges invoked another (moral) philosophical position to achieve the opposite result argued for by Cassese and Stephen, who based their discussions on utilitarianism. Which approach is to be preferred comes down to conflicting views on whether ICL's objectives are accused or victim-centric.²¹ Li also rejected utilitarianism as it could be abused to justify every single perpetrator in the group who participated in the mass killings. For him, there existed no (posited) authority for such a proposition.²² Impliedly, for Li, someone had to be morally blameworthy in the case of the collective killing of innocents. He concluded by noting the lack of posited support for the utilitarian approach proposed by Cassese and Stephen.²³ While Li thus opposed utilitarianism, his insistence on someone being blameworthy for contravention of duty suggested deontology.

Questions pertaining to the possible hierarchical understanding of substantive ICL crimes also raised ethical theories generally. McDonald and Vohrah considered crimes against humanity to be intrinsically more serious than war crimes. This distinction rested upon the belief that war crimes were essentially directed at an 'immediate protected object' whereas crimes against humanity due to 'their heinousness and magnitude...constitute egregious attacks on human dignity, on the very notion of humaneness. They consequently affect, or should affect, each and every member of

¹⁷ Ibid.

¹⁸ Hospers (n 3) 350. See also Pojman (n 11) xiv; Deigh (n 10) 287; Cryer, Friman, Robinson and Wilmshurst (n 3) 29; Bix (n 10) 125.

¹⁹ *Prosecutor v Erdemović* (Judgment) IT-96-22-A (7 October 1997) Joint Opinion of Judges McDonald and Vohrah para 80. See also in this regard GK McDonald, 'The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Laws of War' (1998) 156 *Military Law Review* 48-49.

²⁰ Discussed in section 2.5.

²¹ Robinson (n 13) 129-135 and section 6.3.

²² *Prosecutor v Erdemović* (Judgment) IT-96-22-A (7 October 1997) Separate and Dissenting Opinion of Judge Li para 11.

²³ Ibid.

mankind'.²⁴ Such arguments about the seriousness of an action looks at the action rather than the goal to be attained through punishment. This suggested deontology.²⁵ While the number of victims might be what distinguishes a war crime from a crime against humanity, the argument never moved from act to goal and so did not constitute utilitarianism. Cassese's arguments that crimes against humanity were of a 'greater magnitude' as compared to war crimes, on the one hand, and that deterrence of these more grievous crimes through a heavier sanction was important, on the other hand, indicated such an explicit acceptance of both deontological and utilitarian rationales.²⁶ Li again utilised deontology by arguing that the gravity of an act was determined by the act itself and the harm was identical regardless of classification or animus.²⁷ The *Furundžija* AC, reliant on *Tadić*, resolved this uncertainty as, in principle, there was no distinction in seriousness between crimes against humanity and war crimes either in the ICTY Statute, Rules or in CIL.²⁸ However, Vohrah disagreed: 'When all things *are* equal...the injury to society would necessarily be greater if a crime against humanity has occurred'.²⁹ This view echoed his earlier argument in *Erdemović* and concerned the inherent egregiousness of the impugned action.

Ethical theories next appeared in conjunction with superior responsibility and duty. The determination of whether superior responsibility was based on the failure of the superior to act or whether the criminality of the subordinate was transferred to the superior was ostensibly resolved through deontology. In the *Alekšovski* TC, the ICTY sided with the International Law Commission (ILC) as "an individual incurs criminal responsibility for the failure to act only when there is a legal obligation to act".³⁰ In sum, 'superior responsibility derives directly from the failure of the person against whom the complaint is directed to honour an obligation'.³¹ The point is for a superior to be treated as an end unto himself (punished for his own individual guilt) rather than as a means to

²⁴ *Prosecutor v Erdemović* (Judgment) IT-96-22-A (7 October 1997) Joint Opinion of Judges McDonald and Vohrah para 21. For the initial concurrence with this hierarchical view of the crimes to be tried, see *Prosecutor v Tadić* (Sentencing Judgment) IT-94-1-Tbis-R117 (11 November 1999) paras 28-29. For the rejection of such a hierarchical view of the crimes to be punished, see *Prosecutor v Erdemović* (Judgment) IT-96-22 (7 October 1997) Separate and Dissenting Opinion of Judge Li paras 18-26; *Prosecutor v Tadić* (Sentencing Judgment) IT-94-1-Tbis-R117 (11 November 1999) Separate Opinion of Judge Robinson pp. 2-10 and, authoritatively, *Prosecutor v Tadić* (Judgment in Sentencing Appeals) IT-94-1-A and IT-94-1-Abis (26 January 2000) para 69 (and also Judge Shahabuddeen's Separate Opinion therein).

²⁵ Hospers (n 3) 367; Bix (n 10) 127.

²⁶ *Prosecutor v Tadić* (Judgment in Sentencing Appeals) IT-94-1-A and IT-94-1-Abis (26 January 2000) Separate Opinion of Judge Cassese para 15.

²⁷ R Cryer, 'One Appeal, Two Philosophies, Four Opinions and a Remittal: The Erdemović Case at the ICTY Appeals Chamber' (1997) 2 *JACL* 199.

²⁸ *Prosecutor v Furundžija* (Judgment) IT-95-17/1-A (21 July 2000) paras 240-243 referring to *Prosecutor v Tadić* (Judgment in Sentencing Appeals) IT-94-1-A and IT-94-1-Abis (26 January 2000) para 69.

²⁹ *Prosecutor v Furundžija* (Judgment) IT-95-17/1-A (21 July 2000) Separate Declaration of Judge Lal Chand Vohrah para 6.

³⁰ *Prosecutor v Alekšovski* (Judgment) IT-95-14/1-T (25 June 1999) para 72.

³¹ *Ibid.*

an end (vicariously punished for the guilt of others).³² This was the justificatory argument of the *Krnojelac* AC, the *Halilović* TC and Shahabuddeen in the *Orić* AC as well.³³ However, absent a crime of ‘failure to exercise control’, it has been argued that superiors, guilty of the failure to punish standard,³⁴ have in fact been held responsible and stigmatised for the crimes committed by their subordinates, namely war crimes and crimes against humanity.³⁵ At the ICC, Judge Eboe-Osuji attempted to address this partial undermining of deontology through ostensible vicarious liability, by suggesting that complicity better explained command responsibility for the crime of the subordinate.³⁶

Coding for ethical theories self-reflexively used resulted in a negligible dataset at the post-WWII IMTs and a moderate dataset at the ICTY. No instances of self-reflexive ethical theories were identified at the ICTR and only an isolated instance at the ICC. On the Fullerian rule of law, the dataset delivered inconsistent support for both theories whether on the horizontal dynamics, namely the post-WWII IMTs (due to its negligible size) and the post-Cold War Tribunals respectively, or holistically over all the jurisdictions considered. These inconsistencies might be due to a contradiction over the appropriate understanding of whether ICL as institution is victim or accused-centric.³⁷ No other Fullerian desiderata were applicable. A final finding on the consequent impact on the rule of law will, however, only be possible at the end of this chapter. Ethical theories continued as a crucial element of penology, to which the scrutiny now turns.

4.3 Ethical theories in punishment

4.3.1 Preliminary observations

Ethical theories were most often coded from sentencing purposes.³⁸ Sentencing purposes have been connected to utilitarianism, deontology or a combination theory respectively.³⁹ Hart’s understanding

³² Kant (n 8) 45-46. See also Hospers (n 3) 357; Dower (n 8) 75-76; Bix (n 10) 126.

³³ *Prosecutor v Halilović* (Judgment) IT-01-48-T (16 November 2005) paras 42, 54; *Prosecutor v Orić* (Judgment) IT-03-68-A (3 July 2008) Declaration of Judge Shahabuddeen para 24. See also *Prosecutor v Krnojelac* (Judgment) IT-97-25-A (17 September 2003) para 171.

³⁴ See, for e.g., *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) para 839.

³⁵ For the explicit variance between assertions and practice, see Robinson (n 13) 124-129, footnote 96. For an example of such responsibility, see *Prosecutor v Krnojelac* (Judgment) IT-97-25-A (17 September 2003) para 180.

³⁶ *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/08 A (8 June 2018) Concurring Separate Opinion of Judge Eboe-Osuji paras 191-209 also invoking Grotius in support.

³⁷ See also Robinson (n 13) 129-135 and section 6.3.

³⁸ See SS Terblanche, *The Guide to Sentencing in South Africa* (Butterworths 1999) 177 footnote 202 for the interchangeable nature of ‘purposes’, ‘objects’, ‘goals’, ‘aspects’, ‘effects’, ‘ends’ or ‘elements’ of punishment as labels in a domestic context.

³⁹ Hospers (n 3) 367; Terblanche (n 38) 197; R Wacks, *Understanding Jurisprudence An Introduction to Legal Theory* (3rd edn, OUP 2012) 272; Bix (n 10) 125-130.

of utilitarianism and deontology as serving, respectively, the general justifying aim of punishment and the principle of distribution underpins the compatibility of these theories for sentencing purposes.⁴⁰ The combination theory is often presented as an amalgamation of the first two theories. The subsequent discussions are therefore cumulatively applicable to it.⁴¹ It bears noting that some form of principled balancing between the theories remains important for predictability and foreseeability which are, of course, central to the rule of law.⁴² Before investigating the coded data, this preliminary discussion will briefly reflect on how sentencing purposes embody utilitarianism and deontology respectively. This will explain how these ethical theories were identified through coding for sentencing rationales.

Utilitarian penal theory is future-oriented and punishment aims to achieve objectives like reducing pain and increasing happiness.⁴³ Punishment is therefore a means to another objective.⁴⁴ Utilitarian sentencing considerations include deterrence, incapacitation, rehabilitation and taking account of the effects of the crimes on victims or society.⁴⁵ Deterrence can be divided into particular and general deterrence. Particular deterrence aims to deter the punished person from breaking the law again while general deterrence aims to deter others from breaking the law in future.⁴⁶ By keeping a perpetrator in detention, future crimes are prevented. Incapacitation is therefore linked to individual deterrence.⁴⁷ Rehabilitation constitutes another utilitarian factor as it is a future-oriented objective to maximise utility by reintroducing the perpetrator into society, which in turn no longer needs to fear him.⁴⁸ Justifications of punishment based on the effects of crimes on victims or society per definition look towards consequences beyond the act.⁴⁹ This reflects the essence of utilitarianism.

On the other hand, deontological penal theory often revolves around retribution.⁵⁰ Retribution as

⁴⁰ HLA Hart, *Punishment and Responsibility* (Oxford 1968) 9. See CR Snyman, *Criminal Law* (4th edn, Butterworths 2002) 22-23; Cryer, Friman, Robinson and Wilmshurst (n 3) 29-30 on the combination theory. See also preface to part B in this study.

⁴¹ Snyman (n 40) 13, 22-23.

⁴² M Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 339. See also section 1.2.3.2.

⁴³ Terblanche (n 38) 200; Snyman (n 40) 13; Cryer, Friman, Robinson and Wilmshurst (n 3) 29.

⁴⁴ Snyman (n 40) 13.

⁴⁵ Hospers (n 3) 367. See generally Terblanche (n 38) 197, 200-201; Snyman (n 40) 13; Wacks (n 39) 273-276; Cryer, Friman, Robinson and Wilmshurst (n 3) 32-41; Bix (n 10) 125-129.

⁴⁶ Hospers (n 3) 367; Terblanche (n 38) 178-186; Snyman (n 40) 13, 19-21; Wacks (n 39) 276; Cryer, Friman, Robinson and Wilmshurst (n 3) 32; Bix (n 10) 128-129.

⁴⁷ Hospers (n 3) 367; Terblanche (n 38) 178-186; Snyman (n 40) 13, 18-19; Wacks (n 39) 276; Cryer, Friman, Robinson and Wilmshurst (n 3) 35. However, see Bix (n 10) 129-130 for the classification of incapacitation as neither deontology or utilitarian.

⁴⁸ See generally Hospers (n 3) 367; Terblanche (n 38) 187-190; Snyman (n 40) 13, 21-22; Wacks (n 39) 276; Cryer, Friman, Robinson and Wilmshurst (n 3) 35; Bix (n 10) 129.

⁴⁹ Cryer, Friman, Robinson and Wilmshurst (n 3) 37-41.

⁵⁰ Some, like L Alexander, 'The Philosophy of Criminal Law' in Jules Coleman and Scott Shapiro (eds), *The Oxford*

penal theory is past-oriented – punishment is imposed because a perpetrator committed or attempted to commit a wrong act or omission.⁵¹ Punishment is justified in itself as an end or just desert.⁵² On this view, a wrongdoer obtains an unjustifiable advantage by renouncing a duty which others willingly assumed. The law has to restore the ensuing imbalance.⁵³ Some have argued that retribution is neither a true ‘purpose’ of punishment nor a factor which independently influences sentence.⁵⁴ Depending on the understanding afforded thereto, retribution might simply mean the ‘imposition of an appropriate sentence’ which ensures its permanent relevance.⁵⁵ In ICL jurisprudence, retribution has usually been understood as just deserts and expressing the moral outrage of society,⁵⁶ fitting punishment to crime⁵⁷ and, rarely, embodying vengeance.⁵⁸

Denunciation and moral outrage have, somewhat inconsistently, been linked to retribution.⁵⁹ A sentencing purpose like denunciation engages both with the offender and the broader community

Handbook of Jurisprudence & Philosophy of Law (OUP 2002) 816-817 have distinguished between strong and weak retributivism depending on whether negative desert is a sufficient condition for punishment or whether good consequences are also required. This study will jettison these labels as all data would devolve into weak retributivism. The notion of ‘combination’ or ‘mixed’ theory addresses the same interaction between retribution and other purposes without running them together. Alexander, *ibid*, at footnote 1, concedes this point.

⁵¹ Hospers (n 3) 368. See also Snyman (n 40) 13; Alexander (n 50) 816; Bix (n 10) 126.

⁵² Snyman (n 40) 13-14.

⁵³ *Ibid* 14.

⁵⁴ Terblanche (n 38) 190; Snyman (n 40) 15.

⁵⁵ Terblanche (n 38) 195; Snyman (n 40) 15-16. See *Prosecutor v Prlić et al* (Judgment Volume 4 of 6) IT-04-74-T (29 May 2013) para 1276; *Prosecutor v Popović et al* (Judgment) IT-05-88-A (30 January 2015) para 1968.

⁵⁶ For retribution as just deserts rather than vengeance, see Jackson (n 2) 101; Pal Dissent 216 (for whom the determination of which was beyond the Tribunal); *Prosecutor v Erdemović* (Sentencing Judgment) IT-96-22-T (29 November 1996) para 65. See also T Meron, *The Making of International Criminal Justice A View From the Bench Selected Speeches* (OUP 2011) 96. For the distinction of retribution from revenge because it ‘duly express[ed] the outrage of the international community’, see *Prosecutor v Alekšovski* (Judgment) IT-95-14/1-A (24 March 2000) para 185; *Prosecutor v Ahmad al Faqi al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016) para 67. *Erdemović* and *Alekšovski* were supported in *Prosecutor v Stakić* (Judgment) IT-97-24-T (31 July 2003) para 900; *Prosecutor v Simić, Tadić and Zarić* (Judgments) IT-95-9-T (17 October 2003) para 1059; *Prosecutor v Banović* (Judgment) IT-02-65/1-S (28 October 2003) para 34; *Prosecutor v Dragan Nikolić* (Sentencing Judgment) IT-94-2-S (18 December 2003) para 140; *Prosecutor v Deronjić* (Sentencing Judgment) IT-02-61-S (30 March 2004) paras 143, 150, 154; *Prosecutor v Brđanin* (Judgment) IT-99-36-T (1 September 2004) para 1090; *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) para 1075; *Prosecutor v Dragan Nikolić* (Judgment on Sentencing Appeal) IT-94-02-A (4 February 2005) para 46; *Prosecutor v Bralo* (Sentencing Judgment) IT-95-17-S (7 December 2005) para 22; *Prosecutor v Hadžihasanović* (Judgment) IT-01-47-T (15 March 2006) para 2071; *Prosecutor v Orić* (Judgment) IT-03-68-T (30 June 2006) para 719; *Prosecutor v Krajišnik* (Judgment) IT-00-39-T (27 September 2006) para 1135; *Prosecutor v Bralo* (Judgment on Sentencing Appeal) IT-95-17-A (2 April 2007) para 82; *Prosecutor v Martić* (Judgment) IT-95-11-T (12 June 2007) para 484; *Prosecutor v Delić* (Judgment) IT-04-83-T (15 September 2008) para 559; *Prosecutor v Krajišnik* (Judgment) IT-00-39-A (17 March 2009) paras 775, 804.

⁵⁷ For retribution as ‘punishment of an offender for his specific criminal conduct’, see *Prosecutor v Kunarac, Kovač and Vuković* (Judgment) IT-96-23/1-A (12 June 2002) para 385; *Prosecutor v Vasiljević* (Judgment) IT-98-32-T (29 November 2002) para 273.

⁵⁸ For retribution as revenge and rejected as such, see *Prosecutor v Delalić, Mučić, Delić and Landžo* (Judgment) IT-96-21-T (16 November 1998) para 1231.

See also Terblanche (n 38) 190. For retribution as vengeance, see Genesis 9:6; Exodus 21:23-25.

⁵⁹ Terblanche (n 38) 190-193, 199. See also Snyman (n 40) 15 footnote 12, 16-17; Cryer, Friman, Robinson and Wilmshurst (n 3) 36. But see Bix (n 10) 129-130.

about the wrong committed and so may embody utilitarianism alongside deontology.⁶⁰ As noted earlier, deontology and utilitarianism are not incompatible in relation to sentencing considerations.⁶¹ For purposes of coding for compliance with Fullerian rule of law, any preferences between the aims are significant. To reiterate, it is not an essay on ethical theories in the abstract which is pursued here but rather ethical theories as used and supported in ICL jurisprudence. After these preliminary findings on the contours of the relevant sentencing purposes, the scrutiny will now turn to the substantive sentencing purposes in ICL jurisprudence.

4.3.2 Sentencing purposes

The close link between the ethical theories for sentencing, alongside the possibility of a combination theory, necessitated coding for the various sentencing purposes together. This fully revealed the cadence in support for the respective theories, which is important for the rule of law. While the dataset was small at the post-WWII IMTs, the datasets at the post-Cold War judicial bodies were large.

A largely consistent dataset appeared at the post-WWII IMTs. At Nuremberg, Jackson utilised utilitarianism to suggest that the accused's fate as individuals was not as important as the fact that they had to be punished as examples.⁶² Although this argument ties into the philosophical category of liberalism,⁶³ the prosecution of these defendants was considered to serve as an implicit deterrent for future war-time atrocities.⁶⁴ The consequential aims of the trial were stressed in the process. Moreover, in contrast to Kantian deontology, the accused became a means to an end.⁶⁵

At the Tokyo IMT deterrence served as one of the main sentencing rationales.⁶⁶ Early in his opening statement, Keenan revealed a preference for deterrence as opposed to the 'small meaner purpose of vengeance or retaliation'.⁶⁷ This viewpoint marks a preference for utilitarianism as opposed to the *lex talionis*. However, it bears noting that the prosecutor equated retribution with vengeance and retaliation. This, as was seen earlier, is not the aim of modern deontology.⁶⁸

⁶⁰ See generally Cryer, Friman, Robinson and Wilmschurst (n 3) 36-37, Bix (n 10) 129-130. Terblanche (n 38) 190-193, 199; Snyman (n 40) 16-17 links denunciation and moral outrage to deontology.

⁶¹ Hart (n 40) 9. See also Terblanche (n 38) 201-202; Cryer, Friman, Robinson and Wilmschurst (n 3) 30.

⁶² Jackson (n 2) 99.

⁶³ See section 6.3.

⁶⁴ For this type of use of deterrence, see Terblanche (n 38) 179.

⁶⁵ Kant (n 8) 45-46. See also Wacks (n 39) 215-216; Bix (n 10) 126.

⁶⁶ N Boister and R Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008) 247.

⁶⁷ Transcript of Proceedings 4 June 1946, 387.

⁶⁸ Terblanche (n 38) 192-193; Bix (n 10) 126.

Although neither of the IMTs discussed the purposes of sentencing in their majority judgments, it has been suggested, in relation to the Tokyo IMT – but the argument would apply to Nuremberg too – that retribution was the supreme sentencing objective as the imposition of the death penalty and life imprisonment attested.⁶⁹ Although the Tokyo majority did not venture comments on sentencing rationales, a few instances thereof were coded from the individual opinions. Webb recognised deterrence as the most important objective of punishment. For him, imprisonment for life could have greater deterrent effect for persons like the accused as compared to summary execution.⁷⁰ Röling argued that ‘the justification for prosecuting aggression, in spite of the fact that it was not previously criminal, was that the defendants were dangerous and their influence on Japan had to be excluded by their imprisonment’.⁷¹ This view valued the criminalisation of aggression because of its incapacitating, i.e. consequentialist, effect. The punishment looked toward the future rather than at the specific crime committed. In sum, utilitarianism transcended deontology in Röling’s dictum.

At the post-WWII IMTs the only explicitly articulated sentencing purposes were consistently utilitarian. Utilitarian arguments were found in Jackson, Keenan, Webb and Röling. Although academic interpretation suggested retributive underpinnings of the post-WWII IMTs as a whole, the post-WWII role-players did not explicitly make this point. By utilising utilitarianism, they also seemed to support victims’ interests in the liberalism divide between victims and accused.⁷² The small dataset, however, meant that these findings should not be over-emphasised.

Coding for philosophy in sentencing purposes delivered a large dataset from the post-Cold War Tribunals wherein Fullerian rule of law was directly engaged. As a preliminary, the Tribunals often repeated earlier posited law, that retribution and deterrence must be considered for sentencing, as authority but took the matter no further.⁷³ In some instances these purposes were cited without any

⁶⁹ WA Schabas, *The UN International Criminal Tribunals The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) 8; Boister and Cryer (n 66) 247. Webb, *ibid* at 260, found the purpose to satisfy the ‘moral indignation of the community’ to be a subsidiary one.

⁷⁰ Webb Separate Opinion 17. See also Boister and Cryer (n 66) 256; 259.

⁷¹ Röling Dissent 50. See also Cryer, Friman, Robinson and Wilmshurst (n 3) 35.

⁷² Robinson (n 13) 129-134.

⁷³ For the central importance of retribution and deterrence as purposes in sentencing at the ICTY, see *Prosecutor v Tadić* (Sentencing Judgment) IT-94-1-T (14 July 1997) para 61; *Prosecutor v Tadić* (Sentencing Judgment) IT-94-1-Tbis-R117 (11 November 1999) para 9, *Prosecutor v Jelisić* (Judgment) IT-95-10-T (14 December 1999) para 116; *Prosecutor v Kupreškić* (Judgment) IT-95-16-T (14 January 2000) para 848; *Prosecutor v Blaškić* (Judgment) IT-95-14-T (3 March 2000) paras 761-762; *Prosecutor v Delalić, Mučić, Delić and Landžo* (Judgment) IT-96-21-A (20 February 2001) para 806, *Prosecutor v Kunarac, Kovač and Vuković* (Judgment) IT-96-23-T (22 February 2001) paras 838 and 857; *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-T (26 February 2001) para 847; *Prosecutor v Todorović* (Sentencing Judgment) IT-95-9/1-S (31 July 2001) para 28; *Prosecutor v Kršić* (Judgment) IT-98-33-T (2 August 2001) para 693; *Prosecutor v Kvočka* (Judgment) IT-98-30/1-T (2 November 2001) paras 699, 701; *Prosecutor v Krnojelac* (Judgment) IT-97-25-T (15 March 2002) para 508; *Prosecutor v Milan Simić* (Sentencing Judgment) IT-95-9/2-S (17 October 2002) para 33; *Prosecutor v Vasiljević* (Judgment) IT-98-32-T (29

authority.⁷⁴ The ICC also alluded to these purposes, vesting them on its Statute but without much further philosophical discussion.⁷⁵ These ‘tonorial and agglutinative’⁷⁶ uses of philosophically sensitive concepts, i.e. merely repeating earlier case law without accompanying reasoning, ostensibly failed at least the ‘public’ or ‘clarity’ requirements of Fullerian rule of law.⁷⁷ In other words, it was unclear how much weight these factors were afforded respectively or whether their use was only rhetorical. While the rule of law in this regard competes with other factors such as expedience, a final evaluation will only be possible at the end of this chapter.

November 2002) para 273; *Prosecutor v Plavšić* (Sentencing Judgment) IT-00-39 & 40/1-S (27 February 2003) para 22; *Prosecutor v Naletilić and Martinović* (Judgment) IT-98-34-T (31 March 2003) para 739; *Prosecutor v Stakić* (Judgment) IT-97-24-T (31 July 2003) para 900; *Prosecutor v Simić, Tadić and Zarić* (Judgments) IT-95-9-T (17 October 2003) para 1059; *Prosecutor v Banović* (Judgment) IT-02-65/1-S (28 October 2003) paras 33-34; *Prosecutor v Nikolić* (Sentencing Judgment) IT-02-60/1-S (2 December 2003) para 85; *Prosecutor v Galić* (Judgment) IT-98-29-T (5 December 2003) para 757; *Prosecutor v Dragan Nikolić* (Sentencing Judgment) IT-94-2-S (18 December 2003) para 132; *Prosecutor v Češić* (Sentencing Judgment) IT-95-10/1-S (11 March 2004) paras 22-26; *Prosecutor v Miodrag Jokić* (Sentencing Judgment) IT-01-42/1-S (18 March 2004) para 30; *Prosecutor v Deronjić* (Sentencing Judgment) IT-02-61-S (30 March 2004) para 142; *Prosecutor v Mrđa* (Sentencing Judgment) IT-02-59-S (31 March 2004) para 13; *Prosecutor v Babić* (Sentencing Judgment) IT-03-72-S (29 June 2004) para 43; *Prosecutor v Brđanin* (Judgment) IT-99-36-T (1 September 2004) para 1090; *Prosecutor v Strugar* (Judgment) IT-01-42-T (31 January 2005) para 458; *Prosecutor v Deronjić* (Judgment on Sentencing Appeal) IT-02-61-A (20 July 2005) para 136; *Prosecutor v Limaj et al.* (Judgment) IT-03-66-T (30 November 2005) para 723; *Prosecutor v Bralo* (Sentencing Judgment) IT-95-17-S (7 December 2005) para 22; *Prosecutor v Hadžihasanović* (Judgment) IT-01-47-T (15 March 2006) paras 2070-2073; *Prosecutor v Stakić* (Judgment) IT-97-24-A (22 March 2006) paras 375, 402; *Prosecutor v Orić* (Judgment) IT-03-68-T (30 June 2006) para 718; *Prosecutor v Krajišnik* (Judgment) IT-00-39-T (27 September 2006) para 1134; *Prosecutor v Bralo* (Judgment on Sentencing Appeal) IT-95-17-A (2 April 2007) para 82; *Prosecutor v Zelenović* (Sentencing Judgment) IT-96-23/2-S (4 April 2007) para 31; *Prosecutor v Mrkšić, Radić and Šljivančanin* (Judgment) IT-95-13/1-T (27 September 2007) para 683; *Prosecutor v Dragomir Milošević* (Judgment) IT-98-29/1-T (12 December 2007) para 987; *Prosecutor v Haradinaj, Balaj and Brahimaj* (Judgment) IT-04-84-T (3 April 2008) para 484; *Prosecutor v Boškovski and Tarčulovski* (Judgment) IT-04-82-T (10 July 2008) para 587; *Prosecutor v Delić* (Judgment) IT-04-83-T (15 September 2008) para 559; *Prosecutor v Krajišnik* (Judgment) IT-00-39-A (17 March 2009) para 775; *Prosecutor v Mrkšić, Radić and Šljivančanin* (Judgment) IT-95-13/1-A (5 May 2009) para 415; *Prosecutor v Lukić and Lukić* (Judgment) IT-98-32/1-T (20 July 2009) para 1049; *Prosecutor v Đorđević* (Public Judgment) IT-05-87/1-T (23 February 2011) para 2204; *Prosecutor v Perišić* (Judgment) IT-04-81-T (6 September 2011) para 1794.

For the central importance of retribution and deterrence as purposes in sentencing at the ICTR, see also *Prosecutor v Kambanda* (Judgment and Sentence) ICTR-97-23-S (4 September 1998) para 28; *Prosecutor v Akayesu* (Sentencing Judgment) ICTR-96-4-T (2 October 1998) page 4; *Prosecutor v Serushago* (Sentence) ICTR-98-39-S (5 February 1999) para 20; *Prosecutor v Kayishema and Ruzindana* (Sentence) ICTR-95-1-T (21 May 1999) para 2; *Prosecutor v Rutaganda* (Judgment) ICTR-96-3-T (6 December 1999) para 456; *Prosecutor v Musema* (Judgment) ICTR-96-13-T (27 January 2000) para 986; *Prosecutor v Ruggiu* (Judgment) ICTR-97-32-I (1 June 2000) para 33; *Prosecutor v Ntakirutimana and Ntakirutimana* (Judgment) ICTR-96-10-T & 96-17-T (21 February 2003) para 772; *Prosecutor v Semanza* (Judgment) ICTR-97-20-T (15 May 2003) para 554; *Prosecutor v Niyitegeka* (Judgment) ICTR-96-14-T (16 May 2003) para 484; *Prosecutor v Nahimana, Barayagwiza, Ngeze* (Judgment and Sentence) ICTR-99-52-T (3 December 2003) para 1095; *Prosecutor v Muhimana* (Judgment and Sentence) ICTR-95-1B-T (28 April 2005) para 588; *Prosecutor v Kamuhanda* (Judgment) ICTR 99-54A-A (19 September 2005) para 351; *Prosecutor v Serugendo* (Judgment and Sentence) ICTR-2005-84-I (12 June 2006) para 33; *Prosecutor v Nahimana, Barayagwiza, Ngeze* (Judgment) ICTR-99-52-A (28 November 2007) para 1057; *Prosecutor v Bikindi* (Judgment) ICTR-01-72-T (2 December 2008) para 443; *Prosecutor v Zigiranyirazo* (Judgment) ICTR-01-73-T (18 December 2008) para 449; *Prosecutor v Rukundo* (Judgment) ICTR-2001-70-T (27 February 2009) para 593; *Prosecutor v Nshogoza* (Judgment) ICTR-07-91-T (7 July 2009) para 216; *Prosecutor v Bikindi* (Judgment) ICTR-01-72-A (18 March 2010) para 198; *Prosecutor v Kanyarukiga* (Judgment and Sentence) ICTR-2002-78-T (1 November 2010) para 669; *Prosecutor v Hategekimana* (Judgment and Sentence) ICTR-00-55B-T (6 December 2010) para 732; *Prosecutor v Nindiliyimana et al* (Judgment and Sentence) ICTR-00-56-T (17 May 2011) para 2174.

⁷⁴ *Prosecutor v Akayesu* (Sentence) ICTR-96-4-T (2 October 1998) p 4; *Prosecutor v Simba* (Judgment and Sentence) ICTR-2001-76-T (13 December 2005) para 429; *Prosecutor v Nzabirinda* (Sentencing Judgment) ICTR-2001-77-T

Post-Cold War jurisprudence proved the truth of Hart's contention that deontology and utilitarianism are not mutually exclusive in sentencing.⁷⁸ At times retribution and deterrence both appeared and enjoyed apparent equal weight during sentencing considerations. Illustratively, the *Furundžija* TC argued that a perpetrator 'must be punished because he broke the law' and 'so that he and others will no longer break the law'.⁷⁹ *Krštić* supported the proper labelling of acts as genocide on the grounds of attaching stigma to the perpetrators and to serve as a warning for future wrongdoers.⁸⁰ *Krajišnik* argued that deterrence and retribution are both served through a sentence which is proportional to the gravity of the wrongdoing.⁸¹ The *Galić* AC also noted retribution and deterrence for purposes of sentencing, but relegated both equally as factors that 'must not be given undue weight in the overall assessment of the sentences to be imposed...The TC's duty remains to tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime'.⁸² While also ascribing equal value to retribution and deterrence, this view opposed those cases where retribution was understood as 'a fair and balanced approach to the exaction of punishment for wrongdoing'.⁸³

(23 February 2007) para 49; *Prosecutor v Rugambarara* (Sentencing Judgment) ICTR-00-59-T (16 November 2007) para 11; *Prosecutor v GAA* (Judgment and Sentence) ICTR-07-90-R77-I (4 December 2007) para 8; *Prosecutor v Karera* (Judgment and Sentence) ICTR-01-74-T (7 December 2007) para 571; *Prosecutor v Nchamihigo* (Judgment and Sentence) ICTR-01-63-T (12 November 2008) para 383; *Prosecutor v Bagasora* (Judgment and Sentence) ICTR-98-41-T (18 December 2008) para 2260; *Prosecutor v Kalimanzira* (Judgment) ICTR-05-88-T (22 June 2009) para 741; *Prosecutor v Renzaho* (Judgment and Sentence) ICTR-97-31-T (14 July 2009) para 814; *Prosecutor v Bagaragaza* (Sentencing Judgment) ICTR-2005-86-S (17 November 2009) para 28; *Prosecutor v Muvunyi* (Judgment) ICTR-00-55A-T (11 February 2010) para 135; *Prosecutor v Setako* (Judgment and Sentence) ICTR-04-81-T (25 February 2010) para 494; *Prosecutor v Munyakazi* (Judgment and Sentence) ICTR-97-36A-T (5 July 2010) para 510; *Prosecutor v Ntawukulilyayo* (Judgment and Sentence) ICTR-05-82-T (3 August 2010) para 463; *Prosecutor v Gatete* (Judgment and Sentence) ICTR-2000-61-T (31 March 2011) para 670.

⁷⁵ *Prosecutor v Germain Katanga* (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/04-01/07 (23 May 2014) paras 37-38 based deterrence on its Statute, but not punishment and condemnation. *Prosecutor v Jean-Pierre Bemba Gombo* (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/05-01/08 (21 June 2016) para 10 based both deterrence and retribution on its Statute.

⁷⁶ See the tonsorial and agglutinative style noted by LV Prott, *The Latent Power of Culture and the International Judge* (Professional Books 1979) 177.

⁷⁷ See similarly R Henham, 'The Philosophical Foundations of International Sentencing' (2003) 1 *Journal of International Criminal Justice* 69.

⁷⁸ Hart (n 40) 9.

⁷⁹ *Prosecutor v Furundžija* (Judgment) IT-95-17/1-T (10 December 1998) para 288. See Schabas (n 69) 556.

⁸⁰ *Prosecutor v Krštić* (Judgment) IT-98-33-A (19 April 2004) para 37. For reference to stigma and deterrence, see also *Prosecutor v Furundžija* (Judgment) IT-95-17/1-T (10 December 1998) para 290; *Prosecutor v Rajić* (Judgment) IT-95-12-S (8 May 2006) para 69.

⁸¹ *Prosecutor v Krajišnik* (Judgment) IT-00-39-A (17 March 2009) paras 776-777. Supported in *Prosecutor v Karadžić* (Public redacted version of Judgment issued on 24 March 2016) IT-95-5/18-T (24 March 2016) para 6025; *Prosecutor v Mladić* (Judgment) IT-09-92-T (22 November 2017) para 5182.

⁸² *Prosecutor v Galić* (Judgment) IT-98-29-A (30 November 2006) para 442.

⁸³ *Prosecutor v Todorović* (Sentencing Judgment) IT-95-9/1-S (31 July 2001) para 29. See similarly, *Prosecutor v Kambanda* (Judgment and Sentence) ICTR-97-23-S (4 September 1998) para 58; *Prosecutor v Milan Simić* (Sentencing Judgment) IT-95-9/2-S (17 October 2002) para 33; *Prosecutor v Ntakirutimana and Ntakirutimana* (Judgment) ICTR-96-10-T & 96-17-T (21 February 2003) paras 773-774; *Prosecutor v Plavšić* (Sentencing Judgment) IT-00-39 & 40/1-S (27 February 2003) para 23; *Prosecutor v Naletilić and Martinović* (Judgment) IT-98-

The Tribunals often stressed deterrence alongside other sentencing purposes like retribution.⁸⁴ Yet, at times, the respective sentencing rationales were afforded varying degrees of prominence against the other. Sometimes deterrence was favoured. Writing extra-curially, Meron suggested that the budgetary costs involved in the post-Cold War Tribunals compelled the argument that the benefit of these Tribunals had to exceed retribution and also encompass deterrence.⁸⁵ Thus in *Čelebići*, general and particular deterrence were emphasised as the TC considered deterrence to ‘probably [be] the most important factor in the assessment of appropriate sentences for violations of [IHL]’.⁸⁶ At the ICTR, *Kayishema and Ruzindana*, *Ntakirutimana and Ntakirutimana* and *Ndindabahizi* noted the well-established principles of retribution, deterrence and the protection of society before re-

34-T (31 March 2003) para 739; *Prosecutor v Banović* (Judgment) IT-02-65/1-S (28 October 2003) paras 33-34; *Prosecutor v Nikolić* (Sentencing Judgment) IT-02-60/1-S (2 December 2003) paras 86-87; *Prosecutor v Brđanin* (Judgment) IT-99-36-T (1 September 2004) para 1090; *Prosecutor v Strugar* (Judgment) IT-01-42-T (31 January 2005) para 458; *Prosecutor v Limaj et al.* (Judgment) IT-03-66-T (30 November 2005) para 723; *Prosecutor v Bralo* (Sentencing Judgment) IT-95-17-S (7 December 2005) para 22; *Prosecutor v Orić* (Judgment) IT-03-68-T (30 June 2006) para 719; *Prosecutor v Bralo* (Judgment on Sentencing Appeal) IT-95-17-A (2 April 2007) para 82; *Prosecutor v Zelenović* (Sentencing Judgment) IT-96-23/2-S (4 April 2007) para 32; *Prosecutor v Haradinaj, Balaj and Brahimaj* (Judgment) IT-04-84-T (3 April 2008) para 485; *Prosecutor v Delić* (Judgment) IT-04-83-T (15 September 2008) para 559. See also, Terblanche (n 38) 191 and authorities cited there; Snyman (n 40) 16.

⁸⁴ For the ICTY see *Prosecutor v Stakić* (Judgment) IT-97-24-T (31 July 2003) paras 900-901, 909; *Prosecutor v Banović* (Judgment) IT-02-65/1-S (28 October 2003) paras 33-34; *Prosecutor v Dragan Nikolić* (Sentencing Judgment) IT-94-2-S (18 December 2003) paras 134-138; *Prosecutor v Deronjić* (Sentencing Judgment) IT-02-61-S (30 March 2004) paras 144-148; *Prosecutor v Mrđa* (Sentencing Judgment) IT-02-59-S (31 March 2004) para 16; *Prosecutor v Babić* (Sentencing Judgment) IT-03-72-S (29 June 2004) para 45; *Prosecutor v Brđanin* (Judgment) IT-99-36-T (1 September 2004) para 1091; *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) paras 1076-1078; *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) paras 821-822; *Prosecutor v Strugar* (Judgment) IT-01-42-T (31 January 2005) para 458; *Prosecutor v Limaj et al.* (Judgment) IT-03-66-T (30 November 2005) para 723; *Prosecutor v Bralo* (Sentencing Judgment) IT-95-17-S (7 December 2005) para 22; *Prosecutor v Hadžihasanović* (Judgment) IT-01-47-T (15 March 2006) para 2072; *Prosecutor v Orić* (Judgment) IT-03-68-T (30 June 2006) para 720; *Prosecutor v Krajišnik* (Judgment) IT-00-39-T (27 September 2006) paras 1136-1137; *Prosecutor v Zelenović* (Sentencing Judgment) IT-96-23/2-S (4 April 2007) paras 33-34; *Prosecutor v Martić* (Judgment) IT-95-11-T (12 June 2007) para 484; *Prosecutor v Haradinaj, Balaj and Brahimaj* (Judgment) IT-04-84-T (3 April 2008) paras 486-487; *Prosecutor v Delić* (Judgment) IT-04-83-T (15 September 2008) para 559; *Prosecutor v Milutinović et al* (Judgment Volume 3 of 4) IT-05-87-T (26 February 2009) paras 1144-1146; *Prosecutor v Krajišnik* (Judgment) IT-00-39-A (17 March 2009) paras 776, 802, 805; *Prosecutor v Mrkšić, Radić and Šljivančanin* (Judgment) IT-95-13/1-A (5 May 2009) para 415; *Prosecutor v Lukić and Lukić* (Judgment) IT-98-32/1-T (20 July 2009) para 1081; *Prosecutor v Popović et al* (Judgment) IT-05-88-T (10 June 2010) paras 2128-2130; *Prosecutor v Gotovina et al* (Judgment Volume 2 of 2) IT-06-90-T (15 April 2011) paras 2594-2597; *Prosecutor v Perišić* (Judgment) IT-04-81-T (6 September 2011) para 1796; *Prosecutor v Tolimir* (Judgment) IT-05-88/2-T (12 December 2012) paras 1209-1211; *Prosecutor v Stanišić and Župljanin* (Judgment Volume 2 of 3) IT-08-91-T (27 March 2013) paras 889-891; *Prosecutor v Prlić et al* (Judgment Volume 4 of 6) IT-04-74-T (29 May 2013) paras 1275-1277; *Prosecutor v Đorđević* (Public Judgment) IT-05-87/1-A (27 January 2014) para 974; *Prosecutor v Karadžić* (Public redacted version of Judgment issued on 24 March 2016) IT-95-5/18-T (24 March 2016) paras 6025-6026; *Prosecutor v Mladić* (Judgment) IT-09-92-T (22 November 2017) paras 5181-5183. For the ICTR see *Prosecutor v Kayishema and Ruzindana* (Sentence) ICTR-95-1-T (21 May 1999) para 2; *Prosecutor v Kamuhanda* (Judgment and Sentence) ICTR 99-54A-T (22 January 2003) paras 753-754; *Prosecutor v Ntakirutimana and Ntakirutimana* (Judgment) ICTR-96-10-T & 96-17-T (21 February 2003) para 772; *Prosecutor v Niyitegeka* (Judgment) ICTR-96-14-T (16 May 2003) para 484; *Prosecutor v Kajelijeli* (Judgment) ICTR-98-44A-T (1 December 2003) paras 944-945; *Prosecutor v Ndindabahizi* (Judgment) ICTR-2001-714 (15 July 2004) para 498; *Prosecutor v Rutaganira* (Judgment and Sentence) ICTR-95-1C-T (14 March 2005) paras 110-112.

⁸⁵ Meron (n 56) 149.

⁸⁶ *Prosecutor v Delalić, Mučić, Delić and Landžo* (Judgment) IT-96-21-T (16 November 1998) para 1234.

emphasising specific deterrence ‘so as to demonstrate “that the international community [is] not ready to tolerate serious violations of [IHL] and human rights”’.⁸⁷ Deterrence also found favour with individual judges at the ICTY. Thus Schomburg, in an individual opinion in *Blaškić*, argued for special emphasis on general deterrence ‘as an aggravating factor in finding the appropriate sentence’.⁸⁸ In *Stakić*, *Dragan Nikolić* and *Deronjić*, over all of which Schomburg presided, deterrence was emphasised, whether individual or general, as of paramount importance.⁸⁹

Later cases shifted the importance afforded to deterrence as a principle which may be taken into account yet should not be afforded ‘undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal’.⁹⁰ This was furthered by several Chambers favourably juxtaposing retribution to deterrence.⁹¹ The *Todorović* TC, for e.g., favoured the retributive imperative of imposing a penalty proportionate to the gravity of the crime above general deterrence because of its basis in the ICTY Statute and Rules.⁹² This line of reasoning was followed in *Plavšić*.⁹³

⁸⁷ *Prosecutor v Kayishema and Ruzindana* (Sentence) ICTR-95-1-T (21 May 1999) para 2; *Prosecutor v Ntakirutimana and Ntakirutimana* (Judgment) ICTR-96-10-T & 96-17-T (21 February 2003) para 772. *Prosecutor v Nindabahizi* (Judgment) ICTR-2001-714 (15 July 2004) para 498 refers to *Prosecutor v Kambanda* (Judgment and Sentence) ICTR-97-23-S (4 September 1998) para 28 which was endorsed in *Prosecutor v Aleksovski* (Judgment on Appeal) IT-95-14/1-A (24 March 2000) para 185 but the emphasis on deterrence was *Nindabahizi*’s own.

⁸⁸ *Prosecutor v Blaškić* (Judgment) IT-95-14-A (29 July 2004) Separate Opinion of Judge Schomburg.

⁸⁹ *Prosecutor v Stakić* (Judgment) IT-97-24-T (31 July 2003) paras 900-901; *Prosecutor v Dragan Nikolić* (Sentencing Judgment) IT-94-2-S (18 December 2003) paras 134-138; *Prosecutor v Deronjić* (Sentencing Judgment) IT-02-61-S (30 March 2004) paras 144-148; *Prosecutor v Deronjić* (Sentencing Judgment) IT-02-61-S (30 March 2004) Dissenting Opinion of Judge Schomburg para 19.

⁹⁰ *Prosecutor v Tadić* (Sentencing Judgment) IT-95-9-T (26 January 2000) para 48; *Prosecutor v Nikolić* (Sentencing Judgment) IT-02-60/1-S (2 December 2003) para 90; *Prosecutor v Češić* (Sentencing Judgment) IT-95-10/1-S (11 March 2004) paras 25-26; *Prosecutor v Miodrag Jokić* (Sentencing Judgment) IT-01-42/1-S (18 March 2004) paras 33-34; *Prosecutor v Mrđa* (Sentencing Judgment) IT-02-59-S (31 March 2004) paras 16-17; *Prosecutor v Babić* (Sentencing Judgment) IT-03-72-S (29 June 2004) para 45; *Prosecutor v Dragan Nikolić* (Judgment on Sentencing Appeal) IT-94-02-A (4 February 2005) para 46; *Prosecutor v Martić* (Judgment) IT-95-11-T (12 June 2007) para 484; *Prosecutor v Milutinović et al* (Judgment Volume 3 of 4) IT-05-87-T (26 February 2009) para 1146; *Prosecutor v Popović et al* (Judgment) IT-05-88-T (10 June 2010) para 2129; *Prosecutor v Tolimir* (Judgment) IT-05-88/2-T (12 December 2012) para 1210; *Prosecutor v Stanišić and Župljanin* (Judgment Volume 2 of 3) IT-08-91-T (27 March 2013) para 891; *Prosecutor v Prlić et al* (Judgment Volume 4 of 6) IT-04-74-T (29 May 2013) para 1277.

⁹¹ *Prosecutor v Aleksovski* (Judgment) IT-95-14/1-A (24 March 2000) para 185. This approach was also supported in *Prosecutor v Simić, Tadić and Zarić* (Judgments) IT-95-9-T (17 October 2003) para 1059; *Prosecutor v Dragan Nikolić* (Sentencing Judgment) IT-94-2-S (18 December 2003) para 140; *Prosecutor v Deronjić* (Sentencing Judgment) IT-02-61-S (30 March 2004) paras 143, 150; *Prosecutor v Brđanin* (Judgment) IT-99-36-T (1 September 2004) para 1090; *Prosecutor v Dragan Nikolić* (Judgment on Sentencing Appeal) IT-94-02-A (4 February 2005) para 46; *Prosecutor v Bralo* (Sentencing Judgment) IT-95-17-S (7 December 2005) para 22; *Prosecutor v Hadžihasanović* (Judgment) IT-01-47-T (15 March 2006) para 2071; *Prosecutor v Orić* (Judgment) IT-03-68-T (30 June 2006) para 719; *Prosecutor v Krajišnik* (Judgment) IT-00-39-T (27 September 2006) para 1135; *Prosecutor v Bralo* (Judgment on Sentencing Appeal) IT-95-17-A (2 April 2007) para 82; *Prosecutor v Martić* (Judgment) IT-95-11-T (12 June 2007) para 484; *Prosecutor v Delić* (Judgment) IT-04-83-T (15 September 2008) para 559; *Prosecutor v Krajišnik* (Judgment) IT-00-39-A (17 March 2009) para 775.

⁹² *Prosecutor v Todorović* (Sentencing Judgment) IT-95-9/1-S (31 July 2001) para 30. Compare Snyman (n 40) 16.

⁹³ *Prosecutor v Plavšić* (Sentencing Judgment) IT-00-39 & 40/1-S (27 February 2003) paras 23-25.

Deontology criticises the (utilitarian) use of punishment which rendered perpetrators the mere means through which to deter future crimes.⁹⁴ This critique was essentially the position in *Kunarac* where, paying lip-service to both (general) deterrence and retribution, the TC submitted, in favour of retribution, that ‘a sentence should in principle be imposed on an offender for *his* culpable conduct – it may be unfair to impose a sentence on an offender greater than is appropriate to that conduct solely in the *belief* that it will deter others’.⁹⁵ This revealed Kant’s requirement to treat people as ends rather than means.⁹⁶ This sentiment was essentially approved in *Češić, Jokić, Mrđa, Babić* and *Krajišnik* when the TC reiterated that: ‘imposing upon one person a higher sentence merely for the purpose of deterring others would be unfair to the convicted person, and would ultimately weaken the respect for the legal order as a whole’.⁹⁷

The dataset pertaining to deterrence and retribution was therefore inconsistent for rule of law purposes. Both enjoyed prominence at different times. Sometimes both were favoured equally. While utilitarianism and deontology are not incompatible, such an uneven justificatory narrative does ostensibly raise concerns of cherry-picking.⁹⁸ However, deterrence and retribution do not exhaust the sentencing purposes utilised at the selected ICL judicial bodies. Subsequently, the secondary purposes of incapacitation, didactic function, denunciation and the effects of the impugned conduct on victims and society will be considered. Only after all the sentencing purposes have been considered will findings on consistency of ethical theories be ventured.

Incapacitation as a utilitarian sentencing factor found favour with the *Čelebići* TC: ‘The protection of society often involves long sentences of imprisonment to protect society from the hostile, predatory conduct of the guilty accused’.⁹⁹ The protection of society as sentencing rationale was also upheld at the ICTR in a long series of cases.¹⁰⁰ Incapacitation in this guise is firmly linked to

⁹⁴ Hospers (n 3) 358; Snyman (n 40) 18-21; Meyerson (n 3) 124; Cryer, Friman, Robinson and Wilmshurst (n 3) 30.

⁹⁵ *Prosecutor v Kunarac, Kovač and Vuković* (Judgment) IT-96-23-T (22 February 2001) paras 840-841.

⁹⁶ Kant (n 8) 45-46. See also Bix (n 10) 126.

⁹⁷ *Prosecutor v Češić* (Sentencing Judgment) IT-95-10/1-S (11 March 2004) paras 25-26; *Prosecutor v Miodrag Jokić* (Sentencing Judgment) IT-01-42/1-S (18 March 2004) para 34. Although here in a slight paraphrase, *Prosecutor v Mrđa* (Sentencing Judgment) IT-02-59-S (31 March 2004) para 17; *Prosecutor v Babić* (Sentencing Judgment) IT-03-72-S (29 June 2004) para 45; *Prosecutor v Krajišnik* (Judgment) IT-00-39-T (27 September 2006) para 1137. See also *Prosecutor v Obrenović* (Sentencing Judgment) IT-02-60/2-S (10 December 2003) paras 46, 152.

⁹⁸ See generally Henham (n 77) 69; Schabas (n 69) 556; MB Harmon and F Gaynor, ‘Ordinary Sentences for Extraordinary Crimes’ (2007) 5 *Journal of International Criminal Justice* 691-692; Robinson (n 13) 129-135 and section 6.3 in this study.

⁹⁹ *Prosecutor v Delalić, Mučić, Delić and Landžo* (Judgment) IT-96-21-T (16 November 1998) para 1232.

¹⁰⁰ *Prosecutor v Kayishema and Ruzindana* (Sentence) ICTR-95-1-T (21 May 1999) para 2; *Prosecutor v Semanza* (Judgment) ICTR-97-20-T (15 May 2003) para 554; *Prosecutor v Niyitegeka* (Judgment) ICTR-96-14-T (16 May 2003) para 484; *Prosecutor v Nahimana, Barayagwiza, Ngeze* (Judgment and Sentence) ICTR-99-52-T (3 December 2003) para 1095; *Prosecutor v GAA* (Judgment and Sentence) ICTR-07-90-R77-I (4 December 2007) para 8; *Prosecutor v Karera* (Judgment and Sentence) ICTR-01-74-T (7 December 2007) para 571; *Prosecutor v*

individual deterrence and the protection of society. These aims are utilitarian and future-oriented.¹⁰¹ Conversely, in both *Kunarac* and *Krnojelac* the TC rejected the imposition of a longer sentence in order to remove a convicted person from society and thereby to safeguard society from possible future crimes committed by the convict.¹⁰² The TC found that such ‘preventative detainment’, in the absence of proof of likelihood that the convict will commit violations of IHL again, would neither be fair nor reasonable as a general sentencing factor.¹⁰³ Comparably, the *Hadžihasanović* TC held the objectives to ‘protect society by incapacitating persons considered dangerous, while also reflecting public disapproval and making it possible for the convicted person to return to society at a later date’,¹⁰⁴ only to be of relative significance. By downplaying incapacitation, *Kunarac*, *Krnojelac* and *Hadžihasanović* revealed deontology because the individual was to be treated as an end rather than a means. This stands in contrast to the utilitarianism in *Čelebići* and the ICTR cases.

The aim of reassuring the public that the legal system is being efficiently implemented and enforced was mentioned in several ICTY and ICTR cases as a sentencing purpose.¹⁰⁵ Reprobation and affirmative prevention has been construed as pursuing the same objective, namely ‘to reassure the public that the legal system has been upheld and to influence the public not to violate this legal system’.¹⁰⁶ Closely linked is the didactic (or educative) function of sentencing, namely ‘conveying the message that rules of [IHL] have to be obeyed under all circumstances. In doing so, the sentence seeks to internalise these rules and the moral demands they are based on in the minds of the public’.¹⁰⁷ This sentiment ‘that globally accepted laws and rules have to be obeyed by everybody’ was also repeated in *Dragan Nikolić*, *Deronjić* and *Krajišnik* requiring internal acceptance

Nchamihigo (Judgment and Sentence) ICTR-01-63-T (12 November 2008) para 383; *Prosecutor v Bagasora* (Judgment and Sentence) ICTR-98-41-T (18 December 2008) para 2260; *Prosecutor v Kalimanzira* (Judgment) ICTR-05-88-T (22 June 2009) para 741; *Prosecutor v Renzaho* (Judgment and Sentence) ICTR-97-31-T (14 July 2009) para 814; *Prosecutor v Bagaragaza* (Sentencing Judgment) ICTR-2005-86-S (17 November 2009) para 28; *Prosecutor v Setako* (Judgment and Sentence) ICTR-04-81-T (25 February 2010) para 494; *Prosecutor v Munyakazi* (Judgment and Sentence) ICTR-97-36A-T (5 July 2010) para 510; *Prosecutor v Ntawukulilyayo* (Judgment and Sentence) ICTR-05-82-T (3 August 2010) para 463; *Prosecutor v Gatete* (Judgment and Sentence) ICTR-2000-61-T (31 March 2011) para 670.

¹⁰¹ See Snyman (n 40) 18-19; Cryer, Friman, Robinson and Wilmshurst (n 3) 35. However, see Bix (n 10) 129-130 for the classification of incapacitation as neither deontology or utilitarian.

¹⁰² *Prosecutor v Kunarac, Kovać and Vuković* (Judgment) IT-96-23-T (22 February 2001) para 843; *Prosecutor v Krnojelac* (Judgment) IT-97-25-T (15 March 2002) para 508.

¹⁰³ *Prosecutor v Kunarac, Kovać and Vuković* (Judgment) IT-96-23-T (22 February 2001) para 843.

¹⁰⁴ *Prosecutor v Hadžihasanović* (Judgment) IT-01-47-T (15 March 2006) para 2073.

¹⁰⁵ *Prosecutor v Blaškić* (Judgment) IT-95-14-A (29 July 2004) para 678. Also in *Prosecutor v Dragan Nikolić* (Sentencing Judgment) IT-94-2-S (18 December 2003) para 139; *Prosecutor v Deronjić* (Sentencing Judgment) IT-02-61-S (30 March 2004) para 149; *Prosecutor v Brđanin* (Judgment) IT-99-36-T (1 September 2004) para 1091; *Prosecutor v Rutaganira* (Judgment and Sentence) ICTR-95-1C-T (14 March 2005) para 112.

¹⁰⁶ *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) para 1081. See also *Prosecutor v Mladić* (Judgment) IT-09-92-T (22 November 2017) para 5183. See generally Cryer, Friman, Robinson and Wilmshurst (n 3) 36-37.

¹⁰⁷ *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) paras 1080-1081.

reminiscent of Hart as this ‘fundamental rule fosters the internalisation of these laws and rules in the minds of legislators and the general public’.¹⁰⁸ Both *Brđanin* and *Orić* TCs also contained the sentiment yet without any Hartian internalisation overtones.¹⁰⁹ In *Kordić and Čerkez* the educative function of sentencing was linked to the need ‘to demonstrate the fallacy of the old Roman principle of *inter arma silent leges*...in relation to the crimes under the [ICTY’s] jurisdiction’.¹¹⁰ While the philosophical basis of the educative function has been debated, in these concrete ICL cases utilitarianism was evident.¹¹¹ Throughout the coded cases the broader public had to be reassured that the law was being properly enforced and educated about the rules of ICL. These concerns embody the essence of utilitarianism directed at maximising (future) happiness.

The, arguably utilitarian, didactic objective needs to be compared with the denunciation rationale. While some have classified denunciation of criminal conduct as deontological, sources are not uniform and it is probably a form of the combination theory.¹¹² The data coded here tended to accept denunciation consistently, but repeated the fluctuation in basing it either on retribution or utilitarianism (especially through deterrence).

The international community’s opprobrium was cast as the substance of retribution by the *Alekšovski* AC, which was supported by several cases, thus: ‘a sentence of the International Tribunal should make plain the condemnation of the international community of the behaviour in question and show “that the international community was not ready to tolerate serious violations of [IHL] and human rights”’.¹¹³ Retribution was to be distinguished from revenge precisely because it ‘duly

¹⁰⁸ *Prosecutor v Dragan Nikolić* (Sentencing Judgment) IT-94-2-S (18 December 2003) para 139; *Prosecutor v Deronjić* (Sentencing Judgment) IT-02-61-S (30 March 2004) para 149; *Prosecutor v Krajišnik* (Judgment) IT-00-39-A (17 March 2009) paras 802, 807. For internalisation, see HLA Hart, *The Concept of Law* (OUP 1961) 108-113.

¹⁰⁹ *Prosecutor v Brđanin* (Judgment) IT-99-36-T (1 September 2004) para 1091; *Prosecutor v Orić* (Judgment) IT-03-68-T (30 June 2006) para 720.

¹¹⁰ *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) para 1082.

¹¹¹ Bix (n 10) 129-130 classified the educative function as neither deontological nor utilitarian. However, see Cryer, Friman, Robinson and Wilmschurst (n 3) 36.

¹¹² Terblanche (n 38) 190-193 and Snyman (n 40) 16-17 link moral outrage and denunciation to retribution, i.e. deontology. However, Cryer, Friman, Robinson and Wilmschurst (n 3) 36-37 linked denunciation and education while Bix (n 10) 129-130 classified the denunciation function as neither deontological nor utilitarian.

¹¹³ *Prosecutor v Alekšovski* (Judgment) IT-95-14/1-A (24 March 2000) para 185. See also *Prosecutor v Obrenović* (Sentencing Judgment) IT-02-60/2-S (10 December 2003) para 50; *Prosecutor v Češić* (Sentencing Judgment) IT-95-10/1-S (11 March 2004) para 23; *Prosecutor v Miodrag Jokić* (Sentencing Judgment) IT-01-42/1-S (18 March 2004) para 31; *Prosecutor v Mrđa* (Sentencing Judgment) IT-02-59-S (31 March 2004) para 14; *Prosecutor v Babić* (Sentencing Judgment) IT-03-72-S (29 June 2004) para 44; *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) para 818; *Prosecutor v Bralo* (Sentencing Judgment) IT-95-17-S (7 December 2005) para 22; *Prosecutor v Bralo* (Judgment on Sentencing Appeal) IT-95-17-A (2 April 2007) para 82; *Prosecutor v Zelenović* (Sentencing Judgment) IT-96-23/2-S (4 April 2007) para 32; *Prosecutor v Haradinaj, Balaj and Brahimaj* (Judgment) IT-04-84-T (3 April 2008) para 485; *Prosecutor v Perišić* (Judgment) IT-04-81-T (6 September 2011) para 1795; *Prosecutor v Prlić et al* (Judgment Volume 4 of 6) IT-04-74-T (29 May 2013) para 1275.

express[es] the outrage of the international community'.¹¹⁴ This communal element to punishment was approved, in the context of war crimes and other serious violations of IHL, when *Furundžija*, relying on *Erdemović*, held 'public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence..'.¹¹⁵ Reprobation and stigmatisation were held to be important sentencing factors in the *Kordić and Čerkez* AC as well as in several ICTR cases, including *Ntakirutimana* and *Semanza*.¹¹⁶

In several ICTR cases, denunciation was supplemented with or linked to utilitarian concerns.¹¹⁷ *Gacumbitsi* argued that 'it is of the utmost importance that the international community condemn the said offences in a manner that will prevent a repetition of those crimes..'.¹¹⁸ *Rutaganira* submitted that: 'Retribution is the expression of the social disapproval attached to a criminal act and to its perpetrator and demands punishment for the latter for what he has done...Retribution meets the need for justice and may also appease the anger caused by the crime to the victims and within the community as a whole'.¹¹⁹ Likewise in a contempt case, the ICTR argued for general deterrence and

¹¹⁴ *Prosecutor v Alekšovski* (Judgment) IT-95-14/1-A (24 March 2000) para 185. This approach was also supported in *Prosecutor v Simić, Tadić and Zarić* (Judgments) IT-95-9-T (17 October 2003) para 1059; *Prosecutor v Dragan Nikolić* (Sentencing Judgment) IT-94-2-S (18 December 2003) para 140; *Prosecutor v Deronjić* (Sentencing Judgment) IT-02-61-S (30 March 2004) paras 143, 150; *Prosecutor v Brđanin* (Judgment) IT-99-36-T (1 September 2004) para 1090; *Prosecutor v Dragan Nikolić* (Judgment on Sentencing Appeal) IT-94-02-A (4 February 2005) para 46; *Prosecutor v Bralo* (Sentencing Judgment) IT-95-17-S (7 December 2005) para 22; *Prosecutor v Hadžihasanović* (Judgment) IT-01-47-T (15 March 2006) para 2071; *Prosecutor v Orić* (Judgment) IT-03-68-T (30 June 2006) para 719; *Prosecutor v Krajišnik* (Judgment) IT-00-39-T (27 September 2006) para 1135; *Prosecutor v Bralo* (Judgment on Sentencing Appeal) IT-95-17-A (2 April 2007) para 82; *Prosecutor v Martić* (Judgment) IT-95-11-T (12 June 2007) para 484; *Prosecutor v Delić* (Judgment) IT-04-83-T (15 September 2008) para 559; *Prosecutor v Milutinović et al* (Judgment Volume 3 of 4) IT-05-87-T (26 February 2009) para 1145; *Prosecutor v Krajišnik* (Judgment) IT-00-39-A (17 March 2009) para 775; *Prosecutor v Popović et al* (Judgment) IT-05-88-T (10 June 2010) para 2128; *Prosecutor v Gotovina et al* (Judgment Volume 2 of 2) IT-06-90-T (15 April 2011) para 2595; *Prosecutor v Tolimir* (Judgment) IT-05-88/2-T (12 December 2012) para 1209; *Prosecutor v Stanišić and Župljanin* (Judgment Volume 2 of 3) IT-08-91-T (27 March 2013) para 890; *Prosecutor v Prlić et al* (Judgment Volume 4 of 6) IT-04-74-T (29 May 2013) para 1276; *Prosecutor v Đorđević* (Public Judgment) IT-05-87/1-A (27 January 2014) para 974; *Prosecutor v Karadžić* (Public redacted version of Judgment issued on 24 March 2016) IT-95-5/18-T (24 March 2016) para 6026; *Prosecutor v Mladić* (Judgment) IT-09-92-T (22 November 2017) para 5182.

¹¹⁵ *Prosecutor v Furundžija* (Judgment) IT-95-17/1-T (10 December 1998) para 289. See also *Prosecutor v Erdemović* (Sentencing Judgment) IT-96-22-T (29 November 1996) para 65; *Prosecutor v Blaškić* (Judgment) IT-95-14-A (29 July 2004) para 678.

¹¹⁶ *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) para 1081. See also *Prosecutor v Ntakirutimana and Ntakirutimana* (Judgment) ICTR-96-10-T & 96-17-T (21 February 2003) para 772; *Prosecutor v Semanza* (Judgment) ICTR-97-20-T (15 May 2003) para 554.

¹¹⁷ For the link between denunciation and deterrence, see *Prosecutor v Kambanda* (Judgment and Sentence) ICTR-97-23-S (4 September 1998) para 28; *Prosecutor v Serushago* (Sentence) ICTR-98-39-S (5 February 1999) para 20; *Prosecutor v Rutaganira* (Judgment) ICTR-96-3-T (6 December 1999) para 456; *Prosecutor v Musema* (Judgment) ICTR-96-13-T (27 January 2000) para 986; *Prosecutor v Niyitegeka* (Judgment) ICTR-96-14-T (16 May 2003) para 484; *Prosecutor v Karera* (Judgment and Sentence) ICTR-01-74-T (7 December 2007) para 571. At the ICTY, see *Prosecutor v Đorđević* (Public Judgment) IT-05-87/1-A (27 January 2014) para 974.

¹¹⁸ *Prosecutor v Gacumbitsi* (Judgment) ICTR-2001-64-T (17 June 2004) para 336.

¹¹⁹ *Prosecutor v Rutaganira* (Judgment and Sentence) ICTR-95-1C-T (14 March 2005) para 108.

denunciation in order to maintain the ‘integrity of the administration of justice’.¹²⁰ In sum, the data on denunciation reflected the same ambiguity on its philosophical basis as was found in literature.¹²¹ Nothing really turned on whether denunciation was vested on deontology or utilitarianism as the ensuing aims were, like the relationship between the educative purpose and the denunciation rationale, not in conflict. The proposed aims, focused on denouncing whether in its desert-allocating sense or its communal context, were complementary as per the combination envisaged by Hart.¹²²

Utilitarianism also appeared through the sentencing purpose of rehabilitation. Rehabilitation was considered twice in *Erdemović* by two differently constituted TCs due to its remit on appeal. The TC of first instance subordinated rehabilitation to deterrence.¹²³ In passing, *Stakić* linked these utilitarian rationales since ‘deterrence refers to the attempt to integrate or to reintegrate those persons who believe themselves to be beyond the reach of [ICL]’.¹²⁴ The *Erdemović* TC of final instance argued that the accused was ‘reformable and should be given a second chance to start his life afresh upon release, whilst still young enough to do so’.¹²⁵ Rehabilitation as utilitarian rationale was therefore invoked and applied. Doubt was expressed by *Kunarac* (and approved by *Krnojelac*) as to whether rehabilitation was a significantly important sentencing factor in ICL proceedings.¹²⁶ The *Kordić and Čerkez* AC likewise downplayed the utility of rehabilitation as a sentencing factor due to the heinous nature of the crimes usually brought to trial.¹²⁷ Still, in that case the accused was considered to have good rehabilitative prospects.¹²⁸ Rehabilitation was noted in relation to guilty pleas. Thus, the *Nikolić* TC noted how ‘the process of coming face-to-face with the statements of victims’ could make ‘it less likely that if given an opportunity to act in a discriminatory manner again, an accused would do so’.¹²⁹ In a few cases at the ICTR, rehabilitation was implemented. In

¹²⁰ *Prosecutor v GAA* (Judgment and Sentence) ICTR-07-90-R77-I (4 December 2007) para 10. See also *Prosecutor v Nshogoza* (Judgment) ICTR-07-91-T (7 July 2009) paras 218-219.

¹²¹ To repeat, Terblanche (n 38) 190-193 and Snyman (n 40) 16-17 link moral outrage and denunciation to retribution, i.e. deontology. However, Cryer, Friman, Robinson and Wilmshurst (n 3) 36-37 linked denunciation and education while Bix (n 10) 129-130 classified the denunciation function as neither deontological nor utilitarian.

¹²² Hart (n 40) 9. See also section 4.3.1.

¹²³ *Prosecutor v Erdemović* (Sentencing Judgment) IT-96-22-T (29 November 1996) para 66.

¹²⁴ *Prosecutor v Stakić* (Judgment) IT-97-24-T (31 July 2003) para 902.

¹²⁵ *Prosecutor v Erdemović* (Sentencing Judgment) IT-96-22-Tbis (5 March 1998) para 16.

¹²⁶ *Prosecutor v Kunarac, Kovać and Vuković* (Judgment) IT-96-23-T (22 February 2001) para 844. This principle was also considered and rejected in *Prosecutor v Krnojelac* (Judgment) IT-97-25-T (15 March 2002) para 508.

¹²⁷ *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) para 1079. This sentiment was provided as authority in *Prosecutor v Dragan Nikolić* (Sentencing Judgment) IT-94-2-S (18 December 2003) para 133; *Prosecutor v Deronjić* (Sentencing Judgment) IT-02-61-S (30 March 2004) para 143 and approved in *Prosecutor v Deronjić* (Judgment on Sentencing Appeal) IT-02-61-A (20 July 2005) para 136.

¹²⁸ *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) para 1091. See also *Prosecutor v Obrenović* (Sentencing Judgment) IT-02-60/2-S (10 December 2003) para 146 for approval of accused’s rehabilitation prospects.

¹²⁹ *Prosecutor v Momir Nikolić* (Sentencing Judgment) IT-02-60/1-S (2 December 2003) para 93; *Prosecutor v Češić* (Sentencing Judgment) IT-95-10/1-S (11 March 2004) para 27; *Prosecutor v Miodrag Jokić* (Sentencing Judgment) IT-01-42/1-S (18 March 2004) paras 35-36.

Bisengimana, Nzabirinda, Rugambarara and Bagaraza the TC mitigated the accused's sentence due to their respective rehabilitative prospects on the grounds of remorse and family situation.¹³⁰ In *Seromba*, rehabilitation was considered in conjunction with the accused's young age.¹³¹ Overall rehabilitation was utilised from time to time in several cases at both the ICTY and the ICTR as a secondary principle to be considered for purposes of sentencing.¹³² Its use tended to be determined by the facts of each case and in accordance with judicial discretion.

¹³⁰ *Prosecutor v Bisengimana* (Judgment and Sentence) ICTR-00-60-T (13 April 2006) para 144; *Prosecutor v Nzabirinda* (Sentencing Judgment) ICTR-2001-77-T (23 February 2007) para 81; *Prosecutor v Rugambarara* (Sentencing Judgment) ICTR-00-59-T (16 November 2007) para 39; *Prosecutor v Bagaragaza* (Sentencing Judgment) ICTR-2005-86-S (17 November 2009) para 37.

¹³¹ *Prosecutor v Seromba* (Judgment) ICTR-2001-66-I (13 December 2006) para 399.

¹³² At the ICTY, see *Prosecutor v Furundžija* (Judgment) IT-95-17/1-T (10 December 1998) para 291; *Prosecutor v Delalić, Mučić, Delić and Landžo* (Judgment) IT-96-21-A (20 February 2001) para 806; *Prosecutor v Krštić* (Judgment) IT-98-33-T (2 August 2001) para 704; *Prosecutor v Kvočka* (Judgment) IT-98-30/1-T (2 November 2001) paras 703-704; *Prosecutor v Banović* (Judgment) IT-02-65/1-S (28 October 2003) para 76; *Prosecutor v Galić* (Judgment) IT-98-29-T (5 December 2003) para 757; *Prosecutor v Obrenović* (Sentencing Judgment) IT-02-60/2-S (10 December 2003) paras 53, 143, 146; *Prosecutor v Deronjić* (Sentencing Judgment) IT-02-61-S (30 March 2004) Separate Opinion of Judge Mumba paras 2-3; *Prosecutor v Mrđa* (Sentencing Judgment) IT-02-59-S (31 March 2004) para 18; *Prosecutor v Babić* (Sentencing Judgment) IT-03-72-S (29 June 2004) para 46; *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) paras 817, 824; *Prosecutor v Limaj et al.* (Judgment) IT-03-66-T (30 November 2005) para 723 footnote 2420; *Prosecutor v Bralo* (Sentencing Judgment) IT-95-17-S (7 December 2005) para 22; *Prosecutor v Hadžihasanović* (Judgment) IT-01-47-T (15 March 2006) paras 2073, 2080; *Prosecutor v Rajić* (Judgment) IT-95-12-S (8 May 2006) para 71; *Prosecutor v Orić* (Judgment) IT-03-68-T (30 June 2006) para 721; *Prosecutor v Krajišnik* (Judgment) IT-00-39-T (27 September 2006) para 1138; *Prosecutor v Zelenović* (Sentencing Judgment) IT-96-23/2-S (4 April 2007) para 35; *Prosecutor v Martić* (Judgment) IT-95-11-T (12 June 2007) para 484; *Prosecutor v Dragomir Milošević* (Judgment) IT-98-29/1-T (12 December 2007) para 987; *Prosecutor v Haradinaj, Balaj and Brahimaj* (Judgment) IT-04-84-T (3 April 2008) para 488; *Prosecutor v Delić* (Judgment) IT-04-83-T (15 September 2008) para 559; *Prosecutor v Milutinović et al* (Judgment Volume 3 of 4) IT-05-87-T (26 February 2009) para 1146; *Prosecutor v Krajišnik* (Judgment) IT-00-39-A (17 March 2009) paras 802, 806; *Prosecutor v Popović et al* (Judgment) IT-05-88-T (10 June 2010) para 2130; *Prosecutor v Gotovina et al* (Judgment Volume 2 of 2) IT-06-90-T (15 April 2011) para 2598; *Prosecutor v Perišić* (Judgment) IT-04-81-T (6 September 2011) para 1796; *Prosecutor v Tolimir* (Judgment) IT-05-88/2-T (12 December 2012) para 1211; *Prosecutor v Popović et al* (Judgment) IT-05-88-A (30 January 2015) para 1966; *Prosecutor v Karadžić* (Public redacted version of Judgment issued on 24 March 2016) IT-95-5/18-T (24 March 2016) para 6025; *Prosecutor v Mladić* (Judgment) IT-09-92-T (22 November 2017) para 5181.

At the ICTR, see *Prosecutor v Kayishema and Ruzindana* (Sentence) ICTR-95-1-T (21 May 1999) paras 2, 26; *Prosecutor v Ruggiu* (Judgment) ICTR-97-32-I (1 June 2000) para 33; *Prosecutor v Ntakirutimana and Ntakirutimana* (Judgment) ICTR-96-10-T & 96-17-T (21 February 2003) para 776; *Prosecutor v Semanza* (Judgment) ICTR-97-20-T (15 May 2003) para 554; *Prosecutor v Niyitegeka* (Judgment) ICTR-96-14-T (16 May 2003) para 484; *Prosecutor v Nahimana, Barayagwiza, Ngeze* (Judgment and Sentence) ICTR-99-52-T (3 December 2003) para 1095; *Prosecutor v Ndindabahizi* (Judgment) ICTR-2001-714 (15 July 2004) para 498; *Prosecutor v Rutaganira* (Judgment and Sentence) ICTR-95-1C-T (14 March 2005) para 113; *Prosecutor v Serugendo* (Judgment and Sentence) ICTR-2005-84-I (12 June 2006) para 33; *Prosecutor v Nahimana, Barayagwiza, Ngeze* (Judgment) ICTR-99-52-A (28 November 2007) para 1057; *Prosecutor v GAA* (Judgment and Sentence) ICTR-07-90-R77-I (4 December 2007) para 8; *Prosecutor v Karera* (Judgment and Sentence) ICTR-01-74-T (7 December 2007) para 571; *Prosecutor v Nchamihigo* (Judgment and Sentence) ICTR-01-63-T (12 November 2008) para 383; *Prosecutor v Bikindi* (Judgment) ICTR-01-72-T (2 December 2008) para 443; *Prosecutor v Zigiranyirazo* (Judgment) ICTR-01-73-T (18 December 2008) para 449; *Prosecutor v Rukundo* (Judgment) ICTR-2001-70-T (27 February 2009) para 593; *Prosecutor v Kalimanzira* (Judgment) ICTR-05-88-T (22 June 2009) para 741; *Prosecutor v Renzaho* (Judgment and Sentence) ICTR-97-31-T (14 July 2009) para 814; *Prosecutor v Bagaragaza* (Sentencing Judgment) ICTR-2005-86-S (17 November 2009) para 28; *Prosecutor v Setako* (Judgment and Sentence) ICTR-04-81-T (25 February 2010) para 494; *Prosecutor v Munyakazi* (Judgment and Sentence) ICTR-97-36A-T (5 July 2010) para 510; *Prosecutor v Ntawukulilyayo* (Judgment and Sentence) ICTR-05-82-T (3 August 2010) para 463; *Prosecutor v*

The post-Cold War Tribunals have, in part, quantified punishment in accordance with the consequences of the particular conduct on immediate and remote victims. Such a consequential approach is, of course, characteristic of utilitarianism.¹³³ These cases may be presented on a spectrum from narrower (only effects on immediate victims taken into account) to broader (effects on more remote victims also taken into account) versions thereof.¹³⁴ On the broader version, utilitarianism converged with cosmopolitanism and especially the concentric circle metaphor of Hierocles.¹³⁵ In a few instances, the *post-bellum* contributions of an accused to peace and reconciliation were also considered.¹³⁶

The TC favoured the narrower consequential argument in both *Kunarac* and *Krnjelac*. While the consequences for the immediate victims were considered relevant in sentencing, the effects of the crime on third persons were not.¹³⁷ The *Todorović* TC accepted a guilty plea in mitigation for a variety of reasons, including that it ‘relieves victims and witnesses of the necessity of giving evidence with the attendant stress which this may incur’.¹³⁸ Various subsequent judgments echoed these sentiments.¹³⁹ The ICTR in *Bizimungu* likewise took the direct consequences of crimes on victims into account for purposes of punishment.¹⁴⁰ The *Krnjelac* AC (and followed in *Rajić*) extended the ambit of possible victims who might have suffered from the impugned conduct as it accepted that ‘even where no blood relationships have been established, a trier of fact would be right to presume that the accused knew that his victim did not live cut off from the world but had established bonds with others’.¹⁴¹ Likewise, the *Kvočka* TC sought to assess the seriousness of the

Kanyarukiga (Judgment and Sentence) ICTR-2002-78-T (1 November 2010) para 669; *Prosecutor v Hategekimana* (Judgment and Sentence) ICTR-00-55B-T (6 December 2010) para 732; *Prosecutor v Gatete* (Judgment and Sentence) ICTR-2000-61-T (31 March 2011) para 670.

¹³³ See generally Cryer, Friman, Robinson and Wilmschurst (n 3) 37-41 who view this as a broader goal of ICL.

¹³⁴ Which is unsurprising granted that demarcating consequences is one of utilitarianism’s main difficulties, see Hospers (n 3) 354-355.

¹³⁵ Hierocles, ‘On Appropriate Acts’ in I Ramelli and D Konstan (trs), *Hierocles the Stoic: Elements of Ethics, Fragments, and Excerpts* (Society of Biblical Literature 2009) 91-93. See also section 2.4.

¹³⁶ Cryer, Friman, Robinson and Wilmschurst (n 3) 40. See also GK McDonald, ‘Reflections on the Contributions of the International Criminal Tribunal for the Former Yugoslavia’ (2001) 24 *Hastings International & Comparative Law Review* 156.

¹³⁷ *Prosecutor v Kunarac, Kovać and Vuković* (Judgment) IT-96-23-T (22 February 2001) para 852. This argument is repeated in *Prosecutor v Krnjelac* (Judgment) IT-97-25-T (15 March 2002) para 512.

¹³⁸ *Prosecutor v Todorović* (Sentencing Judgment) IT-95-9/1-S (31 July 2001) para 80.

¹³⁹ For approval of sparing witnesses from reliving the trauma by testifying, see *Prosecutor v Dragan Nikolic* (Sentencing Judgment) IT-94-2-S (18 December 2003) para 121; *Prosecutor v Cesic* (Sentencing Judgment) IT-95-10/1-S (11 March 2004) paras 58-59; *Prosecutor v Miodrag Jokic* (Sentencing Judgment) IT-01-42/1-S (18 March 2004) paras 76-77; *Prosecutor v Deronjic* (Sentencing Judgment) IT-02-61-S (30 March 2004) paras 134, 241; *Prosecutor v Mrda* (Sentencing Judgment) IT-02-59-S (31 March 2004) para 78; *Prosecutor v Bralo* (Sentencing Judgment) IT-95-17-S (7 December 2005) paras 62, 64.

¹⁴⁰ *Prosecutor v Bizimungu et al* (Judgment and Sentence) ICTR-99-50-T (30 September 2011) para 1991.

¹⁴¹ *Prosecutor v Krnjelac* (Judgment) IT-97-25-A (17 September 2003) para 260. See also *Prosecutor v Rajić* (Judgment) IT-95-12-S (8 May 2006) paras 92-93; *Prosecutor v Milutinović et al* (Judgment Volume 3 of 4) IT-05-87-T (26 February 2009) para 1147; *Prosecutor v Popović et al* (Judgment) IT-05-88-T (10 June 2010) para 2151;

offence with reference to the consequences thereof for victims as well as the ‘effect of the crimes on the broader targeted group’.¹⁴²

Hereafter, the ICTY adopted the broader consequentialist view more consistently. *Obrenović* and later *Blagojević and Jokić* noted that ‘punishment must therefore reflect both the calls for justice from the persons who have – directly or indirectly – been victims of the crimes, as well as respond to the call from the international community as a whole to end impunity for massive human rights violations and crimes committed during armed conflicts’.¹⁴³ *Momir Nikolić* argued that a sentence had to reflect the calls of justice from the immediate victims as well as the indirect victims, i.e. ‘the international community as a whole’.¹⁴⁴ In *Dragan Nikolić* the ‘brutality, the number of crimes committed and the underlying intention to humiliate and degrade’ justified a finding that ‘it is not only reasonable and responsible, but also necessary in the interests of the victims, their relatives and the international community, to impose a higher sentence.’¹⁴⁵ That ‘the families of the victims suffered severe pain from the loss of their relatives’ was to be considered in the determination of the seriousness of the crimes in *Mrđa*.¹⁴⁶ In *Vasiljević*, the AC accepted the TC’s approach to take ‘the long term effect of the trauma still suffered by [particular] witnesses...into account as an aggravating factor’.¹⁴⁷ In sentencing *Bralo*, the TC considered the individual direct and indirect victims’ testimony, before concluding that ‘these statements paint a picture of shattered lives and livelihoods, and of tremendous ongoing pain and trauma’.¹⁴⁸ The *Krajišnik* TC afforded the ‘utmost importance’ to the consequences of the accused’s crimes which would ‘persist in Bosnia-Herzegovina for decades, affecting hundreds of thousands of people’.¹⁴⁹

In a few instances, the effects of the accused’s actions *post-bellum* on their societies were considered as well. In *Plavšić*, the TC ascribed much weight to the accused’s role and contribution

Prosecutor v Dorđević (Public Judgment) IT-05-87/1-T (23 February 2011) para 2215; *Prosecutor v Stanišić and Župljanin* (Judgment Volume 2 of 3) IT-08-91-T (27 March 2013) para 892; *Prosecutor v Dorđević* (Public Judgment) IT-05-87/1-A (27 January 2014) para 971; *Prosecutor v Popović et al* (Judgment) IT-05-88-A (30 January 2015) para 1992.

¹⁴² *Prosecutor v Kvočka* (Judgment) IT-98-30/1-T (2 November 2001) paras 699-702. See also *Prosecutor v Galić* (Judgment) IT-98-29-T (5 December 2003) para 758; *Prosecutor v Tolimir* (Judgment) IT-05-88/2-T (12 December 2012) para 1218; *Prosecutor v Prlić et al* (Judgment Volume 4 of 6) IT-04-74-T (29 May 2013) paras 1303-1305; *Prosecutor v Karadžić* (Public redacted version of Judgment issued on 24 March 2016) IT-95-5/18-T (24 March 2016) paras 6046-6050 for these consequential concerns in determination of the gravity of the offence.

¹⁴³ *Prosecutor v Obrenović* (Sentencing Judgment) IT-02-60/2-S (10 December 2003) para 45; *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) para 814.

¹⁴⁴ *Prosecutor v Nikolić* (Sentencing Judgment) IT-02-60/1-S (2 December 2003) para 82.

¹⁴⁵ *Prosecutor v Dragan Nikolić* (Sentencing Judgment) IT-94-2-S (18 December 2003) para 281.

¹⁴⁶ *Prosecutor v Mrđa* (Sentencing Judgment) IT-02-59-S (31 March 2004) para 40.

¹⁴⁷ *Prosecutor v Vasiljević* (Judgment) IT-98-32-A (25 February 2004) para 167.

¹⁴⁸ *Prosecutor v Bralo* (Sentencing Judgment) IT-95-17-S (7 December 2005) para 40.

¹⁴⁹ *Prosecutor v Krajišnik* (Judgment) IT-00-39-T (27 September 2006) para 1151.

to the re-establishment of peace in the Republika Srpska.¹⁵⁰ The TC evaluation of the guilty plea thus considered the utilitarian benefits from the accused's post-conflict conduct. *Deronjić* likewise suggested that the accused's 'contribution to peace and security' through his guilty plea and contribution to factual findings had to be balanced against the 'gravity of the crimes...In doing so, it is for this [TC] to come as close as possible to justice for both victims and their relatives and the Accused, justice being of paramount importance for the restoration and maintenance of peace'.¹⁵¹

While the effects of crimes on victims were thus often taken into account, the fluctuating demarcation of the consequences to be considered dovetailed the inherent tension on this point which exists in utilitarianism. There was thus some internal variance in the utilitarianism used.¹⁵²

Turning to the ICC, a noteworthy dataset was coded bearing in mind the limited output of the Court to date. Deterrence, based on the ICC Statute, was considered as sentencing factor in *Lubanga* and *Katanga*.¹⁵³ In *Bemba* the TC, following *Krajišnik*, accepted both general and specific deterrence as sentencing rationales.¹⁵⁴ *Al Mahdi* also considered both forms of deterrence. Moreover, *Al Mahdi*'s guilt admission was considered to possibly have a 'deterrent effect on others tempted to commit similar acts'.¹⁵⁵ The support for utilitarian rationales continued when rehabilitation was accepted as secondary consideration in two cases. The *Bemba* TC accepted rehabilitation as a relevant sentencing provision, but advised against affording it undue weight in light of 'serious crimes of concern to the international community as a whole'.¹⁵⁶ *Al Mahdi* concurred with this view and, in light of the facts of the case, considered the accused's likeliness to successfully reintegrate into society.¹⁵⁷ Odio Benito, in a dissent, argued that 'trial proceedings should also attend to the harm suffered by the victims as a result of the crimes within the jurisdiction of the Court'.¹⁵⁸ She

¹⁵⁰ *Prosecutor v Plavšić* (Sentencing Judgment) IT-00-39 & 40/1-S (27 February 2003) paras 85-94, 110.

¹⁵¹ *Prosecutor v Deronjić* (Sentencing Judgment) IT-02-61-S (30 March 2004) para 4. For the criticism of this aim to restore peace as optimistic and utopian, see E Vulliamy, *The War is Dead, Long Live the War Bosnia: The Reckoning* (The Bodley Head 2012) 226.

¹⁵² Hospers (n 3) 354-357. See generally Dower (n 8) 74; Wacks (n 39) 216; Cryer, Friman, Robinson and Wilmschurst (n 3) 32.

¹⁵³ *Prosecutor v Thomas Lubanga Dyilo* (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/04-01/06 (10 July 2012) para 16; *Prosecutor v Germain Katanga* (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/04-01/07 (23 May 2014) paras 37-38. See also WA Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 60-61.

¹⁵⁴ *Prosecutor v Jean-Pierre Bemba Gombo* (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/05-01/08 (21 June 2016) para 11.

¹⁵⁵ *Prosecutor v Ahmad al Faqi al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016) paras 67, 100.

¹⁵⁶ *Prosecutor v Jean-Pierre Bemba Gombo* (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/05-01/08 (21 June 2016) para 11.

¹⁵⁷ *Prosecutor v Ahmad al Faqi al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016) paras 67, 97.

¹⁵⁸ *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) Separate and Dissenting Opinion of Judge Odio Benito para 8.

disagreed with the majority's neglect to consider the damage caused to the victims and their families (especially in relation to the punishments and sexual violence inflicted).¹⁵⁹ In particular, she pointed out that the crimes' consequences extended to future generations, the victims' families as well as the children born from sexual violence.¹⁶⁰ In *Katanga, Bemba* and *Al Mahdi* the ICC subscribed to a sentence which could acknowledge the harm to victims.¹⁶¹ The *Al Mahdi* TC accepted a guilt admission as potentially furthering peace and reconciliation 'by alleviating the victims' moral suffering through acknowledgement of the significance of the destruction'.¹⁶² These overwhelming utilitarian arguments were slightly offset by the more deontological rationale that the expression of society's condemnation for a criminal act needed consideration in *Katanga, Bemba* and *Al Mahdi*.¹⁶³

As was noted throughout this code, deontological and utilitarian sentencing purposes are often compatible.¹⁶⁴ This is even more so if retribution is simply taken to mean that punishment for wrongdoing is justified.¹⁶⁵ However, ICL jurisprudence often understood retribution as more than that. The fact that retribution and utilitarian rationales were often juxtaposed, confirmed an understanding of retribution in excess of mere justification for punishment.

The post-WWII IMTs produced a small dataset but, whenever ethical theory was explicitly argued, it was consistently utilitarian. The ICC produced a significant dataset, given its total output to date, which was also consistently utilitarian. In these instances no rule of law concerns appeared. The post-Cold War Tribunals' dataset, in particular at the ICTY, was significant. Many of the post-Cold War references to ethical theories were no more than 'tonorial and agglutinative', i.e. merely accepting the law as set out in earlier case law.¹⁶⁶ This raised questions about whether the purposes were merely invoked for rhetorical support or whether they substantively impacted sentencing. Yet, despite the 'tonorial and agglutinative' use of sentencing purposes, the post-Cold War Tribunals

¹⁵⁹ Ibid paras 2, 6.

¹⁶⁰ Ibid para 19.

¹⁶¹ *Prosecutor v Germain Katanga* (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/04-01/07 (23 May 2014) paras 37-38; *Prosecutor v Jean-Pierre Bemba Gombo* (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/05-01/08 (21 June 2016) paras 11, 32; *Prosecutor v Ahmad al Faqi al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016) para 67.

¹⁶² *Prosecutor v Ahmad al Faqi al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016) para 100.

¹⁶³ *Prosecutor v Germain Katanga* (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/04-01/07 (23 May 2014) paras 37-38; *Prosecutor v Jean-Pierre Bemba Gombo* (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/05-01/08 (21 June 2016) para 11; *Prosecutor v Ahmad al Faqi al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016) para 67.

¹⁶⁴ Hart (n 40) 9. See also Snyman (n 40) 22-23; Cryer, Friman, Robinson and Wilmschurst (n 3) 29-30 on the combination theory.

¹⁶⁵ Terblanche (n 38) 190-195.

¹⁶⁶ For the tonorial and agglutinative style, see Prott (n 76) 177; section 1.2.2.

produced a large substantive dataset as well. Oscillation in support for deontology and utilitarianism alongside some variance within the individual sentencing purposes were visible which ostensibly pressurised the Fullerian rule of law requirement of non-contradictory justifications.¹⁶⁷

The most significant challenge to consistency of ethical theory in the post-Cold War Tribunals revolved around retribution and deterrence. The oscillation in preference between them, on the one hand, or the cumulative support of both equally, on the other hand, embodied an apparent contradiction. Even accepting the possibility of a combination theory as well as judicial discretion to individualise sentence, these positions are in conflict. There was no clear evidence of an overarching framework guiding the selections, which suggested that these positions were inconsistently held.¹⁶⁸ This also filtered into the incapacitation purpose. While incapacitation was generally accepted, a deontological critique thereof was also visible. The use of the other purposes was explainable on the combination theory or through judicial discretion to individualise punishment. The didactic aims of punishment as coded from the selected cases were linked to utilitarianism and the denunciation of wrong conduct linked to the combination theory. While their respective support seemed motivated by rhetorical considerations rather than a principled framework of some sort, both can be held simultaneously without contradiction. Rehabilitation was sometimes taken into account but usually relegated to secondary significance. While this suggested fluctuation in support for utilitarianism, the imperative to individualise punishment may explain said variance.¹⁶⁹ Again some variance appeared in the range of effects on victims taken into account from immediate victims to broader humanity to societal concerns, but this was at most a fluctuation within a utilitarian purpose which has stabilised in favour of the broader category.¹⁷⁰

Coding for compliance with the Fullerian desiderata in this chapter is ostensibly a delicate exercise. The philosophical categories are not incompatible – the argument in literature for combination theories attests to this fact.¹⁷¹ The ICL judiciaries have thus taken into account factors that were in their discretionary powers to do. Moreover, there is the further discretionary impact of individualising punishment on the facts of a particular case. However, the concern revolved around retribution and deterrence. Elevating one rationale above another (and later reversing the

¹⁶⁷ See Henham (n 77) 83 on the variance between utilitarian purposes.

¹⁶⁸ Snyman (n 40) 22-23; Henham (n 77) 69.

¹⁶⁹ For agreement on rehabilitation, see Harmon and Gaynor (n 98) 693.

¹⁷⁰ Hospers (n 3) 354-357. See generally Dower (n 8) 74; Wacks (n 39) 216; Cryer, Friman, Robinson and Wilmshurst (n 3) 32.

¹⁷¹ Hart (n 40) 9. See also Snyman (n 40) 22-23; Cryer, Friman, Robinson and Wilmshurst (n 3) 29-30 on the combination theory.

preference) without any framework directive thereto is problematic.¹⁷² Preferring one purpose to another when they were broadly-speaking compatible raises questions. Without an explanation of the framework within which such preferences were made a lack of clarity may be identified.¹⁷³ The amount of tenuous and agglutinative uses of the sentencing purposes noted compounds the lack of clarity problem. A further concern appears as to whether the purposes of sentencing were only added for rhetorical effect.

The lack of clarity is also reflected in literature. Thus – despite coded data in this study revealing many instances of utilitarianism – some observers have suggested a pervasive retributive undercurrent still endures in ICTY jurisprudence which needs to be supplanted with a victim-focused approach.¹⁷⁴ Conversely, some observers have opposed utilitarian rationales in favour of denunciatory purposes.¹⁷⁵ Others have labelled Tribunal use of retribution as ‘uneven’ and ‘unsatisfactory’.¹⁷⁶ Another commentary suggested that utilitarianism underpinned the Tribunals.¹⁷⁷ Still others have identified consistency through several purposes which are firmly predictive of sentence length.¹⁷⁸ Such variances in interpretation are precisely due to the lack of clarity caused by the omission of some overarching framework regarding the relative importance of the sentencing purposes. This raises further rule of law concerns, apart from clarity, as the justificatory apparatus presented was not truly ‘public’ beyond the rhetorical presentation of philosophical arguments. It seems more than coincidental that the philosophical categories utilised in conjunction with sentencing, specifically pertaining to retribution and deterrence, should be found somewhat inconsistent here and that the ICL judiciaries are at times criticised for inconsistent sentencing as well.¹⁷⁹ Possibly, the variance and inability to postulate an overarching framework can be a consequence of the opposing views on what an appropriate understanding of ICL should be, viz, victim-focused (which deterrence tends to be) or accused-centric (which retribution tends to be).¹⁸⁰ This will be revisited in section 6.3. It is, however, suggested that, on the matter of sentencing purposes, more could be done about clarifying the weight afforded to the respective purposes.

¹⁷² Snyman (n 40) 23; R Henham, ‘Developing Contextualized Rationales for Sentencing in International Criminal Trials’ (2007) 5 *Journal of International Criminal Justice* 774; Damaška (n 42) 339.

¹⁷³ Henham (n 77) 69; Harmon and Gaynor (n 98) 691-692; Henham (n 172) 758, 774; Damaška (n 42) 331, 339.

¹⁷⁴ Henham (n 77) 72, 84; Henham (n 172) 757-759.

¹⁷⁵ Damaška (n 42) 344-345.

¹⁷⁶ Harmon and Gaynor (n 98) 692.

¹⁷⁷ Schabas (n 69) 556-558.

¹⁷⁸ J Meernik, ‘Sentencing Rationales and Judicial Decision Making at the International Criminal Tribunals’ (2011) 92 *Social Science Quarterly* 588-606.

¹⁷⁹ Henham (n 77) 69; Harmon and Gaynor (n 98) 691-692; Henham (n 172) 758.

¹⁸⁰ Robinson (n 13) 129-135.

However, this matter pertains to the exact contours of the sentences to be imposed, an aspect about which moral agents need not have exact predictability and foreseeability to be able to direct their actions and therefore to ensure compliance with the formal rule of law. The rule of law simply cannot be dependent on the exact contours of sentencing being always known in advance. This will undermine judicial discretion and the ability to fit punishment to crime. The certainty of punishment and the pre-existence of a penal provision, which have been complied with by the selected ICL judicial bodies throughout, have sufficiently ensured foreseeability and predictability in the administration of law.¹⁸¹ In sum, while the rule of law principle of clarity has been pressurised by somewhat inconsistent ethical theories in sentencing considerations, the rule of law has endured.¹⁸² There are grounds here, however, upon which improvements can be made for purposes of institutional legitimacy.

4.4 Conclusion on the ethical theories of utilitarianism and deontology under part B

Coding for consistency of ethical theories in the selected ICL jurisdictions produced two codes, namely self-reflexive justifications and sentencing purposes. While the overall dataset at the post-WWII IMTs was small, the dataset at the post-Cold War Tribunals and the ICTY, in particular, was large. The ICC did not produce data on the first code, but it delivered a noteworthy dataset on sentencing purposes.

With the exception of constant utilitarianism under sentencing purposes at the post-WWII IMTs and the ICC, consistency in justifications utilising ethical theories was absent at the selected ICL judicial bodies. Preferential support for either deontology or utilitarianism appeared alongside the equal support of both. This was true of both self-reflexive justifications and sentencing purposes. Accordingly, inconsistency emerges whether these codes are considered cumulatively or separately. The matter is complicated, especially in relation to sentencing purposes, by the fact that these ethical theories are compatible. In the context of sentencing, Hart pointed out that utilitarianism and deontology can coexist.¹⁸³ Judicial discretion and the need to individualise punishment cloud the preference afforded to certain purposes, like rehabilitation, as well.

Turning to the individual codes, self-reflexive justifications resulted in a small dataset which was inconsistent. Functional objectives might explain the differing positions of Jackson, Cassese,

¹⁸¹ See, for example, *Prosecutor v Furundžija* (Judgment) IT-95-17/1-T (10 December 1998) para 290.

¹⁸² Of course, per LL Fuller, *The Morality of Law* (Yale University Press 1969) 53 complete compliance with the desiderata is not required.

¹⁸³ Hart (n 40) 9.

McDonald and Vohrah. Thus, Jackson utilised both utilitarianism and deontology to add rhetorical support for the legitimacy of the IMT. Cassese's utilitarianism was opposed by McDonald and Vohrah which was consistent with their respective focal concerns on the accused and the victims respectively.¹⁸⁴ Ascribing superior responsibility to a failure of duty constituted deontology, but in the absence of a crime 'failure to punish' it seemed that liability, in such instances, was rather vicarious.¹⁸⁵ These inconsistencies reflected the broader tension within liberalism as to what an appropriate understanding of ICL should be.¹⁸⁶ This tension will be considered in section 6.3. For purposes of the self-reflexive statements, however, the inconsistency endures. With a small dataset involved, the inconsistency should, however, not be over-emphasised.

In the context of sentencing purposes, the concern for the rule of law is not so much the use of both ethical theories,¹⁸⁷ but the lack of any overarching theoretical framework for doing so. Deontological and utilitarian sentencing purposes are often compatible,¹⁸⁸ but their cumulative use in sentencing seemed like a belt-and-braces approach which required but never received an overall framework.¹⁸⁹ Sometimes punishment theories were merely reiterated rhetorically with no or bare reference to authority, despite the fact that their inclusion implied the whole of their philosophical apparatus too. This pressurised the rule of law requirement of justification having to be public.

Arguing that deontology and utilitarianism can be used in a combination theory does not resolve the oscillation in their respective prominence revealed through coding. This fluctuation was especially pronounced between retribution and deterrence (and for and against incapacitation to an extent). The other purposes of sentencing could either co-exist because they addressed complementary concerns (education, denunciation) or were delineated relative to sentencing discretion and the need to individualise punishment (rehabilitation). The purpose of taking into account the effects of crimes on victims was generally compatible with the other rationales but showed the typical utilitarian difficulty of consistent demarcation.¹⁹⁰ It is therefore at the specific intersection between deontology and utilitarianism under the sentencing purposes of retribution and deterrence (and

¹⁸⁴ See section 2.5 above.

¹⁸⁵ Robinson (n 13) 125. This argument applies to the failure to punish rather than the failure to prevent.

¹⁸⁶ Ibid 129-135.

¹⁸⁷ This has been the concern for other studies, (such as Henham (n 77) 72, 84; Henham (n 172) 757-759) but the argument here pertains to rule of law rather than to whether one theory is better than the other.

¹⁸⁸ Hart (n 40) 9. See also Snyman (n 40) 22-23; Cryer, Friman, Robinson and Wilmshurst (n 3) 29-30 on the combination theory.

¹⁸⁹ Snyman (n 40) 23. See also Henham (n 77) 69; Harmon and Gaynor (n 98) 691-692; Henham (n 172) 758; Damaška (n 42) 339.

¹⁹⁰ Hospers (n 3) 354-357. See generally Dower (n 8) 74; Wacks (n 39) 216; Cryer, Friman, Robinson and Wilmshurst (n 3) 32.

arguably incapacitation) that the rule of law principle of clarity was pressurised. While the exact scope of punishment need not be known beforehand for purposes of the formal rule of law, the lack of clarity in the prominence afforded to the respective sentencing purposes can be improved upon here.¹⁹¹ In sum, if the rule of law exists as a matter of degree,¹⁹² clarifying the overarching framework of these sentencing purposes could enhance foreseeability and predictability in the administration of ICL. It is especially the morality of aspiration, i.e. the excellence towards which good law strives, which will be improved.¹⁹³ This would also benefit outcome-based legitimacy which, in turn, should improve the possibility of consent legitimacy.

¹⁹¹ See comparably Henham (n 172) 758; Harmon and Gaynor (n 98) 691-692.

¹⁹² Fuller (n 182) 42-45, 122-123, 145; J Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 211-222; J Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) 276-281 noted that legal systems and the rule of law exist as a matter of degree.

¹⁹³ Fuller (n 182) 43.

Part C

Critical approaches as philosophical category for coding in the selected international criminal law role-players

Some philosophical justifications were coded in the selected ICL jurisprudence which can be labelled ‘critical approaches’. Particular care is required with the label of ‘critical approaches’.¹ ‘Critical approaches’ is not the only possible label to include the approaches discussed in chapter 5, but it has support in academic literature.² It will be used here as an umbrella concept. Briefly, critical approaches ‘can be described as a “will to knowledge”...to know *how* things work and why, not simply how we are told they are supposed to work’.³ Critical scholarship critiques the system under scrutiny to establish what is authentic in that system and what not.⁴ In legal discourse, this calls for a renewed scrutiny into the premises and beliefs which underpin the law, legal rules, procedures and institutions.

The critical approaches identified in ICL jurisprudence included feminism, antecedents to Third World Approaches to International Law (TWAIL) and generic Other-based arguments. This preface contextualises these approaches and briefly explains them. A more detailed exposition on them will precede the individual sections below because coding occurred directly. The ensuing discussions aim, like in previous chapters, to explain the philosophies as they were subjectively relevant for the coding and ensuing classification of ICL justifications against the Fullerian rule of law framework of the study.

While critical approaches are not necessarily postmodern, they have taken inspiration from postmodernism from time to time.⁵ Concepts posited as universally valid often need investigation to ascertain whether universality is truly embodied or not.⁶ Postmodernism aids in the undermining of a master narrative, but does not attempt to show the truth of any alternative. Arguably

¹ R Cryer, T Hervey, B Sokhi-Bulley with A Bohm, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 59-60.

² R Cotterrell, *The Politics of Jurisprudence* (2nd edn, OUP 2003) 211; Cryer, Hervey, Sokhi-Bulley with Bohm (n 1) 59-60; BH Bix, *Jurisprudence: Theory and Context* (7th edn, Sweet & Maxwell 2015) 237 uses ‘modern critical perspectives’ but also refers to ‘critical approaches’.

³ Cryer, Hervey, Sokhi-Bulley with Bohm (n 1) 59-60. The phrase is from Michel Foucault’s *The History of Sexuality*.

⁴ Cryer, Hervey, Sokhi-Bulley with Bohm (n 1) 60.

⁵ M Freeman, *Lloyd’s Introduction to Jurisprudence* (9th edn, Thomson Sweet Maxwell 2014) 1189, 1197; Bix (n 2) 287-288.

⁶ A Anghie and BS Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflict’ in Steven Ratner and Anne-Marie Slaughter (eds), *The Methods of International Law* (ASIL 2004) 210.

postmodernism is best used to stress the social conditioning of existing thinking.⁷ Postmodernism, through its valuation of difference and plurality, further contributes to giving a voice to those previously marginalised by requiring the recognition of ‘the unique identity of particular individuals or groups’.⁸ Against this background, feminism and TWAIL, as specific types of critical approaches, can both be labelled ‘outsider jurisprudence’.⁹ Both approaches oppose a dominant, master narrative of perspectives, values and their ensuing effects on particular outsider groups. Law is seen by both as systematically oppressive to women and the Third World respectively.¹⁰

Before briefly considering feminism and TWAIL, and as it culminates in a separate code on critical technique, ‘othering’ requires elucidation. This term can be used as either a noun or a verb. As a noun it connotes ‘a person or group of people who are different from oneself’.¹¹ Used as a verb, it means ‘to distinguish, label, categorize, name, identify, place and exclude those who do not fit a societal norm’.¹² In sum, ““othering” is the process that makes the other’.¹³ This process occurs through frequently pointing out those characteristics of a group which differ from the norm in a particular way.¹⁴ Othering can be used in different ways depending on objective and point of view.

⁷ D Meyerson, *Understanding Jurisprudence* (Routledge 2007) 106. See also R Wacks, *Understanding Jurisprudence An Introduction to Legal Theory* (3rd edn, OUP 2012) 287; Bix (n 2) 288. The relativity of truth has been noted in post-Cold War jurisprudence, e.g., *Prosecutor v Kayishema and Ruzindana* (Judgment) ICTR-95-1-T (21 May 1999) para 32; *Prosecutor v Stakić* (Judgment) IT-97-24-T (31 July 2003) paras 20-21; *Prosecutor v Kajelijeli* (Judgment) ICTR-98-44A-T (1 December 2003) para 61; *Prosecutor v Nikolić* (Sentencing Judgment) IT-02-60/1-S (2 December 2003) paras 84, 91; *Prosecutor v Dragan Nikolic* (Sentencing Judgment) IT-94-2-S (18 December 2003) para 122; *Prosecutor v Deronjic* (Sentencing Judgment) IT-02-61-S (30 March 2004) para 135; *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) para 820; *Prosecutor v Gacumbitsi* (Judgment on Appeal) ICTR-2001-64-A (7 July 2006) para 32; *Prosecutor v Krajišnik* (Judgment) IT-00-39-T (27 September 2006) para 717; *Prosecutor v Milutinović et al* (Judgment Volume 1 of 4) IT-05-87-T (26 February 2009) para 4; *Prosecutor v Perišić* (Judgment) IT-04-81-T (6 September 2011) paras 410-411; *Prosecutor v Lukić and Lukić* (Judgment) IT-98-32/1-A (4 December 2012) paras 260, 396; *Prosecutor v Mathieu Ngudjolo Chui* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-02/12 (18 December 2012) para 36; *Prosecutor v Đorđević* (Public Judgment) IT-05-87/1-A (27 January 2014) para 143; *Prosecutor v Germain Katanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) para 70.

⁸ Meyerson (n 7) 107.

⁹ M Khosla, ‘The TWAIL Discourse: The Emergence of a New Phase’ (2007) 9 *International Community Law Review* 292 and footnote 6; Bix (n 2) 242.

¹⁰ See generally, H Charlesworth, C Chinkin and S Wright, ‘Feminist Approaches to International Law’ (1991) 85 *American Journal of International Law* 616-618; L Eslava and S Pahuja, ‘Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law’ (2012) 45 *Verfassung und Recht in Übersee VRÜ* 195; Bix (n 2) 242-243. For the congruence of CRT and TWAIL, see M Mutua, ‘Critical Race Theory and International Law: The View of an Insider-Outsider’ (2000) 45 *Villanova Law Review* 851-853.

¹¹ A Mountz, ‘The Other’ in Carolyn Gallaher, Carl Dahlman, Mary Gilmartin, Alison Mountz and Peter Shirlow (eds), *Key Concepts in Political Geography* (Sage 2009) 328.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.* Othering the opponent has underlined many conflicts, see BVA Röling, *The Tokyo Trial and Beyond Reflections of a Peacemaker* (Antonio Cassese ed, Polity Press 1993) 24; R Dallaire, *Shake Hands with the Devil The Failure of Humanity in Rwanda* (Arrow Books 2004) 513; S Drakulić, *They Wouldn't Hurt a Fly* (Hachete Digital 2004) chapter 13. See also HC Kelman and VL Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (1989), p 163 quoted in *Prosecutor v Tadić* (Sentencing Judgment) IT-94-1-T (14 July 1997) para 72.

Self can oppose Other to point out deviant behaviour or to marginalise. Other, in turn, can oppose Self to undermine the privileged position assumed by Self or to advocate for the value of plurality and difference.

Coding revealed feminism, antecedents to TWAIL¹⁵ and generic instances of othering in ICL justifications. Both feminism and TWAIL are specialised forms of the Self/Other separation as both link to a marginalised Other.¹⁶ While feminism focuses on women, TWAIL emphasises the Third World.¹⁷ Overlap occurs between the approaches through Third World Feminism, but this encompasses neither the entirety of feminism nor TWAIL. Feminism is internally varied (which is typical for critical approaches), but common themes include that the viewpoint and interests of men have been favoured in theory and practice.¹⁸ Feminism in law seeks to reveal the consequences of law's ostensible gender neutrality.¹⁹ TWAIL is likewise internally varied yet aims to 'understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans'.²⁰ TWAIL reveals how those in power can use international law as an instrument.²¹ Finally, instances of othering along a Self/Other axis appeared which were not linked to the categories of gender or the Third World. They encompassed both arguments of Self opposing Other and Other opposing Self for the purposes enumerated above.

As with previous chapters, the coded data is structured around the Fullerian principle requiring consistent (or non-contradictory) justifications. The essential question is whether the justifications ventured were foreseeable and predictable. Further, as with the policy-oriented, NCSL, interpretation and ethical theory codes,²² the two liberalisms inherent to ICL could be identified, at times, in the chapter 5 data. This discussion will be continued in section 6.3.

¹⁵ As is explained in section 5.3, 'TWAIL' could simply be used as label because it has support in literature to classify e.g. Pal thus. The arguments noted were congruous with TWAIL. This arguably justifies using 'TWAIL' here, but because TWAIL formally only appeared after Tokyo, the label 'antecedents to TWAIL' will be used throughout.

¹⁶ For feminism, see KT Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 831; Cotterrell (n 2) 242-243. For TWAIL see Anghie and Chimni (n 6) 192-193; Cryer, Hervey, Sokhi-Bulley with Bohm (n 1) 69; Eslava and Pahuja (n 10) 202.

¹⁷ Charlesworth, Chinkin and Wright (n 10) 616-618.

¹⁸ Freeman (n 5) 1080-1081; Bix (n 2) 243.

¹⁹ H Charlesworth, 'Feminist Methods in International Law' in Steven Ratner and Anne-Marie Slaughter (eds), *The Methods of International Law* (ASIL 2004) 180; Cryer, Hervey, Sokhi-Bulley with Bohm (n 1) 63.

²⁰ M Mutua, 'What is TWAIL?' (2000) 94 *American Society of International Law Proceedings* 31; A Anghie, 'What is TWAIL: Comment' (2000) 94 *ASIL Proceedings* 39. See generally, Khosla (n 9) 295; A Anghie, 'TWAIL: Past and Future' (2008) 10 *International Community Law Review* 480.

²¹ Khosla (n 9) 304. See also KC Moghalu, *Global Justice The Politics of War Crimes Trials* (Stanford Security Studies 2008) 14.

²² See sections 2.5, 3.4, 3.5 and the preface to part B respectively.

Chapter 5

Critical approaches in ICL jurisprudence: Feminism, antecedents to Third World Approaches to International Law (TWAIL) and generic othering in ICL jurisprudence

5.1 Introduction

For purposes of this study, coding for critical approaches revealed three philosophical categories, namely feminism, antecedents to Third World Approaches to International Law (TWAIL) and generic arguments pertaining to othering. Coding for Fullerian consistency revealed limited datasets in all categories. Nonetheless, the appearance of such critical theories are noteworthy because they can reflect a change in the intellectual zeitgeist of a community. They engage the interest-based extra-curial dynamic which weighs the philosophical positions of the ICL judicial bodies against the interests of the broader international community.¹ The subsequent sections introduce the respective approaches in some detail before considering the coded data. This is necessary because these philosophical categories were directly coded for.

5.2 Feminism

Feminism reveals international law to be a gendered system.² On this understanding women are traditionally subordinated to men. Feminism attempts to give a voice to women as a previously marginalised group.³ The identification of past or present exploitation, the empowerment of women and the transformation of patriarchal institutions are paramount for feminism.⁴

Feminists are not unified and different strands exist.⁵ Literature reveals various strands of feminism,

¹ See section 1.2.3.1.

² H Charlesworth, C Chinkin and S Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 615, 621.

³ Charlesworth, Chinkin and Wright (n 2) 621.

⁴ A van Blerk, *Jurisprudence an Introduction* (Butterworths Lexisnexis 1998) 171; MA Fineman, 'Feminist Legal Theory' (2005) 13 *Journal of Gender, Social Policy & the Law* 14.

⁵ Charlesworth, Chinkin and Wright (n 2) 621; Van Blerk (n 3) 173; D Meyerson, *Understanding Jurisprudence* (Routledge 2007) 173-189; R Cryer, T Hervey, B Sokhi-Bulley with A Bohm, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 63; R Wacks, *Understanding Jurisprudence An Introduction to Legal Theory* (3rd edn, OUP 2012) 300; M Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Thomson Sweet Maxwell 2014) 1082; BH Bix, *Jurisprudence: Theory and Context* (7th edn, Sweet & Maxwell 2015) 244.

including liberal,⁶ difference,⁷ radical⁸ and postmodern.⁹ Because ICL arguments lacked the requisite nuance, it was not possible to distinguish between different feminist strands through coding. Some observers have, in any case, questioned such fragmentation on the basis that no single method is sufficient when a concrete issue needs to be addressed.¹⁰ This also applies to judicial pronouncements. Common to all strands, however, were responses ‘to the inherent or socially constructed differences between men and women,’¹¹ the analysis of law’s role in ‘constructing, maintaining, reinforcing and perpetuating patriarchy and [looking] at ways in which this patriarchy can be undermined and ultimately eliminated’.¹² These common understandings served as the basis for philosophy identification under part (ii) of SCA.

Identification of feminism in ICL further occurred through the techniques of feminism. Feminist legal methods attempt to understand and reveal oppressive structures in society. Asking the woman question was particularly important for this study.¹³ Briefly, the woman question in law ‘means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women’.¹⁴ Silences can be as noteworthy as positive rules and rhetorical structures.¹⁵ The pervasive silence of women in international law is of special importance to feminism.¹⁶ This does not mean the complete absence of women in international law, but may entail that when they are included it is in a curtailed manner reducing them to victims, potential or actual mothers all in need of protection.¹⁷ This method was most evident in ICL judgments. Outside observers have further utilised methods like consciousness-raising¹⁸ and feminist practical reasoning,¹⁹ but these have not been as visible in the pronouncements of ICL role-players which is the subject matter of

⁶ PA Cain, ‘Feminism and the Limits of Equality’ (1990) 24 *Georgia Law Review* 829. See also W Morrison, *Jurisprudence* (Cavendish 1997) 486-488; Fineman (n 4) 13-16; Meyerson (n 5) 174-175; Wacks (n 5) 302-303.

⁷ Cain (n 6) 835-836; Morrison (n 6) 497-504; Fineman (n 4) 16-17; Meyerson (n 5) 181-183; Wacks (n 5) 306-308.

⁸ Cain (n 6) 831-837; Morrison (n 6) 488-494; Fineman (n 4) 15-16; Meyerson (n 5) 185-187; Wacks (n 5) 303-308.

⁹ KT Bartlett, ‘Feminist Legal Methods’ (1990) 103 *Harvard Law Review* 834-835, 877; Morrison (n 6) 511-512; Van Blerk (n 4) 179-183; R Cotterrell, *The Politics of Jurisprudence* (2nd edn, OUP 2003) 224-228; Meyerson (n 5) 187-188; Wacks (n 5) 305-306.

¹⁰ H Charlesworth, ‘Feminist Methods in International Law’ in Steven Ratner and Anne-Marie Slaughter (eds), *The Methods of International Law* (ASIL 2004) 161.

¹¹ Bix (n 5) 244. See also Morrison (n 6) 480-483.

¹² Charlesworth, Chinkin and Wright (n 2) 621; Meyerson (n 5) 173; Freeman (n 5) 1081.

¹³ Freeman (n 5) 1092.

¹⁴ Bartlett (n 9) 837; Van Blerk (n 4) 186-187.

¹⁵ Charlesworth (n 10) 162.

¹⁶ *Ibid.*

¹⁷ *Ibid.* 162-163.

¹⁸ See, for e.g., CA MacKinnon, ‘Feminism, Marxism, Method, and the State: An Agenda for Theory’ (1982) 7 *Signs* 519 et seq. *Ibid.* at 543 she defines it as ‘the collective critical reconstitution of the meaning of women’s social experience, as women live through it’. See also Bartlett (n 9) 863-864.

¹⁹ Feminist practical reasoning argues that individual fact-finding often surpasses universal principles and generalisations as it affords more respect to difference. See Bartlett (n 9) 849.

this study. The applicable methods dovetailed the gradual maturation of the ICL regime. Thus, the rudimentary techniques of feminism were utilised most prominently in a regime which was still developing.

Turning towards the coded data, both post-WWII IMTs were criticised for their failures to properly prosecute rape and sexual violence. Rape was neither listed in the respective Charters nor charged as a separate offence.²⁰ It has been argued that rape was not formally prosecuted at Nuremberg because some of the Allied soldiers were similarly guilty of raping women. From a feminist perspective this can be seen as ‘an example of the banality of evil in militarised patriarchal culture’.²¹ Asking the woman question, therefore, revealed the silence regarding female protection at Nuremberg. This silence also emerged in relation to the evidence accepted at the Tokyo IMT. Categories of victims like the so-called comfort women were ignored in the judgment.²² This neglect can be ascribed, in feminist terms, ‘to the privatisation of sexual violence in patriarchal culture’.²³

Although only a few external critiques expose the philosophical position in relation to women at the post-WWII IMTs, this is understandable as the issue revolved around the silences which were revealed through the woman question. Because of the nature of feminism, such silences were relevant to expose the hidden consequences of the ostensible gender neutrality in law.²⁴ At the IMTs, feminism was thus consistently neglected. This revealed a lack of concern with women as victims which would contrast with human rights (HR) liberalism.²⁵ On the formal rule of law, there was congruence between the (lack of) rules and their administration.²⁶ The ensuing consistency contributed to foreseeability and predictability, but revealed the limits of formal rule of law in lieu of substantive rule of law.

With some exception, before the 1990s sexual violence in war was often invisible or trivialised or justified as inevitable.²⁷ This position has changed as coding for feminism at the post-Cold War Tribunals shows. Both the ICTY and ICTR were influenced by feminism in developing sensitivity

²⁰ R Copelon, ‘Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law’ (2000) 46 *McGill Law Journal* 221.

²¹ *Ibid* 222.

²² N Boister and R Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008) 313. See also Copelon (n 20) 221-223.

²³ Copelon (n 20) 223.

²⁴ Charlesworth (n 10) 159; Cryer, Hervey, Sokhi-Bulley with Bohm (n 5) 63.

²⁵ See section 6.3.

²⁶ Fuller’s 8th principle, see section 1.2.3.2.

²⁷ Copelon (n 20) 220.

and pertinent recognition for gender-based crimes for which they were lauded.²⁸ Feminism is, however, layered and the shift is still part of the first steps to improve the position of women.²⁹ External critiques have revealed continued gendered biases. Nonetheless, the persistence of challenges does not undo the progressive shift in favour of women which has been identified.

At the ICTY, the candidature of female judges received support from the women's HR movement. Two of the first elected female judges, McDonald and Odio-Benito were credited with playing a leading role in making the Tribunal's evidentiary rules more sensitive to witnesses in sexual violence cases.³⁰ In *Tadić*, like the ICTR's *Akayesu* later, the first papers filed noted the rape of women at Omarska prison as no more than a background matter. Civil society noted this and filed an amicus brief which, among others, noted the failure to hold the accused accountable for rape. This, of course, revealed the silence imposed on women by the proceedings. Odio-Benito also noted the absence of sexual violence charges.³¹ Under such pressures the resultant indictment did contain charges of rape, but these charges were later dropped because of the unwillingness of the witness to testify absent full protection.³² In the Rule 61 proceedings against *Dragan Nikolić*, the TC also evidenced feminism, by inviting the prosecution to consider amending the indictment in light of evidence that rape and sexual violence occurred against women and girls during their detention at Sušica camp.³³ These early instances revealed that feminist civil society and the Tribunal judges significantly impacted the jurisprudence of the ICTY (and, as will be seen below, the ICTR) and commenced the process to address the previous silence afforded to women in ICL.

The *Furundžija* TC and AC both delved into feminist arguments, the TC regarding the categorisation of rape and the AC regarding a charge of bias. The TC argued that categorising forcible oral sex as rape did not fall foul of the legality principle even where the indicted acts would have been (merely) classified as sexual assault in some domestic jurisdictions, including that of the accused. The impugned acts were in any event criminal. Moreover, as long as the sentence was imposed on the 'factual basis of coercive oral sex' and the relevant statutory provisions 'then [the accused] is not adversely affected by the categorisation of forced oral sex as rape rather than as

²⁸ D Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' (2011) 11 *International Criminal Law Review* 409.

²⁹ Charlesworth (n 10) 159 et seq.

³⁰ Copelon (n 20) 228; KD Askin, 'Gender Crimes Jurisprudence in the ICTR' (2005) 3 *Journal of International Criminal Justice* 1009.

³¹ Copelon (n 20) 229.

³² *Ibid* 230.

³³ *Prosecutor v Nikolić* (Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-94-2-R61 (20 October 1995) paras 32-33. See also WA Schabas, *The UN International Criminal Tribunals The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) 374.

sexual assault’.³⁴ This finding was justified on the fact that war transformed actions which could have been classed as sexual assault as an aggravated form thereof as well as the imperative to protect human dignity.³⁵ The accused’s ‘only complaint can be that a greater stigma attaches to being a convicted rapist rather than a convicted sexual assailant’.³⁶ The TC addressed this type of sentiment by submitting that ‘any such concern is amply outweighed by the fundamental principle of protecting human dignity, a principle which favours broadening the definition of rape’.³⁷ The desire that a crime which specifically affects women be correctly and comprehensively labelled so that the appropriate level of opprobrium could be brought to bear on the impugned conduct was congruous with feminist concerns.

Feminist considerations appeared in the *Furundžija* AC regarding whether Judge Mumba was impartial or gave the appearance of bias due to her pre-ICTY involvement with the United Nations Commission on the Status of Women (the UNCSW).³⁸ The UNCSW primarily worked for ‘social change which promotes and protects the human rights of women’.³⁹ The AC emphasised that, while it reflected the definition proposed by the Expert Group Meeting, the expanded understanding of rape adopted in this particular case was based on earlier case law. On this argument, Mumba was not shown to be biased.⁴⁰ The issue soon turned to whether she gave the appearance of bias. The AC submitted as bottom-line that ‘even if Judge Mumba sought to implement the relevant objectives of the UNCSW, those goals merely reflected the objectives of the United Nations, and were contemplated by the Security Council resolutions leading to the establishment of the Tribunal’.⁴¹ Furthermore, the eligibility criteria of ICTY judges required experience in international law which would include knowledge of HR law obtained from working at the UNCSW.⁴² Concern for the vulnerability of women was thus found per curiam to have pervaded the UN, the ICTY and the eligibility requirements of its judges.⁴³ The silence afforded to women at the post-WWII IMTs stands in stark contrast to this pervasive recognition of their position.

In *Kunarac*, the prosecutor charged rape and outrages against human dignity separately. This was

³⁴ *Prosecutor v Furundžija* (Judgment) IT-95-17/1-T (10 December 1998) para 184.

³⁵ M Swart, ‘Judicial Lawmaking at the ad hoc Tribunals: The Creative Use of the Sources of International Law and “Adventurous Interpretation”’ (2010) 70 *ZaöRV* 467-468.

³⁶ *Prosecutor v Furundžija* (Judgment) IT-95-17/1-T (10 December 1998) para 184.

³⁷ *Ibid.*

³⁸ *Prosecutor v Furundžija* (Judgment) IT-95-17/1-A (21 July 2000) para 164.

³⁹ *Ibid* para 166.

⁴⁰ *Ibid* para 211.

⁴¹ *Ibid* para 201.

⁴² *Ibid* para 205.

⁴³ As well as the prosecutor, see C Del Ponte, *Confrontations with Humanity’s Worst Criminals and the Culture of Impunity* (Other Press 2008) 31.

the case even though the prosecutor acknowledged that ‘rape could have and has been classified as an outrage upon personal dignity’.⁴⁴ The desire to label the crime properly, i.e. to reveal its sexual nature, seemed to coincide with the feminist approach to reveal gendered silences. The proper labelling showed sensitivity to the vulnerability of women, thereby linking this argument to feminism. The separate existence of rape as war crime was further confirmed by the AC.⁴⁵ That feminism influenced the legal outcome in *Kunarac* has been confirmed by academic observers.⁴⁶

In several cases the violence to female detainees or their unique experience of certain crimes were emphasised in particular. In *Dragan Nikolić*, the TC emphasised the fact that the accused subjected the female detainees, in particular, to humiliating and degrading treatment at Sušica Camp.⁴⁷ Both *Stakić* and *Brđanin* noted that for ‘a woman, rape is by far the ultimate offence, sometimes even worse than death because it brings shame on her’.⁴⁸ Likewise in *Bralo*, the TC emphasised the position of women in that ‘[IHL], along with basic principles of humanity, require that individuals who are detained during an armed conflict must be treated humanely, and that the rape and torture of a woman in this context is a most heinous crime requiring unequivocal condemnation’.⁴⁹ The TC then proceeded to recall the particular heinous details of a particular rape committed by the accused. The TC concluded on an even firmer feminist note that: ‘These actions demonstrate a desire to debase and terrify a vulnerable woman, who was at the complete mercy of her captors’.⁵⁰ While these sentiments consistently reiterated the consequences of violence for women, there might simultaneously be feminist concerns surrounding *Stakić* and *Brđanin*. Both linked women’s identity to the arguably outdated notion of modesty. While that is a possible critique for external feminist observers, the overall increase in sensitivity for women’s plight was evident.

Turning to the ICTR, the discussion on feminism essentially revolved around *Akayesu*. Despite the inclusion of sexual violence under the crime of genocide in the ICTR Statute, the *Akayesu* case, like *Tadić*, initially went to trial without charges or evidence of rape. The prosecutor claimed that ‘it was impossible to document rape because women wouldn’t talk about it’.⁵¹ This unwillingness on the part of the prosecutors to amend the indictment persisted despite the evidence on this matter

⁴⁴ *Prosecutor v Kunarac, Kovać and Vuković* (Judgment) IT-96-23-T (22 February 2001) para 554.

⁴⁵ *Prosecutor v Kunarac, Kovać and Vuković* (Judgment) IT-96-23/1-A (12 June 2002) para 195.

⁴⁶ Buss (n 28) 410.

⁴⁷ *Prosecutor v Dragan Nikolić* (Sentencing Judgment) IT-94-2-S (18 December 2003) paras 194-195, 213.

⁴⁸ *Prosecutor v Stakić* (Judgment) IT-97-24-T (31 July 2003) para 803; *Prosecutor v Brđanin* (Judgment) IT-99-36-T (1 September 2004) para 1009.

⁴⁹ *Prosecutor v Bralo* (Sentencing Judgment) IT-95-17-S (7 December 2005) para 33.

⁵⁰ *Ibid* para 34.

⁵¹ Copelon (n 20) 224-225; Askin (n 30) 1009; Schabas (n 33) 372.

extracted through Judge Pillay's questioning.⁵² However, the indictment was eventually amended to include allegations of sexual violence. The prosecution contended that the testimony of a certain witness motivated their renewed investigation into sexual violence in the area under scrutiny. The accused countered that this amendment was the result of 'pressure from the women's movement and women in Rwanda, whom he described as "worked up to agree that they have been raped"'.⁵³ Indeed, several civil society bodies, working for the betterment of women, exerted pressure on the prosecutor to charge the gender crimes.⁵⁴ The TC addressed these viewpoints in the judgment in the following manner:

'The Chamber understands that the amendment of the indictment resulted from the spontaneous testimony of sexual violence by Witness J and Witness H during the course of this trial and the subsequent investigation of the Prosecution, rather than from public pressure. Nevertheless, the Chamber takes note of the interest shown in this issue by non-governmental organizations, which it considers as indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes. The investigation and presentation of evidence relating to sexual violence is in the interest of justice'.⁵⁵

The TC evidently accepted the prosecution's argument but firmly supported the feminist project of civil society as 'in the interest of justice'. This concern with woman's protection was clear in the *Akayesu* judgment as the sexual violence charges, in particular, were emphasised throughout.⁵⁶ Like its Yugoslav counterpart, these first attempts to reflect feminist sensitivities were not beyond reproach on that selfsame front. The TC finding that rape was an act of genocide if committed with the intention to destroy a specific group was understood as continuing the notion of women as cultural objects.⁵⁷ This represents a dissatisfaction with the gendered nature of the law as 'the violation of the woman's body is secondary to the humiliation of the group'.⁵⁸ Observers are, however, not unanimous on this point.⁵⁹ The gendered nature of law, including ICL, cannot be gainsaid. The recognition of the position of women was the first step away from the previous silences even if much work is still to be done. For purposes of this study, this counts as an instance of feminism even if the protection afforded could be refined.

⁵² Copelon (n 20) 225.

⁵³ *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) paras 42, 417, 448. See generally Askin (n 30) 1009; R Cryer, 'The Philosophy of International Criminal Law' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 261.

⁵⁴ Copelon (n 20) 225-226. For further confirmation of the role feminists played in the *Akayesu* judgment, see Buss (n 28) 410; BN Schiff, *Building the International Criminal Court* (CUP 2008) 61-62.

⁵⁵ *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) para 417.

⁵⁶ *Ibid* paras 731-734.

⁵⁷ Charlesworth (n 10) 172.

⁵⁸ *Ibid*.

⁵⁹ See, for example, Copelon (n 20) 228; Buss (n 28) 413.

On appeal, *Akayesu* continued the argument that Judge Pillay had not been impartial during the trial when asking certain witnesses questions pertaining to sexual violence. However, the AC rejected these claims when taking the Judge's comments into account in their context – they were the logical consequence of earlier questions on crimes against humanity.⁶⁰ Feminist concerns thus still animated the accused's argument on appeal.

While only a few instances of feminist considerations were noted at the post-Cold War Tribunals, this was because of study design focusing on articulated instances of philosophical justificatory arguments. Later on, charges concerning crimes against women became normal and so required less direct argument.⁶¹ The initial cases showed consistent support for feminist concerns even if international organisations had to get involved. Such involvement, however, revealed the interest-based extra-curial dynamic at work. The judicial bodies internalised and reflected a shift in the communal zeitgeist regarding the commitment to the legal protection afforded to women. The harmonisation of curial and communal standards of protection for women would also comply with Fullerian rule of law. The shift in position was not frequent and, more importantly, foreseeable and predictable.

Feminism also appeared in a few cases at the ICC. Although the prosecution in *Lubanga* presented evidence of sexual violence, it had omitted charging the accused accordingly. The TC relegated these arguments to constitute context to the charged acts and refrained from directly attributing responsibility for them.⁶² Judge Odio Benito took this passivity to task as she wanted the sexual nature of the crimes incorporated into the 'participation in hostilities'.⁶³ Otherwise this critical aspect of the crime would be invisible and those who systematically suffer from sexual violence in the context of enlistment, conscription and participation would not be protected.⁶⁴ This, of course, exemplified the typical feminist concern with gendered silence and the unbalanced impact of the law. Odio Benito also noted the gendered-dimension of sexual violence against children in armed groups. Thus 'unwanted pregnancies for girls...often lead to maternal or infant's deaths, disease,

⁶⁰ *Prosecutor v Akayesu* (Judgment on Appeal) ICTR-96-4-T (1 June 2001) paras 195-200. However, see J Wessel, 'Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication (2006) 44 *Columbia Journal of Transnational Law* 392.

⁶¹ See, for e.g., the discussion and cases noted in the Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820 <www.icty.org/x/file/Outreach/sv_files/DPKO_report_sexual_violence.pdf> accessed 28 June 2018.

⁶² *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) paras 889-896, 913.

⁶³ *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) Separate and Dissenting Opinion of Judge Odio Benito paras 16-17.

⁶⁴ *Ibid.*

HIV, psychological traumatisation and social isolation'.⁶⁵ While sexual violence is an element of enlistment and conscription, sexual violence and enslavement are distinct and separate crimes which could have been considered separately if the prosecution presented charges accordingly.⁶⁶ The TC, in sentencing, likewise reproached the prosecution as it 'strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence' which was limited to statements in the opening and closing submissions rather than inclusion in the charges.⁶⁷ Strong feminist sentiments were thus visible in *Odio Benito* as she was specifically concerned with the gendered implications of the prosecution omission while the TC also revealed feminist sympathies in its disapproval of the prosecution's attitude towards sexual violence.

Finally, dealing with the rape charges in *Bemba*, the TC considered various expert testimonies on the particular consequences of rape on women before finding the crimes committed to be very grave. The psychological and social consequences of women in the DRC were considered.⁶⁸ The Court devoted some time to discuss the particular problems facing women who had been raped as evidenced by several experts. This showed feminist sensitivities in contrast with the IMT silences discussed earlier.

In its limited output to date, the ICC has ostensibly continued the post-Cold War trend to advocate the position of women. This, of course, continued the embodiment in legal institutions of the shift sensitive to the gendered-dimension of international crimes. Similarly, the use of these justifications was consistent, predictable and foreseeable per the Fullerian requirements. The difference from the position at the post-WWII IMTs could not be more stark.

Coding for feminism revealed a shift in trend across the selected ICL judgments. External feminist critiques revealed the post-WWII IMTs' omission pertaining to feminist concerns and the lack of proper prosecution for the crimes of rape and sexual violence. Under the influence of feminist civil society, there occurred a significant paradigm shift in this regard at the post-Cold War Tribunals. Thus the ICTY, ICTR and, based on its limited output, the ICC have revealed sensitivity to the need for improving the protections afforded to women in war as well as to particularise the protection afforded in line with the specific vulnerabilities of women. The subsequent protections showed HR

⁶⁵ Ibid paras 13, 20

⁶⁶ Ibid paras 20-21.

⁶⁷ *Prosecutor v Thomas Lubanga Dyilo* (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/04-01/06 (10 July 2012) para 60.

⁶⁸ *Prosecutor v Jean-Pierre Bemba Gombo* (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/05-01/08 (21 June 2016) paras 36-40.

liberalism as women's position as victims was considered in particular. While there is nothing intrinsic in feminism which attaches it to the interests of victims in ICL, in ICL jurisprudence, to date, this was the context in which it appeared.⁶⁹

On the coded data, it was the earlier cases at the ICTY (*Tadić, Furundžija*), ICTR (*Akayesu*) and ICC (*Lubanga*) wherein feminist arguments were most prominent and consistently made. Once 'normalised' as standard, it became less necessary to argue this matter – prosecutors increasingly prosecuted crimes against women, without the need for further accompanying justifications. A more balanced, but by no means perfect, approach to women's protection ensued. The protection afforded through feminism can be compared to the levels of an excavation. Initially at the IMTs no specific protection existed for women. After the initial obstacles at the post-Cold War Tribunals, the tenuous position of women was at least identified and some protection afforded. Yet, a feminist critique of existing protections is still possible.⁷⁰ The initial silence might have been overcome, but much still needs to be done on the deepest levels of excavation.⁷¹ For, e.g., at both the ICTY and the ICC sexual violence is only addressed against the context of a widespread, systematic, or large-scale attack, i.e. when the community is threatened by destruction.⁷² Nonetheless, for purposes of this study, the articulated justificatory narratives revealed feminism. Just because the protection sought was not yet completely attained did not render the initial arguments any less feminist.

When this limited dataset is measured against the rule of law, it is revealed that the post-Cold War judicial bodies, under the influence of civil society, reflected a change in accordance with the zeitgeist of the international community. Bringing the law into accordance with society's expectations, on what is labelled the interest-based extra-curial dynamic in this study,⁷³ does not adversely affect predictability and foreseeability.⁷⁴ None of the Fullerian desiderata are contravened. The shift which occurred was gradual and in line with the broader zeitgeist of the international society. It was also not a matter of retrospective law. Protections which had existed, but were often neglected, were now just being explicitly recognised again. Finally, once the protection was afforded it became a consistent aspect of Tribunal jurisprudence.

⁶⁹ This is revisited in section 6.3.

⁷⁰ Charlesworth (n 10) 159 et seq.

⁷¹ Ibid 161-162.

⁷² Ibid 171.

⁷³ See section 1.2.3.1.

⁷⁴ For R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 43 legal principles can develop from 'a sense of appropriateness developed in the profession and public over time'.

5.3 Antecedents to TWAIL

For critical approaches, it is imperative to reveal the 'situatedness' of law. For some, the formal, abstract and universal nature of international law was, and remains, a construct of European states for the purpose of domination and enforcing their conceptions of law.⁷⁵ In short, the universality of international law is geographic rather than normative.⁷⁶ An example of such a view is TWAIL, which investigates how present arrangements reflect and/or perpetuate colonial relations by subjecting and/or silencing people from the Global 'South' and 'Third' World.⁷⁷

Because such sentiments in ICL appeared at the Tokyo IMT, in particular in the relationship between the Allies and Japan, a brief explanation of 'Third World' is necessary. Sometimes 'Third World' is used as a synonym for 'less-developed', 'developing', 'underdeveloped countries' or 'the South'.⁷⁸ Traditionally African, Asian and Latin American countries are juxtaposed as 'lagging behind the 'West', 'North', 'First World' or 'developed countries'.⁷⁹ Some observers use 'Third World' to mean 'the Rest and not merely the West'.⁸⁰ The 'Third World' has referred to a political coalition.⁸¹ 'Third World' can also be construed as a 'social movement' of the poor against the rich or the weak opposing the strong.⁸² All of these understandings can be criticised on grounds, for e.g., of essentialising the Third World.⁸³ Mickelson attempted to circumvent some of these issues by arguing holistically for the Third World as 'occupying a historically constituted, alternative and oppositional stance within the international system'.⁸⁴ Thus, whatever the objective status of Japan was, in the case of the Tokyo proceedings, the Western Allies assumed the role of arbiter over it. This forcefully juxtaposed West and East in a manner which ostensibly raised the TWAIL-type

⁷⁵ Transcript of Proceedings 3 March 1948, 42 206 for the Eurocentric nature of international law and Webb Separate Opinion 10 for support of the view that Christian civilisation was essentially responsible for international law. See also BVA Röling, *International Law in an Expanded World* (Djambatan, 1960) 10-11; M Mutua, 'What is TWAIL?' (2000) 94 *American Society of International Law Proceedings* 31-33; M Mutua, 'Critical Race Theory and International Law: The View of an Insider-Outsider' (2000) 45 *Villanova Law Review* 843-845; E Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18 *European Journal of International Law* 380-391; M Khosla, 'The TWAIL Discourse: The Emergence of a New Phase' (2007) 9 *International Community Law Review* 296.

⁷⁶ Mutua, 'What is TWAIL?' (n 75) 31 fn 1; Mutua, 'Critical Race Theory and International Law' (n 75) 844.

⁷⁷ Mutua, 'What is TWAIL?' (n 75) 36, 38; A Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflict' in Steven Ratner and Anne-Marie Slaughter (eds), *The Methods of International Law* (ASIL 2004) 186; Cryer, Hervey, Sokhi-Bulley with Bohm (n 5) 69.

⁷⁸ K Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) 16 *Wisconsin International Law Journal* 356. See also L Eslava and S Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45 *Verfassung und Recht in Übersee VRÜ* 196.

⁷⁹ Mickelson (n 78) 356.

⁸⁰ See OC Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 *International Community Law Review* 377.

⁸¹ *Ibid* 357.

⁸² *Ibid*.

⁸³ Mickelson (n 78) 357-359.

⁸⁴ *Ibid* 360.

concerns just mentioned.

TWAIL aims to reactively guard against lingering (Western) hegemony and proactively improve the situation of the Third World.⁸⁵ TWAIL is concerned about the lived experience of Third World peoples and not merely the States which represent them.⁸⁶ TWAIL aims to ensure that international law is genuinely based on justice rather than power.⁸⁷ Importantly, TWAIL does not deny the importance of international law, but only seeks to expose its singularly Eurocentric bias and realign it to be more inclusive of the values of the Third World.⁸⁸ Some observers even formulate this negatively, namely that TWAIL's novelty resides less in a 'critical third world voice...[than] in intervening within the dominant discourses of international law, particularly within North America, Australia and Europe'.⁸⁹

Although TWAIL scholarship abounds in internal variations, there exists unity in its commitment to oppose the unjust global order.⁹⁰ The variety in TWAIL projects, however, enables challenges in excess of international law and colonialism as the determinants of power relations. TWAIL can oppose the 'hegemony of the dominant narratives of international law...along many axes – race, class, gender, sex, ethnicity..'.⁹¹ In the context of early ICL at Tokyo, the matter of race was particularly relevant.

While the benefits for taxonomical consistency of using the label 'TWAIL' for scholarship that started in the 1960s (or arguably even earlier) and progressed into the future cannot be gainsaid, there are dangers involved as well pertaining to watering down the label.⁹² For some, TWAIL can be subdivided into TWAIL I, which embodies scholarship of the period directly subsequent to decolonisation, and TWAIL II, which embodies more contemporary scholarship.⁹³ TWAIL I focused on the 'nation-state and the manner in which the powerful nations used international law as a

⁸⁵ Mutua, 'What is TWAIL?' (n 75) 31; JT Gathi, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 *Trade, Law and Development* 30.

⁸⁶ Anghie and Chimni (n 77) 186.

⁸⁷ A Anghie, 'What is TWAIL: Comment' (2000) 94 *ASIL Proceedings* 40; Mutua, 'What is TWAIL?' (n 75) 36, 38; Anghie and Chimni (n 77) 202.

⁸⁸ Mutua, 'What is TWAIL?' (n 75) 36. See also Anghie and Chimni (n 77) 202; Gathi (n 85) 38-39.

⁸⁹ Anghie and Chimni (n 77) 202; Gathi (n 85) 35.

⁹⁰ Mickelson (n 78) 353; Mutua, 'What is TWAIL?' (n 75) 36; Anghie and Chimni (n 77) 185-186; Okafor (n 80) 375; A Anghie, 'TWAIL: Past and Future' (2008) 10 *International Community Law Review* 480; Gathi (n 85) 27; Eslava and Pahuja (n 78) 195.

⁹¹ Gathi (n 85) 37.

⁹² Mickelson (n 78) 360-361.

⁹³ K Mickelson, 'Taking Stock of TWAIL Histories' (2008) 10 *International Community Law Review* 360. See also Anghie and Chimni (n 77) 186-195.

vehicle of oppression to serve their hegemonic ends and self-interest.’⁹⁴ TWAIL II centres around how international organisations, globalisation and development continued the hierarchies created by international law.⁹⁵ Yet, the distinction between TWAIL I and II is not universally accepted. On such a view, TWAIL as a movement commenced in 1997 with its first conference at the Harvard Law School.⁹⁶ On this view, ‘TWAIL would be seen as part of a Third World tradition of international law scholarship rather than the overarching framework into which all Third World scholarship can be fit’.⁹⁷ Nothing in this study turns on whether ‘TWAIL I’ is accepted as a label or TWAIL is merely seen as part of a larger Third World scholarship on international law and that is accepted as the appropriate label. The post-WWII arguments coded in the selected ICL pronouncements embody elements characteristic of what became TWAIL. This necessitated discussing them within this context. Moreover, Pal, who was the central role-player under this philosophical category, has been linked to TWAIL proper in literature.⁹⁸ Yet, to reflect that TWAIL was not yet established, this section uses ‘antecedents to TWAIL’ as label.⁹⁹

In addition to Pal, such sentiments antecedent to TWAIL pervaded the arguments of selected counsel and Röling at Tokyo. In typical TWAIL vein, the arguments raised concerns about Western hegemony (here West-East rather than contemporary North-South¹⁰⁰), the power differential between West and East and giving a voice to those marginalised in the international community. While the resultant dataset was small, questions into rule of law consistency intra-curially at Tokyo could be pursued. Also, TWAIL engaged with the rule of law generally as interest vied with law.

Turning to counsel first, it has been argued by external observers that the legal ideas, staff and historical ideas relied on by the Tokyo IMT were marked by Eurocentrism.¹⁰¹ To illustrate how cultural underpinnings influenced prosecutorial strategy, for example, reference can be made to

⁹⁴ Anghie and Chimni (n 77) 187; Khosla (n 75) 297.

⁹⁵ Khosla (n 75) 293, 298.

⁹⁶ Ibid 356.

⁹⁷ Ibid 361-362.

⁹⁸ Gathi (n 85) 35-37 for Pal’s resistance as a third world judge; K Sellars, ‘Imperfect Justice at Nuremberg and Tokyo’ (2011) 21 *European Journal of International Law* 1095 reads Pal as reflective of ‘third-worldist sentiment’.

⁹⁹ E Kopelman, ‘Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial’ (1991) 23 *New York University Journal of International Law and Politics* 428-431 also reads Pal as a precursor to TWAIL because the ‘implications of his arguments were not understood as an alternative ‘Third World’ perspective...until almost a decade after he wrote’. See also Boister and Cryer (n 22) 287-288.

¹⁰⁰ Eslava and Pahuja (n 78) 196-197 identified several other binaries, including North-South, before finding that TWAIL focuses on “‘the governed’” no matter where they are spatially located’.

¹⁰¹ C Hosoya, N Ando, Y Onuma and R Minear, ‘Preface’ in C Hosoya, N Ando, Y Onuma and R Minear (eds), *The Tokyo War Crimes Trial An International Symposium* (Kodansha Ltd 1986) 10. That the difference in case selection between Tokyo and Nuremberg has also been read in such a manner, see Awaya, ‘In the Shadows of the Tokyo Trial’ in C Hosoya, N Ando, Y Onuma and R Minear (eds), *The Tokyo War Crimes Trial An International Symposium* (Kodansha Ltd 1986) 85; Boister and Cryer (n 22) 313.

Keenan's reliance on theocentric natural law when he argued for "values which are immutable and eternal" in the light of the "the Christian-Judaic absolutes of good and evil", and further invoked a "universal brotherhood under the fatherhood of God" in his effort to legitimate the international jurisdiction'.¹⁰² Keenan and Brown persisted with this homogeneous understanding of the international community's ethical structure.¹⁰³ While Christianity might not have been completely alien to the Japanese as Boister and Cryer have argued, it is true, however, that the natural law adopted by the prosecution was not sensitive to cultural particularities and embodied a very partial understanding of the entire enterprise.¹⁰⁴ This problem is compounded by the general critique that natural law can mean different things to different people so 'in Tokyo it also became clear that the law that the American Keenan deemed natural, was not natural law to the French dissenting Justice Bernard.'¹⁰⁵ At minimum, the prosecutors were perpetuating the Western narrative at the expense of any alternative.

The Tokyo defence retorted 'that the Allies, in their attempts to put people on trial were arrogating to themselves the role of universal arbiter, and in doing so were violating their own principles of civilisation'.¹⁰⁶ Takanayagi's argument, as noted in section 2.4, which rejected the existence of a homogeneous international community might be recalled here too.¹⁰⁷ The Tokyo defence brought a motion that requested the IMT to require the 'considered opinions of the world's highest authorities on morals and right conduct, and of the chief exponents of human wisdom'.¹⁰⁸ The Allies' right to speak on behalf of a homogeneous, unified civilisation was thus questioned.

Besides creating the impression that there were two different legal regimes applicable to the victors (West) and vanquished (East), the imposition of the death penalty at Tokyo was seen by Takanayagi as a hindrance to building a world wherein law as opposed to power reigned supreme. The imposition of the death penalty would transform the convicted into martyrs in the cause of ensuring freedom for Asia.¹⁰⁹ The defence rejection of the death penalty at Tokyo revealed a colonial overtone: 'Future generations of Oriental people, and the whole of mankind will remember that

¹⁰² S Nimaga, 'An International Conscience Collective? A Durkeimian Analysis of International Criminal Law' (2007) 7 *International Criminal Law Review* 612. The references are to JB Keenan and BF Brown, *Crimes against International Law* (Public Affairs Press 1950) vi, vii, 72.

¹⁰³ Keenan and Brown (n 102) 138.

¹⁰⁴ See generally Boister and Cryer (n 22) 294-295.

¹⁰⁵ Nimaga (n 102) 613. See also preface to part A; Van Blerk (n 4) 3.

¹⁰⁶ Boister and Cryer (n 22) 277.

¹⁰⁷ Transcript 42 206, 42 212, 42 244-42 245.

¹⁰⁸ Boister and Cryer (n 22) 277 refers to IMTFE Paper 148 (15) 12 June 1946. See also H Grotius, *De Iure Belli ac Pacis Libri Tres* (Francis Kelsey tr, Clarendon Press 1925) Prolegomena 40.

¹⁰⁹ Transcript of Proceedings 3 March 1948, 42 282-42 283.

“Western statesmen and generals had never been penalized during the preceding three centuries for their aggressions on Eastern lands”¹¹⁰. This statement emphasised the hegemony of West over East. In sum, the IMT prosecutors argued for homogeneity and universality in international legal life based on an extrapolation of their own values while the defence counsel argued for plurality and tried to show the power differential and hegemony at play in the proceedings. These arguments remained consistent (and thus foreseeable and predictable) for rule of law purposes and congruent with their respective aims to prosecute or defend.

Turning to the Tokyo judgment, the first question relevant to TWAIL pertained to whether Japan formed part of ‘civilisation’. Rather than expound an abstract conception of world society, the majority referred to those treaties which Japan had ratified. Accordingly, the Japanese ratification of treaties such as the Hague Convention, the Kellogg-Briand Pact and the Covenant of the League of Nations led to the finding that ‘for many years prior to the year 1930, Japan had claimed a place among the civilized communities of the world’.¹¹¹ This approach seemed instrumental as it ensured that Japan would be held accountable for the perpetrated atrocities. Such an approach attempted to establish a homogeneous international community on an ostensible neutral ground, i.e. the ratification of treaties. Yet, the majority judgment neglected to reveal the discrepancy in the application of the incurred obligations between East and West. It fell to the individual judges to point out this fact.

Turning to the individual judges at Tokyo, both Pal and Röling produced noteworthy data. Pal’s dissent, in particular, will be analysed in some depth. He accused the Allies of contravening the very rules they now wanted to impose.¹¹² In the process he opposed colonialism, noted the hegemony of the West and suggested the need for cultural sensitivity all of which are congruent with what has been labelled TWAIL. These arguments will now be considered in turn.

Pal exhibited clear anti-colonialist sentiments.¹¹³ He rejected the ‘widening sense of humanity’ argued for in international life on the basis that the powerful states continued to dominate their

¹¹⁰ Quoted in Boister and Cryer (n 22) 251. See Transcript of Proceedings 3 March 1948, 42 282 for the slightly different version given at trial.

¹¹¹ Tokyo IMT Majority Judgment 38-82 refers to numerous treaties signed. See also Boister and Cryer (n 22) 279-280, 293.

¹¹² A Nandy, ‘The Other Within: The Strange Case of Radhabinod Pal’s Judgment on Culpability’ (1992) 23 *New Literary History* 49.

¹¹³ Kopelman (n 99) 418-423; BVA Röling, *The Tokyo Trial and Beyond Reflections of a Peacemonger* (Antonio Cassese ed, Polity Press 1993) 28; Boister and Cryer (n 22) 287; WA Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 7. See Gathi (n 85) 38 on centrality of colonisation in TWAIL.

colonies.¹¹⁴ The unfairness underpinning the fact that the Allies could charge the accused with aggression yet obtain and maintain colonies by using force engendered sympathy in Pal for the right of colonized peoples to free themselves by using force.¹¹⁵ He considered the establishment of peace on the post-WWII status quo to be dangerous. Establishing peace on the post-WWII status quo would petrify the subjugated position of a great many states. For Pal ‘the present age is faced with not only the menace of totalitarianism but also the actual plague of imperialism’.¹¹⁶ Accordingly, Pal opposed the colonial consequences of maintaining the status quo of the international community.¹¹⁷ He argued that ‘peoples under colonial rule could not be expected “to submit to eternal domination only in the name of peace”’.¹¹⁸ For Pal, ‘anti-colonial justice took precedence over peace rather than peace taking precedence over justice’.¹¹⁹ The overall thrust of this anti-colonial argument is congruous with TWAIL, but also suggested a movement towards traditional just war thinking.¹²⁰

In addition to colonialism, Pal reacted to Western hegemony. He perceived the IMT proceedings as an attempt by the US to fashion the international legal community in its own image.¹²¹ Ostensibly a position of inferiority was given to Japan through the proceedings, implying perhaps that they were not as civilised as the West.¹²² Reliant on a *tu quoque* argument, Pal pointed out the absurdity of the Allies prosecuting Japan for acts of aggression which they had committed with impunity not long before. Pal argued that ‘domination of one nation by another’ was not yet a crime in international law. Otherwise ‘the entire international community would be a community of criminal races’.¹²³ Interests in the East were mostly obtained by Western Powers through armed violence prior to 1914. Few, if any, of these conflicts would comply with the test for being a ‘just war’.¹²⁴ Pal resolved this by noting the Western hypocrisy behind the charge of aggression’s criminality: ‘Instead of saying that all the powerful nations were living a criminal life I would prefer to hold that international society did not develop before the Second World War so as to make this taint a crime’.¹²⁵ For Pal, the Japanese committed as much or as less a crime as the West did in setting up its colonial interests. The TWAIL undercurrent lies in the differential treatment afforded to the East when it

¹¹⁴ Pal Dissent 136, 234. See also Boister and Cryer (n 22) 131.

¹¹⁵ Boister and Cryer (n 22) 287. See also Hosoya, Ando, Onuma and Minear (n 101) 10.

¹¹⁶ Pal Dissent 238-239.

¹¹⁷ A consequence Pal, Dissent at 238, understood to flow from Jackson’s argument that “whatever grievances a nation may have, however objectionable it finds the status quo, aggressive warfare is an illegal means for settling those grievances or for altering those conditions”. See Sellars (n 98) 1096.

¹¹⁸ Pal Dissent 239; Gathi (n 85) 36.

¹¹⁹ Sellars (n 98) 1096; Gathi (n 85) 36.

¹²⁰ Sellars (n 98) 1096. See section 2.3.

¹²¹ Kopelman (n 99) 374-375, 380.

¹²² Anghie and Chimni (n 77) 192.

¹²³ Pal Dissent 225.

¹²⁴ Ibid 70.

¹²⁵ Ibid 137, 246.

acted in the same manner as the West.

Pal frequently pointed out how the West exploited the East in general. The tenor of these submissions were often scathing. He observed ‘that the so-called Western interests in the Eastern Hemisphere were mostly founded on the past success of these western people in “transmuting military violence into commercial profit”’.¹²⁶ Likewise, the Western intervention in China was justified on the essential inability of that country to look after its own interests. These interests were defined by Western standards.¹²⁷ The West also forcefully penetrated Japan, according to Pal, and provided Japan with the very example of how to conduct international affairs: ‘the Empire of Japan...entered, or, more correctly, was made to enter, again into relations with the outer world, under the terms of treaties obtained by the Western Powers from her by methods which, when later on imitated by Japan in relation to her neighbours, were characterized by these very treaty powers as aggressive’.¹²⁸ Pal continued: ‘Even if we assume that everything that was done by the Western Powers during this period was done by them with a “noble purpose of a pure heart” and only to give Japan the blessings of western intercourse, the method adopted in doing this was certainly not agreeable to Japan. In international law, however, it was only “the peaceful opening” of Japan’.¹²⁹ Pal here anticipates TWAIL in its anti-Eurocentricity format, opposing Western hegemony and hypocrisy.¹³⁰ The scathing undercurrent in these sentiments recalls the importance afforded to rhetoric in TWAIL.¹³¹

Pal suggested that Japan had only emulated the Western Powers to obtain scarce material resources from foreign territories. However, Japan commenced these pursuits ‘at a time when neither of the two essential assets, “a free-hand” for their ability and a worldwide field, was any longer available to them’.¹³² This is, of course, another accusation aimed at the West which had already appropriated foreign territories for itself. What was allowed for the West was denied to the East. This reflects the power differential and hegemony which TWAIL opposes. The real responsibility for Japan’s actions, according to Pal, attached to those statesmen who set Japan ‘upon the stream of westernization and had done so, at a moment when the stream was sweeping towards a goal which was a mystery even to the people of the West themselves’.¹³³ Pal set up Japan (and the East) as

¹²⁶ Ibid 279.

¹²⁷ Ibid 380.

¹²⁸ Ibid 785-785(1).

¹²⁹ Ibid.

¹³⁰ Mutua, ‘Critical Race Theory and International Law’ (n 75) 844.

¹³¹ Mickelson (n 78) 417-419.

¹³² Pal Dissent 874-875.

¹³³ Ibid.

following in the footsteps of the West and then being suddenly berated for doing exactly what the West itself had done. If the West could protect its interests in the East by extending ‘their reservation of the right of self-defence to the protection of such interests as well while signing the Pact of Paris’, Japan’s rights in China had to be measured by the same standard.¹³⁴ The West was presented as dishonest, inconsistent and lacking integrity. Essentially the West was now measuring the Japanese against a standard it had contravened itself. Moreover, the argument implied that the West was the example for Japan’s actions or, at the very least, Japan did no more (and were thus no more or less guilty) than the West.

The third aspect of Pal’s dissent, which anticipated TWAIL, was Pal’s cultural sensitivity. Considering the Japanese treatment of POWs, Pal noted two factors to understand the position adopted: ‘One is the fundamental difference between the Japanese and the Western view of surrender, – the “shame” or the “honour” of surrender. And the other is the overwhelmingly large number of surrenders which Japan had to face during the Pacific War’.¹³⁵ Sensitivity to cultural differences is completely congruous with TWAIL thinking. While not justifying the atrocious conduct, it explained ‘their conduct without ascribing the same to government policy’.¹³⁶ His recognition of cultural difference was not to exonerate, but to provide another plausible explanation for Japanese conduct apart from an overarching governmental conspiracy.

Pal’s philosophical arguments were not homogeneous. Several observers have noted this fact.¹³⁷ His views overlapped with ‘pan-Asianism and anti-communism, with the non-aligned movement over anti-colonialism and self-determination, and with Western anti-militarists over American foreign policies’.¹³⁸ While some link his thought with positivism or natural law,¹³⁹ the statements anticipating TWAIL are often a central pivot around which the other approaches revolve.

Moving away from Pal, Röling was also aware of the East-West divide at the Tokyo IMT. For him, invoking natural law was dangerous due to natural law’s link to the colonial project. Accordingly, after he jettisoned just war theory as part of 19th and early 20th century positive international law, he submitted:

¹³⁴ Pal Dissent 548; Kopelman (n 99) 421.

¹³⁵ Ibid 1140.

¹³⁶ Ibid 1144-1145.

¹³⁷ Kopelman (n 99) 411-424; Nandy (n 112) 60; Boister and Cryer (n 22) 289-291; Sellars (n 98) 1096, 1110; Gathi (n 85) 36-37.

¹³⁸ Sellars (n 98) 1110.

¹³⁹ See for example Kopelman (n 99) 411-424; Sellars (n 98) 1096. See sections 2.2, 2.3, 2.4, 3.2, 3.3, 3.4.

‘Nor do I feel I can quote Grotius, Gentili and Vattel in the trial of Japanese aggression...I hesitate to approach the Far East in our effort to determine the criminality of aggression with quotations from idealists and philosophers of the very period when our heroes and soldiers were conquering its territories in what could hardly be called a defensive war’.¹⁴⁰

This concession recognised the dialectic tension between East and West embodied in the IMT proceedings. Röling showed respect for the marginalised Other (East) by refraining from assimilating it into the standards and authorities of the Self (West).¹⁴¹ Extra-curially, Röling conceded that international law was historically a ‘product of European Christian civilization’.¹⁴² The question for him was whether this law could ‘meet with respect, accord and intrinsic acceptance in the expanded world’.¹⁴³ This argument revealed the belief that values are situated and may be a means of imposing further hegemony if care was not taken. Röling noted how power and interest were hidden elements in positive law. Law then tended to serve the interests of the powerful. European international law could be and was thus challenged.¹⁴⁴ Such sentiments again anticipated the TWAAIL challenge to hegemony in international law.

In sum, the individual opinions of Pal and Röling at Tokyo revealed anti-colonial sentiments which resonate with contemporary TWAAIL arguments. Pal, in particular, pointed out how the Tokyo IMT was a manifestation of Western hegemony over the East. Japan had merely imitated the actions of the West and was no more or less guilty than its accusers. Congruous with later TWAAIL arguments, Pal and Röling both showed awareness of the power and interest which underpinned the law and proceedings at Tokyo.

Apart from external critiques about bias towards prosecuting nationals from African states at the ICC, no data appeared regarding TWAAIL at the other post-Cold War Tribunals.¹⁴⁵ As this study focuses on pronouncements by the selected role-players, these external observations are only noted here and will be revisited in chapter 7.

In conclusion, sentiments anticipating TWAAIL emerged intra-curially at Tokyo. The prosecution

¹⁴⁰ Quoted in Boister and Cryer (n 22) 292.

¹⁴¹ See section 5.4.

¹⁴² Röling (n 75) 10-11.

¹⁴³ Ibid.

¹⁴⁴ Ibid 15, 68.

¹⁴⁵ See, for e.g., A Cassese, ‘Soliloqui’ in Heikelina Verrijn Stuart and Marlise Simons, *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese: Interviews and Writings* (Amsterdam University Press 2009) 174. See section 0.2.

argued for a world society premised on universal values whereas the defence noted the cultural plurality which made up that community. Anticipating TWAIL, Pal and Röling argued from the premise of a pluralist world society upon which universal natural law could not be enforced. Pal went further and showed that Japan was merely following the example set by the West. The distinction in juridical reaction to these respective actions of East and West (i.e. prosecuting Japan but not the Allies) could only be ascribed to hegemony. It was an important theme in Pal's dissent to point out the unfairness of the proceedings and to constantly note the equal guilt (or, equal lack of blameworthiness depending on the point of view) of the Allies.

While the overall dataset was too fragmentary for measurement against the Fullerian desiderata, consistency can be sought relative to the Tokyo IMT (intra-curially) which was the sole role-player to deliver data on the antecedents to TWAIL. Although the dataset was mixed, it inclined towards the critical approaches. As with feminism, TWAIL-type arguments are not conceptually linked to either HR or criminal law liberalism. Its use at Tokyo was in relation to the position of the accused, i.e. criminal law liberalism.¹⁴⁶

Questions of systemic hegemony, which TWAIL and its antecedents attempt to expose, challenges the rule of law. These arguments also challenge the perceived legitimacy of ICL directly because the administration of law is seen to be biased. These concerns are tied into institutional concerns pertaining to who controls the judicial body, which is not itself a matter for judges to decide. This further ties into concerns of realism which are coded in section 6.2. Accusations of such hegemony has reappeared regarding the ICC cases, at present, solely from Africa.¹⁴⁷ While this concern needs to be addressed on an institutional level,¹⁴⁸ the Tokyo arguments might be seen as a guiding light for what the judiciary might do to alleviate the situation. For such critical arguments to enter opinions contributed to transparency. The Tokyo judges showed critical self-awareness of their own institution's unjustified biases and noted them. It is difficult to see, on such an institutional issue, what more the judiciary could have done in an attempt to try and safeguard the rule of law. Put another way, at the very least, the use of TWAIL-type arguments here did not undermine the rule of law. More likely, such arguments to oppose systemic bias probably engages a 'thicker', substantive version of the rule of law than is pursued in this study.¹⁴⁹

¹⁴⁶ See section 6.3.

¹⁴⁷ See section 0.2. Cassese (n 145) 176; Cryer (n 53) 262.

¹⁴⁸ Institutional rule of law is not the focus here per section 1.2.3.2.

¹⁴⁹ See section 1.2.3.2.

5.4 Generic instances of othering along the Self/Other axis

Since this section coded for the generic instances where Self and Other were juxtaposed, othering will be briefly contextualised. Othering emerged as a generalisation of Hegel's master-slave dialectic.¹⁵⁰ Depending on the approach, the aim might either be to synthesise the dialectic tension or to leave the tension unresolved. Thus, othering also entails a matter of perspective, i.e. looking from the vantage point of Self at Other or looking from the vantage point of Other at Self. As noted in the preface, Self opposes Other either to marginalise Other or because Other exhibited deviant behaviour.¹⁵¹ The objective of such an argument might be to justify a return to homogeneity or unity, by resolving (or synthesising) the difference between Self and Other. On the second approach, Other opposes Self to value plurality, the equal worth and dignity of Other and/or undermine the privileged position of Self. The designated Other might attempt to break down the particular binary Self relied on to establish its superiority. If the binary is shown to be false, it takes the 'right' away from Self to dictate to the Other. Postmodernism has especially emphasised difference and deconstructed binaries, but in a manner to celebrate otherness. The aim was to move the marginalised to the centre of debate and consideration.¹⁵² This was also the aims of feminism and TWAIL discussed earlier vis-a-vis women and the Third World.

Coding for critical techniques revealed some inductive instances from the research data where othering occurred without being linked to marginalisation based on gender or the 'Third World'. These instances revolved around an 'in' or 'Self' group and a diametrically oppositional 'out' or 'Other' group linked to the more general aims of othering. The prominent instance was from Self to underline Other's deviant behaviour and so add support for the legal proceedings undertaken. The second main instance revolved around Other trying to undermine the privileged position of Self. This section investigated these generic arguments along the Self-Other axis in ICL jurisprudence because it revealed philosophical justifications as per part (ii) of SCA and the first point of study significance.

Illustratively then, Jackson distinguished between 'us' and 'them' in his opening speech at Nuremberg. He also distinguished the Nazis from other Germans.¹⁵³ Jackson submitted that the

¹⁵⁰ See SQ Jensen, 'Othering, Identify Formation and Agency' (2011) 2 *Qualitative Studies* 64; L Brons, 'Othering, an Analysis' (2015) 6 *Transcience* 69.

¹⁵¹ See, for e.g., Jensen (n 150) 65; Brons (n 150) 84.

¹⁵² A Mountz, 'The Other' in Carolyn Gallaher, Carl Dahlman, Mary Gilmartin, Alison Mountz and Peter Shirlow (eds), *Key Concepts in Political Geography* (Sage 2009) 330.

¹⁵³ R Jackson in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg*, Vol. II:102-103.

Nazis ‘took from the German people all those dignities and freedoms that we hold natural and inalienable rights in every human being’.¹⁵⁴ Thus, in language reminiscent of Lockean inherent rights, he opposed the disregard of fundamental rights by the Nazis. Rights and liberties were juxtaposed against tyranny and bondage. The Nazi atrocities threatened ‘civilization’ which required immediate and firm response.¹⁵⁵ On this last point the Russian prosecutor Rudenko seemingly agreed.¹⁵⁶ Civilisation had been subjected to the aberrant conduct of a rogue Outsider. Such an attack on the unified collective could of course not be allowed and was invoked to enhance the legitimacy of the unprecedented legal proceedings being adopted. Jackson’s discussion on the centralised control of the Nazi Party led to a comment on the character of the German people which firmly distinguished between the Allies and the Germans:

‘They inculcated and practiced the Führerprinzip which centralized control of the Party and of the Party controlled State over the lives and thought of the German people, who are accustomed to look upon the German State, by whomever controlled, with a mysticism that is incomprehensible to my people’.¹⁵⁷

By relying on religious wording (i.e. mysticism) Jackson indicated the cult-like nature of German politics. On this argument, the Nazis and the German people – i.e. the ‘them’ – are set up as irrational in opposition to the rational ‘us’ who find such mysticism ‘incomprehensible’.

For Jackson, the Allies ‘charge guilt on planned and intended conduct that involves moral as well as legal wrong...It is not because they yielded to the normal frailties of human beings that we accuse them. It is their abnormal and inhuman conduct which brings them to this bar’.¹⁵⁸ Jackson ‘othered’ the defendants, on the first category based on aberrant behaviour, by indicating that they were charged precisely because they did not act in the manner of normal human beings, but rather in an abnormal and inhuman way.¹⁵⁹ Jackson’s line of argument also seemed to underline that the Nazis’ conduct was so opposite to normal human actions that they had to be seen as expelled from the human species. This type of reasoning would analogise the Nazis to the pirates and slave traders of old – two of the cases where universal jurisdiction could have been invoked.¹⁶⁰ It seems as though Jackson was suggesting something similar here. The dichotomy of the human and inhuman or the civilised and barbarian clearly attempted to enhance the IMT’s claim to exercise jurisdiction in this

¹⁵⁴ Ibid 100.

¹⁵⁵ Ibid. See J Locke, *Two Treatises of Government* (P Laslett ed, CUP 2008) 270-271.

¹⁵⁶ RA Rudenko in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. XII:169.

¹⁵⁷ Jackson (n 153) 131.

¹⁵⁸ Ibid 102.

¹⁵⁹ Ibid.

¹⁶⁰ J Dugard, *International Law A South African Perspective* (3rd edn, Juta 2005) 157.

case.

In a continued reliance on opposites, Jackson used a law-abiding versus a lawless binary to further separate the camps of the civilised, moral Allies (acting as prosecutors) and the bestial, inhuman and immoral Nazi defendants.¹⁶¹ When he referred to the Nazi legal system it was to show its ‘otherness’ and to expose its frequent use of ‘every sanction that any legitimate state could exercise and many that it could not’.¹⁶² In particular, he noted that the atrocities committed against the Jews were usually not sanctioned by law, but sometimes even the law was used as an instrument to engender evil.¹⁶³ In his brief account of the historical rise to power of the Nazi Party in Germany, Jackson contrasted the different ideological understandings in Nazism and the ‘western world’ on matters of politics as the divide between power and democracy.¹⁶⁴ He underlined the difference between the Self (Allies) and the Other (Nazis) when he suggested that ‘four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason’.¹⁶⁵ Jackson contrasted power to reason/law here thus explaining why the Allies affording the Nazi defendants their day in court was to be welcomed.¹⁶⁶ This argument was echoed by Rudenko.¹⁶⁷

The French prosecutors, de Menthon and de Ribes, also provided instances of othering to point out the unacceptable behaviour of the defendants. De Menthon used his role as prosecutor for war crimes in Western Europe to contrast the values of those powers which he represented and those of the Nazis.¹⁶⁸ He circumvented the victor’s justice critique through othering:

‘After that gigantic struggle where two ideologies, two conceptions of life were at grips, in the name of the people whom we represent here and in the name of the great human hope for which they have so greatly suffered, so greatly fought, we can without fear and with a clean conscience rise as accusers of the leaders of Nazi Germany’.¹⁶⁹

¹⁶¹ Jackson (n 153) 105, 130, 144.

¹⁶² Ibid 108.

¹⁶³ Ibid 120.

¹⁶⁴ Ibid 107-108.

¹⁶⁵ Ibid 99.

¹⁶⁶ R Jackson in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. XIX:399.

¹⁶⁷ RA Rudenko in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. XIX:570.

¹⁶⁸ F de Menthon in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. V:369, 423.

¹⁶⁹ Ibid 425.

In closing for France, De Ribes, juxtaposed justice and force arguing that the Nazis adopted the latter while international society had been systematically infiltrated by the former.¹⁷⁰ Again, like Jackson and De Menthon, these arguments revealed the accused's conduct to be beyond the pale.

In sum, the prosecutors used othering to separate Self and Other based on Other's deviant conduct. Self and Other were linked to respectively 'liberty' v 'bondage', 'rational' v 'irrational', 'normal' v 'abnormal', 'civilised' v 'barbarian', 'law-abiding' v 'lawless', 'reason' v 'power', 'democracy' v 'power' and 'justice' v 'force'. By differentiating Self and Other through their respective embodiment of desired and undesired attributes, the prosecutors could suggest that the legal proceedings against the accused were appropriate to dissolve Other back into Self.

Similar to Jackson, De Menthon and De Ribes, at the Tokyo IMT Keenan also set the trial up as a corrective measure on behalf of what was plainly assumed to be a homogeneous civilisation:

'this is no ordinary trial, for here we are waging a part of the determined battle of civilization to preserve the entire world from destruction...A very few throughout the world, including these accused, tried to take the law into their own hands and to force their will upon mankind. They declared war on civilization'.¹⁷¹

By taking the law into their own hands, the accused ostracised themselves from civilisation and this justified the intervention of the Tokyo IMT for Keenan. The prosecution deemed the IMT justified irrespective of the tenability of positivist arguments thereto since 'civilisation and humanity demanded that such a trial be held'.¹⁷² Several binaries were visible in Keenan's argument above where the Allies embody the first and the Japanese the second set, i.e. 'preservers' v 'destroyers', 'peace-loving' v 'usurpers', 'many' v 'few' and 'law' v 'power'. Keenan postulated the trial as a contrast between those (Japan) who use human lives as a mere means to an end and those (us) who value human life as a matter of utmost sanctity.¹⁷³ Consistent with Jackson, De Menthon and De Ribes at Nuremberg, Keenan also employed the first category of othering, to bring Other back into line with Self.

The defence at Tokyo, per Takanayagi, reacted to this by attempting to disprove the implied notion that the international community was homogeneous.¹⁷⁴ This embodied the second argument where

¹⁷⁰ AC De Ribes in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. XIX:534-535.

¹⁷¹ Transcript of Proceedings 4 June 1946, 384-386 and quoted in Boister and Cryer (n 22) 274.

¹⁷² Quoted in Boister and Cryer (n 22) 275. See also Transcript of Proceedings 4 June 1946, 391.

¹⁷³ Transcript of Proceedings 4 June 1946, 464-465.

¹⁷⁴ See section 2.4.

Other aims to value plurality and difference so that the Other can exist alongside the Self. What followed was a ‘stinging rebuke to the idea that civilisation was at a stage where criminal law could be deduced from ideas of societal necessity’.¹⁷⁵ Takanayagi recognised that ‘aggressor’ is a label which belligerents hurl at one another ‘in self-righteousness and for purposes of soliciting public sympathy’.¹⁷⁶ However, because no cosmopolitan super-state existed, the introduction of a new principle (for e.g., that aggression was criminal) needed careful examination.¹⁷⁷ For Takanayagi the requested change in international law would perpetuate conflict and uncertainty for posterity. This culminated in his implicit equation of the Allies’ and Nazis’ approach to new law:

‘It is well known that Karl Schmidt and others in Germany attempted to build up new international law to suit the political exigencies of the Third Reich. That attempt has been looked down upon as unworthy of the glorious traditions of the legal profession as it means the subservience of law to politics’.¹⁷⁸

Takanayagi likened the present effort of the Allies to redraw international law to those attempts of the Nazis to achieve something similar. He was equating the Allies with the Nazis in this instance, something which he knew would have been despicable to them. This was not the only instance where Takanayagi equated the sworn enemies either. A principle utilised by Keenan which seemed congruous with ‘sound popular feeling’ was criticised by Takanayagi for being no different and as malleable as Nazi laws which relied on the ‘sound popular feeling’ of presiding officers to further cruel and oppressive decisions.¹⁷⁹ By equating the Allied and Nazi actions in relation to the development of international law, Takanayagi attempted to undermine the Allied claim to Self as no better than that of the Nazis. By accusing the Allies of acting in precisely the manner they rejected against a group they had othered, their preferred position as Self was undermined. If Self and Other were not different, Self could not justify its punishment of the Other on those grounds.

The final instance of othering echoed Takanayagi’s and emerged from the dissent of Pal at Tokyo. Ostensibly Pal equated the rationale given by the German Emperor after WWI in justification of the atrocious methods used and those reasons furnished post-WWII by the Allies in justification of the dropping of the atomic bombs. In the process, Pal revealed a vehement anti-colonial undertone and argued that the Allies were no more civilised, i.e. no more justified to assume the mantle of Self,

¹⁷⁵ Boister and Cryer (n 22) 276. See also Y Onuma, ‘The Tokyo Trial: Between Law and Politics’ in C Hosoya, N Ando, Y Onuma and R Minear (eds), *The Tokyo War Crimes Trial An International Symposium* (Kodansha Ltd 1986) 46-47.

¹⁷⁶ Transcript of Proceedings 3 March 1948, 42225-42229.

¹⁷⁷ Ibid.

¹⁷⁸ Transcript of Proceedings 3 March 1948, 42229. See, *ibid.*, 42 132-42 133 for a similar argument equating the Allies and Nazis. See also Boister and Cryer (n 22) 276.

¹⁷⁹ Transcript of Proceedings 3 March 1948, 42 131-42 133; Transcript of Proceedings 4 June 1946, 435.

than the Germans after WWI and therefore no different, i.e. equally guilty.¹⁸⁰ In fact, the lack of distinction between the Allies and the accused before the IMT was significant enough for Pal to take aim at the legitimacy of the Allies to pronounce judgment on the Japanese:

‘It would be sufficient for my present purpose to say that if any indiscriminate destruction of civilian life and property is still illegitimate in warfare, then, in the Pacific war, this decision to use the atom bomb is the only near approach to the directives of the German Emperor during the first world war and of the Nazi leaders during the second world war. Nothing like this could be traced to the credit of the present accused’.¹⁸¹

Like Takanayagi, this argument attempted to undermine the privileged position the Self adopted by first equating it to a third despised Other (from a different yet related context) and secondly contrasting it to the present Other. In the process, the roles were essentially reversed with the present Other postulated as morally superior to the Self. This would imply that the present Other becomes Self and the initial Self has become the Other.

Otherring was, therefore, frequently relied on as technique by counsel before the post-WWII Tribunals. The arguments of prosecutors like Jackson, De Menthon, De Ribes and Keenan favoured Self and attempted to bring the Other back into line with the Self. The aim was ostensibly to justify the exercise of jurisdiction over the accused. The use of othering was consistent between the various prosecutors. Defence counsel, like Takanayagi, of course, attacked this position head-on by questioning whether the Self and Other differed on the grounds offered. Thereby, he tried to undermine the suggested binaries and consequently destroy the right of Self to undertake proceedings against the accused. Very few instances of othering occurred in the ICL judicial bodies under investigation. Pal, similar to Takanayagi, also undermined the basis of Self and thus undermined the Allies’ right to charge the accused with aggression. Owing to the limited dataset from the judiciary, no comments can be ventured on consistency of philosophical position. Despite not being significant for rule of law considerations, othering as critical technique required noting for the research question (per SCA part (ii)) into the identification of philosophies used by ICL judicial bodies. Othering was important as a rhetorical device and utilised by the post-WWII prosecutors to justify the proceedings. This elicited a response from the defence and Pal to emphasise the Other.

5.5 Conclusion on the critical approaches of feminism, antecedents to TWAIL and generic instances of othering under part C

The critical approaches of feminism, antecedents to TWAIL and generic instances of othering

¹⁸⁰ Pal Dissent 137-138.

¹⁸¹ Ibid 1091.

produced small datasets respectively which precluded extensive inter-curial findings on consistency. They were moreover limited to particular ICL role-players. Although its absence at the post-WWII IMTs was also relevant, feminism only appeared under the post-Cold War judicial bodies. The antecedents to TWAIL were all coded for at Tokyo (this excludes, of course, the systemic TWAIL arguments raised against the ICC because they have not yet appeared in judicial pronouncements). Finally, the generic instances of othering appeared at the post-WWII IMTs and, with one exception, exclusively in the justificatory arguments of counsel.

Because feminism and TWAIL-type arguments involved substantive concerns about what the content of law should be, they seemingly embodied ‘thicker’ rule of law concerns.¹⁸² Their importance resides more in the fact that they appeared as opposed to how frequently they appeared. Still, on the formal rule of law approach adopted in this study, their overall trends and value for the rule of law will be considered.

Coding for feminism in the selected ICL role-players revealed a progressive shift from no initial recognition at the post-WWII IMTs to increased substantive recognition at the post-Cold War judicial bodies, including the ICC. The increased reliance on feminism did not contravene Fuller’s principle which prohibits constant shifts in justifications. Moreover, the reflection of feminism in ICL jurisprudence echoed the changed zeitgeist, on the interest-based extra-curial dynamic,¹⁸³ towards the improvement of women’s position in (international) society. These arguments represented the progressive development of law, which is, of course, completely congruous with rule of law ideals. Although the autonomy of women was increasingly safeguarded, external critiques have shown that much can still be done in this regard. This does not undermine this study’s finding that feminism appeared in the cases considered. At the very least the shift to what is now consistent and increased sensitivity to the position of women in the ICL justificatory arguments should be construed as strengthening the rule of law.

Coding for critical approaches revealed a few arguments anticipating TWAIL. On size, the antecedents to TWAIL dataset appeared to be negligible. However, its re-emergence on an institutional level at the ICC proved that it is not the number of times a critique is made that matters, but that it is made. The dataset was limited to role-players at Tokyo, namely Keenan, Takanayagi, arguably the majority, Pal and Röling. Overall, the data favoured the critique of the power

¹⁸² See section 1.2.3.2.

¹⁸³ See section 1.2.3.1.

differential between East and West which undermined the foundation of the IMT somewhat. Yet, TWAIL (and this should apply to its antecedents) accepts the existence of international law with the aim to improve its fairness towards the Third World. The point of departure is that the law exists but that it could be fairer.¹⁸⁴ This does not purport to destroy the rule of law, but rather to improve it. For the ICL role-players to recognise these concerns served the valuable function of transparency and to push for increased fairness in ICL. This challenge remains, however, as attested to at the ICC, and has the potential to undermine international law on a foundational level if it is not attended to. While the rule of law is directly engaged, the Fullerian requirements (apart from intra-curial consistency) were circumvented. The focus here turned to an institutional rather than a law-making level. For purposes of this study, the difference between international law institutions, including how charging occurs (through the prosecutor), who creates judicial bodies, on the one hand, and judicial pronouncements, on the other hand, is important. This study only focused on the judicial pronouncements and their impact on rule of law and legitimacy. The antecedents to TWAIL showed judicial awareness of fairness concerns in the broader institutional framework of ICL, but the structural issues engaged were beyond the power of the judiciary to affect any further. The structural issues are also outside the scope of this study.

In sum, while feminism allowed judicial bodies to re-emphasise the protection afforded to a group which were already under the authority of the rules they were tasked to adjudicate upon,¹⁸⁵ TWAIL-type arguments on ICL data engaged with institutional level concerns. Antecedents to TWAIL played out regarding those who created the ICL judicial bodies and the ostensible prejudices which were involved thus. Unlike the critical approach of feminism, the judicial bodies utilising antecedents to TWAIL could not directly alter any protection regime, but they could note the bias in charging others for violations committed by oneself. More than noting this, the judicial bodies could not do. Neither philosophical category could be construed as undermining the rule of law, in fact, the converse is true. Also, anticipating the two liberalisms of ICL (like the codes under parts A and B), the concrete arguments ventured showed concerns for victims (feminism) and accused (antecedents to TWAIL) although neither philosophy was conceptually bound to do so.

Generic othering was included because it forms part of the research question into the taxonomy of philosophies utilised by the selected ICL role-players (i.e. part (ii) of SCA). However, such othering arguments were only adopted to justify the unprecedented legal proceedings. This is further proven

¹⁸⁴ Mutua, 'What is TWAIL?' (n 75) 36; Anghie and Chimni (n 77) 202; Gathi (n 85) 38-39.

¹⁸⁵ For the view that feminism is supplementary to other methods, see Charlesworth (n 10) 159.

by its instrumental use. The post-WWII prosecutors especially favoured this argument to postulate a deviant Other in need of correction while the defence and those sympathetic to the defence, like Pal,¹⁸⁶ questioned the privileged position afforded to Self thus. Apart from Pal, no judicial use of this argument occurred. With almost no instances amongst the judiciary, othering did not impact the rule of law or affect performance or consent legitimacy.

¹⁸⁶ Boister and Cryer (n 22) 95.

Part D

Realism and Liberalism as systemic philosophical categories for coding in the selected international criminal law role-players

This study assumes that the law should not be understood in isolation. Law functions within a broader socio-political context which permeates and informs it.¹ In particular, international law and international politics exist in the same conceptual space. Together they form the ‘rules and the reality of “the international system”’.² Bearing in mind the definition of philosophy as ‘general theoretical questions about the nature of laws and legal systems’,³ judicial pronouncements on the nature of this systemic environment of ICL are relevant here. This study thus coded for systemic philosophies on two levels, namely the selected ICL role-players’ understanding on the nature of the international system within which they exist as well as reflections on their own institutional design. These systemic arguments, in turn, constitute the broader context against which the other philosophical justifications investigated in this study may be understood.

Realism was identified under international relations (IR) theory and liberalism under political philosophy. Realism and liberalism can be understood in many different ways.⁴ As with the previous chapters, the aim here is not to solve such theoretical debates, but rather to discuss these theories in the context of ICL justificatory narratives. Briefly, realism is a descriptive theory of the international system on which states are the dominant actors focused on attaining their own interest of which self-preservation, through self-help, is most important.⁵ Liberalism, under the influence of

¹ MDA Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Thomson Sweet Maxwell 2014) 1-2.

² A-M Slaughter, ‘International Law in a World of Liberal States’ (1995) 6 *European Journal of International Law* 503; C Reus-Smit, ‘The Politics of International Law’ in Christian Reus-Smit (ed), *The Politics of International Law* (CUP 2004) 36. See also RJ Pritchard, ‘An Overview of the Historical Importance of the Tokyo Trial’ in C Hosoya, N Ando, Y Onuma and R Minear (eds), *The Tokyo War Crimes Trial An International Symposium* (Kodansha Ltd 1986) 89; KC Moghalu, *Global Justice The Politics of War Crimes Trials* (Stanford Security Studies 2008) 5, 154; R Cryer, ‘Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources’ (2009) 12 *New Criminal Law Review* 390-391; A Orakhelashvili, ‘International Law, International Politics and Ideology’ in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 345, 349.

³ Freeman (n 1) 2. See, similarly, R Wacks, *Understanding Jurisprudence An Introduction to Legal Theory* (3rd edn, OUP 2012) 1. See section 0.2.

⁴ For realism, see T Dunne and BC Schmidt, ‘Realism’ in John Bayliss, Steve Smith and Patricia Owens (eds), *The Globalization of World Politics* (4th edn, OUP 2008) 95-100; for liberalism, see D Robinson, ‘A Cosmopolitan Liberal Account of International Criminal Law’ (2013) 26 *Leiden Journal of International Law* 132-139; D Bell, ‘What is Liberalism?’ (2014) 42 *Political Theory* 683-706.

⁵ Slaughter (n 2) 507; KW Abbott, ‘International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts’ in Steven Ratner and Anne-Marie Slaughter (eds), *The Methods of International Law* (ASIL 2004) 129-133; Dunne and Schmidt (n 4) 92-102; N Dower, *The Ethics of War and Peace Cosmopolitan and Other Perspectives* (Polity Press 2009) 10, 29-33.

criminal law and human rights (HR) law, embodies individualism, individual responsibility, human rights and moral autonomy, which are all associated with domestic liberalism.⁶ This preface will explain why the IR version of realism and the domestic version of liberalism were adopted. Substantive detail on each philosophy will follow in chapter 6 because, like chapter 5, these theories were directly coded for.

As role-players in international life, dependent on state cooperation for fulfilling their mandates, ICL judicial bodies at times reflected on that relationship in judgments. This ensured that realism, as an IR theory, was a feasible philosophical category for coding. However, ICL pronouncements regarding liberalism was not contextualised against international relations. ICL judiciaries lacked the detachment to fully consider the IR aspects of liberalism which would include their own function in the international system.⁷ When they reflect on their relationship with states, judiciaries are situated as Self so they never, as far as coding in judgments revealed, needed to self-reflexively analyse their own meta-position in and contributions to the international community. Nor have their mandates necessitated such a consideration. In contrast, they often scrutinised their own internal structures. In the process, the criminal law and HR aspects noted earlier could be identified. Still, whether liberalism is seen as IR or transposed from the domestic context, significant overlap exists.⁸ Some have observed from an IR perspective that:

‘Liberal theorists stake out a strong predictive/normative position: the distinctions between international, transnational, and domestic politics and law are artificial, inappropriate, and crumbling in practice. Thus, liberals would predict and support increasing resort to individual criminal responsibility and the demise of the distinction between international and internal conflicts, on political as well as legal grounds’.⁹

If the distinction between international and domestic politics and law hypothetically ‘crumbled’ thus, coding on a single liberalism code, as is done here, will be justified. If the distinction between political liberalism and IR liberalism is maintained, the coded data could be construed as necessary and sufficient to establish political liberalism, but merely necessary and insufficient to prove the additional detail required by IR liberalism.¹⁰ Domestic liberalism, rather than IR liberalism, was the common denominator and coded for thus.

⁶ D Robinson, ‘The Two Liberalisms of International Criminal Law’ in Carsten Stahn and Larissa van den Herik (eds) *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010) 116; D Robinson, ‘A Cosmopolitan Liberal Account of International Criminal Law’ (2013) 26 *Leiden Journal of International Law* 132-133.

⁷ C Reus-Smit, ‘International Law’ in John Bayliss, Steve Smith and Patricia Owens (eds), *The Globalization of World Politics* (4th edn, OUP 2008) 287.

⁸ Abbott (n 5) 136; T Dunne, ‘Liberalism’ in John Bayliss, Steve Smith and Patricia Owens (eds), *The Globalization of World Politics* (4th edn, OUP 2008) 110.

⁹ Abbott (n 5) 154.

¹⁰ For the additional detail of IR liberalism, see as example Slaughter (n 2) 508.

IR realism can be effectively juxtaposed with political liberalism as they respectively revolve around state-centric and individualist approaches.¹¹ Moreover, liberals tend to argue that states are subjected to ‘a universal jurisdiction for war crimes’ while realists argue that ‘[w]ar crimes trials serve inherently political ends determined mainly by states’ thereby reflecting different understandings of the international system.¹² These tensions explain why realism and liberalism were coded together under systemic philosophy. In addition, as noted throughout the study, the discussion of liberalism will reflect on a significant tension within ICL liberalism which was due to the basis thereof in both criminal law and human rights.¹³

This study is mindful that immanent critiques have revealed problems in the liberal principles adopted in ICL jurisprudence and that the blanket transposition of domestic concepts to international law is inappropriate.¹⁴ However, the focus here is on the arguments raised in ICL jurisprudence which revealed liberal sympathies. This study does not purport to evaluate the use of liberal sentiments beyond compliance with Fullerian rule of law.¹⁵

¹¹ Reus-Smit (n 7) 291.

¹² Moghalu (n 2) xiii.

¹³ Robinson, ‘The Two Liberalisms’ (n 6) 115-118. See also GP Fletcher and JD Ohlin, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’ (2005) 3 *JICJ* 540, 544. See sections 2.5, 3.4, 3.5 and the prefaces to parts B and C.

¹⁴ D Robinson, ‘A Cosmopolitan Liberal Account’ (n 6) 134.

¹⁵ See section 1.2.3.2.

Chapter 6

Systemic philosophy in ICL jurisprudence: Realism and Liberalism

6.1 Introduction

Coding for philosophical categories pertaining to the nature of the environment within which ICL judicial bodies exist as well as their structural design revealed large datasets for realism and liberalism. While both philosophies are broader in scope than will be discussed here, the focus in this study remains on philosophy in judicial pronouncements and the ensuing impact thereof on the rule of law. Importantly, apart from constituting relevant philosophical categories, these systemic philosophies provided the broader context against which all other philosophies used in this study were made. This will be reflected on as necessary. The subsequent sections introduce the respective approaches in detail before considering the coded data. As with part C's critical approaches, this is necessary because realism and liberalism were directly coded for.

6.2 Realism

Medieval thought regarded the law as more fundamental than political institutions (like states) whereas the nineteenth to early twentieth century trend has been to subordinate law to the state and in fact render it an instrument of state.¹ A similar tension between state interest and the requirements of international law – might versus right – still dominates the international community, of which the selected ICL role-players are part.

International relations (IR) theory differs from the approaches identified earlier in this study. IR neither focuses on doctrinal nor normative questions. IR aims to situate 'legal rules and institutions in their political context'.² IR aids the description of legal institutions by considering how political factors like 'interests, power, and governance structures of states and other actors' shape the law.³ IR might also attempt to explain the behaviour of political actors.⁴ Admittedly, there are several forms of realism in IR.⁵ Neither space nor research objective allowed a detailed discussion of these intricacies. More importantly, an overall lack of argumentative detail and a predilection for

¹ See SL Paulson, 'Classical Legal Positivism at Nuremberg' (1975) 4 *Philosophy & Public Affairs* 132, 134 for a discussion of these trends in Bodin and Austin.

² KW Abbott, 'International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts' in Steven Ratner and Anne-Marie Slaughter (eds), *The Methods of International Law* (ASIL 2004) 128.

³ Ibid 129.

⁴ Ibid at 129-130.

⁵ T Dunne and BC Schmidt, 'Realism' in John Bayliss, Steve Smith and Patricia Owens (eds), *The Globalization of World Politics* (4th edn, OUP 2008) 95 distinguishes classical, modern and structural. See also M Festenstein, 'Pragmatism, Realism and Moralism' (2016) 14 *Political Studies Review* 40.

descriptive use, meant the ICL arguments were not highly technical. Certain common elements which exist in the different strands of realism could therefore be coded directly.⁶

For this study, realism is premised upon the understanding of the international system as constituted by separate political communities, i.e. states. This view emphasises the attainment of national interest which causes states to pursue their own interest first.⁷ Realism maintains that states exist in a hostile environment where no common superior exists to enforce a coherent code of conduct; that truly universal common values are absent or that the world is such an unpredictable, violent place that it is justified to look after one's own interests. It is own interest, rather than international society's interest, which dictates any specific course of action.⁸ The most important goal in international politics is survival.⁹ Because of the lack of a central authority governing over them, self-help becomes an important tool for states to achieve their goals.¹⁰ Power is central in the international system with state interactions a continuous struggle and frequently zero-sum.¹¹ Through the balance of power between states, an equilibrium is sought which might prevent any single state or coalition of states from dominating the rest.¹² The three characteristics identified for purposes of this study are thus the emphasis on states as role-players in international society, the centrality of self-survival and the right to exercise self-help.¹³

Realism can play out directly in the legal context too. Traditionally realists were sceptical of the pronouncements of international organisations in excess of 'the actual practice of states and unambiguous expressions of consent of major states'.¹⁴ International rules and organisations, on this view, are tools built on 'underlying interest and power relationships' which will vary along with those relationships. Such rules and organisations, therefore, have little direct impact on state conduct.¹⁵ On this view, states are expected to influence the design of international law in ways

⁶ These common elements are accepted in IR theory as well, see Dunne and Schmidt (n 5) 100-103.

⁷ A-M Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 507; Dunne and Schmidt (n 5) 100; N Dower, *The Ethics of War and Peace Cosmopolitan and Other Perspectives* (Polity Press 2009) 33.

⁸ Dower (n 7) 10, 29-31. See also C Reus-Smit, 'The Politics of International Law' in Christian Reus-Smit (ed), *The Politics of International Law* (CUP 2004) 16; KC Moghalu, *Global Justice The Politics of War Crimes Trials* (Stanford Security Studies 2008) 137; BN Schiff, *Building the International Criminal Court* (CUP 2008) 4-5; Dunne and Schmidt (n 5) 92-93; Festenstein (n 5) 40.

⁹ Dunne and Schmidt (n 5) 101-102.

¹⁰ Slaughter (n 7) 507; Dunne and Schmidt (n 5) 102; Schiff (n 8) 5.

¹¹ Slaughter (n 7) 507; Reus-Smit (n 8) 15; A Orakhelashvili, 'International Law, International Politics and Ideology' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 356.

¹² Reus-Smit (n 8) 16; Dunne and Schmidt (n 5) 94; Schiff (n 8) 5.

¹³ Abbott (n 2) 132-133; Dunne and Schmidt (n 5) 93-103.

¹⁴ Abbott (n 2) 133.

¹⁵ Reus-Smit (n 8) 15-16; Abbott (n 2) 133.

which would secure their national interests.¹⁶ The notion that a state complies with international rules if it is in their interest is typically realist.¹⁷

Realism manifested through political interactions with ICL judicial bodies, e.g., through funding, state cooperation, procurement of evidence, apprehending accused and so on. This study, however, focuses on its appearance in ICL pronouncements. Accordingly, realist issues like the Russian involvement at Nuremberg;¹⁸ the inclusion of perceived political charges;¹⁹ claims of victor's justice;²⁰ the political concerns surrounding the creation of the ICTY and ICTR;²¹ the legality of the Tribunals;²² the selective arraignment of accused;²³ the political concerns of the ICC as an unsafe court;²⁴ chequered state cooperation;²⁵ potential personal interest on the part of judges²⁶ and the pressures surrounding re-election of judges²⁷ fall outside the remit of this study unless they were directly engaged in ICL pronouncements.

The core realist elements were utilised in the ICL justificatory narratives in two different ways, namely descriptive and theoretical. Descriptive use usually revolved around pointing out a fact of actual international life which impacted a decision. Theoretical use meant an exposition on the nature of international life in the abstract. Theoretical use normally included descriptive use while the converse was not necessarily the case.

¹⁶ Abbott (n 2) 153; Schiff (n 8) 5.

¹⁷ Slaughter (n 7) 507; Reus-Smit (n 8) 15; Abbott (n 2) 145.

¹⁸ T Taylor, *The Anatomy of the Nuremberg Trials* (Skyhorse 2013) 639-640.

¹⁹ Taylor (n 18) 117; 467-472 for the killings in Katyn Forest in Smolensk in 1941. See Transcript of Proceedings 3 March 1948, 42 137 on the conspiracy charge.

²⁰ N Boister and R Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008) 311.

²¹ P Gourevitch, *We wish to inform you that Tomorrow we will be Killed with our Families* (Picador 1998) 252-253; Moghalu (n 8) 5; Schiff (n 8) 65-66; T Meron, *The Making of International Criminal Justice A View From the Bench Selected Speeches* (OUP 2011) 141; E Vulliamy, *The War is Dead, Long Live the War Bosnia: The Reckoning* (The Bodely Head 2012) 66-67.

²² *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) paras 9-24; *Prosecutor v Šešelj* (Judgment) IT-03-67-T (31 March 2016) para 9. See also S Drakulić, *They Wouldn't Hurt a Fly* (Hachete Digital 2004) chapter 9; Moghalu (n 8) 64-66.

²³ Moghalu (n 8) 61-62 on the non-arraignment of NATO; C del Ponte, *Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (Other Press 2008) 60, 88, 224-229; Meron (n 21) 84-86, Taylor (n 18) 89-90; 460.

²⁴ WA Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 25-34. See *ibid*, at 38-42, for Uganda's use of the ICC to engender negotiations with the LRA and *ibid*, at 152, for the insulation of the Security Council against prosecution.

²⁵ Del Ponte (n 23) 88; 224-229; Meron (n 21) 84-86, 99-100, 131-132, 144-145.

²⁶ Judgment in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg*, Vol. I:342-364. See also BVA Röling, *The Tokyo Trial and Beyond Reflections of a Peacemaker* (Antonio Cassese ed, Polity Press 1993) 29; Boister and Cryer (n 20) 81-83; 311. See *ibid* at 94-95 for the view that bias was visible on the part of the judges during the Tokyo trial. However, see Pal Dissent 10-13; 147 that the judges were present in their personal capacities and that their moral integrity would protect against an impartial trial.

²⁷ Meron (n 21) 108, 271.

Realism can especially impact the rule of law on its institutional level, i.e. the independence and objectivity of judicial role-players.²⁸ Yet, in accordance with the focal point of this study, realism can also be measured against a Fullerian model. Judgments which jettison legal principles or rule-based methods to adjudication destroy the predictability of decisions, which in turn destroys rule of law.²⁹ According to Fuller, law is the enterprise for the subordinating of people's actions to the governance of rules.³⁰ If politics were used for decisions, then Fuller's first desideratum requiring rules to govern would be violated.³¹ Also, the consistency of arguments remained the central structuring principle for the data.

The subsequent discussion will be clustered around the arguments and patterns found in post-WWII IMTs, on the one hand, and the post-Cold War judicial bodies, on the other hand. Turning to the Nuremberg IMT first, most coded data emanated from the selected counsel. For Jackson, ICL was normatively superior to sovereignty as the Nuremberg Charter 'evidences a faith that the law is not only to govern the conduct of little men, but that even rulers are,..."under God and the law"'.³² This descriptive statement reflected the supremacy of law to state sovereignty.³³ Statism was subordinated to ICL on this view which opposed traditional realism.³⁴ Shawcross based the British participation at Nuremberg on the realisation that victory and might were not enough to ensure lasting peace and rule of law. Also the IMT would educate future generations that right does not necessarily entail might, but that law and justice would rule relations between states rather than power.³⁵ By subordinating power to law, Shawcross descriptively justified the British support and participation in the IMT through a rejection of realism.

In contrast to these positions rejecting realism, defence counsel Kranzbuehler argued that US naval practices under Nimitz were comparable to those for which Dönitz and Raeder had been indicted. Imposition of capital punishment would implicitly indicate that Nimitz deserved a similar fate.³⁶ The IMT responded by acquitting the accused on the relevant charges.³⁷ While Kranzbuehler's *tu*

²⁸ S Beaulac, 'The Rule of Law in International Law Today' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009) 212-220. See section 1.2.3.2.

²⁹ Meron (n 21) 255-256.

³⁰ LL Fuller, *The Morality of Law* (Yale University Press 1969) 96.

³¹ Fuller (n 30) 46-49. See section 1.2.3.2.

³² R Jackson in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. II:143.

³³ In line with medieval jurisprudence, see Paulson (n 1) 134.

³⁴ Reus-Smit (n 8) 15-16.

³⁵ H Shawcross in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. III:91; H Shawcross in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. XIX:434.

³⁶ Taylor (n 18) 400-409.

³⁷ Judgment in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. I:313-317.

quoque argument could be construed as natural law,³⁸ the decisive issue was the political interest of the US.³⁹ Self-interest prevailed over justice in a typical realist manner.

At Nuremberg the notion that ‘the Right lies in the Victory’, which was central to Hitler’s expansionist designs, became the very point around which the IMT revolved.⁴⁰ Although the IMT could be seen as a product of political negotiation, once created, it favoured reason over power, to paraphrase Jackson’s opening statement.⁴¹ Its design to serve as countermeasure for wartime violations was in conflict with the hitherto realist belief in war as prerogative of states. The notion of sovereignty, which still accepted in realist terms that war was the continuation of politics by ‘other means’,⁴² was confronted by the IMT argument that armed conflict was inherently ‘evil’.⁴³ The IMT, in terms of its premise and judgment, therefore attempted to oppose realism by favouring law and downplaying power.

At both Nuremberg and Tokyo the proceedings against the accused were criticised as victor’s justice.⁴⁴ Since the IMTs ventured pronouncements on the critique, its inclusion here is justified. Unsurprisingly, both IMTs rejected this argument.⁴⁵ At Nuremberg the ‘making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered’.⁴⁶ The Tokyo IMT judges invoked different philosophies in their respective dissenting opinions to address this realist critique of the proceedings as based on state-interest and power. Webb found that international law supported belligerents prosecuting those who committed crimes against their nationals;⁴⁷ Jaranilla believed that Douglas MacArthur’s authority to create the IMT was absolute;⁴⁸ Bernard adopted natural law to support the Tribunal’s creation⁴⁹ and Pal also justified the IMT due to the moral integrity of the members of the IMT.⁵⁰ Pal surmised, however, that ‘aggressors’ might be ‘chameleonic’ and may signify ‘the leaders of the losing party’.⁵¹ Different strategies were used at the IMTs to do so, but the notion of realist self-interest

³⁸ See section 2.3; H Grotius, *De Iure Belli ac Pacis Libri Tres* (Francis Kelsey tr, Clarendon Press 1925) II.XX.III at 465-466.

³⁹ Taylor (n 18) 400.

⁴⁰ Judgment in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. I:202.

⁴¹ Jackson (n 32) 99.

⁴² C von Clausewitz, *On War* (Penguin Books 1982) 119.

⁴³ Judgment in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. I:186.

⁴⁴ A Cassese, *International Criminal Law* (OUP 2003) 332-333; Boister and Cryer (n 20) 32-33.

⁴⁵ However, in the case of the Tokyo IMT without specific reasons from the majority, see Boister and Cryer (n 20) 33.

⁴⁶ Judgment in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. I:218.

⁴⁷ Webb Separate Opinion 2.

⁴⁸ Jaranilla Concurring Opinion 13.

⁴⁹ Bernard Dissent 1-3.

⁵⁰ Pal Dissent 10-14 and 147. See also Boister and Cryer (n 20) 33-34.

⁵¹ Pal Dissent 251b. See also Boister and Cryer (n 20) 132.

and power as responsible for the creation of the Tribunals was consistently rejected.

Another external critique which elicited response per curiam, at Tokyo, revolved around the non-selection of several prominent Japanese leaders.⁵² In descriptive accounts, several judges lamented the realist considerations impacting the selection of accused. Webb found the impunity granted to the Emperor, despite his clear involvement with the war, fundamental enough to justify revisiting the sentences to be imposed on the other accused as a matter of justice.⁵³ Webb was quick to note that he was not suggesting that the Emperor ought to have been indicted as such a suggestion exceeded the judge's function. Yet, Webb recognised the workings of realism in this matter as he linked the Emperor's immunity to the best interests of the Allied Powers.⁵⁴ Years after the trial, he lapsed and indicated the need to have prosecuted the Emperor.⁵⁵ According to Bernard, the absence of the criminal leader from the trial undermined the very justice meted out by the IMT.⁵⁶ Both Bernard and Webb thus held the justice meted out by the IMT as lessened by the state power and self-interest which was responsible for the selection of the accused. Their pronouncements could be seen as responses to the reality of politics at the IMT. On a related argument, Pal indicated that if 'it is really law which is being applied I would like to see even the members of the victor nations being brought before such tribunals'.⁵⁷ Of course, self-interest and politics rendered such an occurrence unlikely.⁵⁸ Pal's arguments under TWAIL are also relevant here as they also revolved around the choices for selection and inclusion of accused.⁵⁹ Pal's realist implication was that power rather than law produced the exclusive selection of accused from the vanquished nation. In all three opinions, the concession of interest and power as determinative of the selection of accused can be found.

Coding for realism at Tokyo next revealed a significant theoretical discourse on the nature of international law by Pal. For Pal, state sovereignty was the very cornerstone of the international community. States were parties and judges in their own cases.⁶⁰ Pal accepted that the right to self-

⁵² The exclusion of the Emperor for prosecution was explicitly contained in paragraph 17 of the State War Navy Coordinating Committee (SWNCC) *Directive on the Identification, Apprehension and Trial of Persons Suspected of War Crimes*. See also Awaya, 'In the Shadows of the Tokyo Trial' in Awaya, 'In the Shadows of the Tokyo Trial' in C Hosoya, N Ando, Y Onuma and R Minear (eds), *The Tokyo War Crimes Trial An International Symposium* (Kodansha Ltd 1986) 85-86; BVA Röling, 'The Tokyo Trial and the Quest for Peace' in C Hosoya, N Ando, Y Onuma and R Minear (eds), *The Tokyo War Crimes Trial An International Symposium* (Kodansha Ltd 1986) 131; Röling (n 26) 48; Boister and Cryer (n 20) 21-23, 50, 62-69, 311; Moghalu (n 8) 42-46.

⁵³ Webb Separate Opinion 18 and 20.

⁵⁴ Ibid 19.

⁵⁵ Boister and Cryer (n 20) 68-69.

⁵⁶ Bernard Dissent 19, 22. See also Boister and Cryer (n 20) 68-69.

⁵⁷ Pal Dissent 147.

⁵⁸ Boister and Cryer (n 20) 61, 311.

⁵⁹ See section 5.3.

⁶⁰ Pal Dissent 123.

preservation would override the duty one state might owe in respect of the rights of another state.⁶¹ He submitted that ‘self-preservation is not only a right of a state, it is also its paramount duty; all other duties are subordinated to this right and duty of self-preservation. In international relations all the states treat this right as a governing condition, subject to which all rights and duties exist’.⁶² All the essential elements of realism appear in this discussion, including the centrality of states, the fundamental right to self-help and the overarching importance of survival.⁶³

Pal expounded on the realist notion of a balance of power as well: ‘The basis of international relations is still the competitive struggle of states, a struggle for the solution of which there is still no judge, no executor, no standard of decision. There are still dominated and enslaved nations, and there is no provision anywhere in the system for any peaceful readjustment without struggle. It is left to the nations themselves to see to the readjustment’.⁶⁴ Stability in international relations depended on the power relations between states and the balancing of interests.⁶⁵ With struggle as the basis of this state of nature, Pal possibly even harks back to the Hobbesian paradigm where self-interest dictated actions in a nasty and brutish anarchical environment which was likely to be violent.⁶⁶ Such a Hobbesian state of nature further reverberated in Pal’s argument that the nature of international relations was that of a society rather than a community. Unlike a community where behaviour is ‘based on the solidarity of the members’, which establishes a ‘cohesive force without which a community cannot exist’ and individuals are ‘united in spite of their individual existence’, a society entails members ‘isolated in spite of their association’, with the law aimed at preventing the *bellum omnium contra omnes*.⁶⁷

Pal’s theoretical explanation of the realist nature of international life gave way for descriptive realism as he accepted Japan’s entry into the Tripartite Act as dictated ‘by the principle of the balance of power, the only factor of relative stability in a world divided by alliances and counter-alliances’.⁶⁸ Japan’s action was thus determined by the desire for self-preservation in the hostile environment of the international community which embodied the quintessence of realism.

⁶¹ Ibid 92-94.

⁶² Ibid 412.

⁶³ Dunne and Schmidt (n 5) 93-103.

⁶⁴ Pal Dissent 222-223, 1003-1004.

⁶⁵ Slaughter (n 7) 507; Reus-Smit (n 8) 15-16; Dunne and Schmidt (n 5) 94.

⁶⁶ T Hobbes, *Leviathan* (R Tuck tr, Cambridge University Press 2007) 86-90.

⁶⁷ Pal Dissent 340-341. A Cassese, ‘Soliloqui’ in Heikelina Verrijn Stuart and Marlise Simons (eds), *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese: Interviews and Writings* (Amsterdam University Press 2009) 163 later repeated this sentiment in extra-curial writing.

⁶⁸ Pal Dissent 775-776.

Like Pal, Röling too conceded the realist nature of international relations pertaining to the limited reach of law as opposed to self-help. For him, the criminalisation of aggressive war would remain meaningless if other methods of aggression, which were as effective as war, were left unregulated. Accordingly, the issue was one of ends and means – illegal ends may be obtained through legal means.⁶⁹ The judge essentially lamented the possibility of self-help legitimately circumventing the law, yet achieving the same results as criminally impugned conduct and being just as (morally) unacceptable.

Overall, at the post-WWII IMTs a moderate dataset revealed inconsistent arguments regarding realist concerns. Consistency can be found intra-curially. At Nuremberg, claims supporting state power over law were consistently rejected. In fact, apart from the impact of defence counsel Kranzbuehler's arguments, the coded pronouncements revealed uniformity against realism. This could have been functional as giving any quarter to accusations of the political basis of the IMT would have undermined what was an unprecedented exercise in international criminal justice. At Tokyo, apart from a structural issue with the conspiracy charge and some opposition against individual criminal responsibility,⁷⁰ no data appeared from the selected counsel.⁷¹ The individual judges, however, considered realism and were divided. Whereas Webb, Jaranilla, Bernard and Pal all opposed the realist challenge of victor's justice underpinning the IMT's creation; Bernard, Webb and Pal took issue with the selection of the accused as dictated by state-interest. Pal and Röling added theoretical explanations of the realist nature of international life. While the dataset on realism at Tokyo was therefore inconsistent, it possibly inclined towards realism as a descriptor of international life. The impact of these arguments on the rule of law will be discussed below.

Similar realist matters emerged in the post-Cold War judicial bodies. The initial Rule 61 proceedings reflected the lack of direct enforcement powers of the ICTY.⁷² Rule 61 proceedings served to disseminate the crimes with which an accused was charged to the world.⁷³ These proceedings ensured that the Tribunal was 'not rendered ineffective by the non-appearance of the

⁶⁹ Röling Dissent 125.

⁷⁰ Transcript of Proceedings 3 March 1948, 42 206-42 2012, 42 258-42 259. See section 6.3.

⁷¹ Transcript of Proceedings 3 March 1948, 42 137 on the conspiracy charge.

⁷² *Prosecutor v Nikolić* (Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-94-2-R61 (20 October 1995) para 3; *Prosecutor v Martić* (Decision) IT-95-11-R61 (8 March 1996) para 3; *Prosecutor v Mrkšić* (Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-95-13-R61 (3 April 1996) para 3; *Prosecutor v Karadžić and Mladić* (Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-95-5-R61 and IT-95-18-R61 (11 July 1996) para 3; *Prosecutor v Rajić* (Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-95-12-R61 (13 September 1996) para 2.

⁷³ *Prosecutor v Rajić* (Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-95-12-R61 (13 September 1996) para 7.

accused and can proceed nevertheless'.⁷⁴ In the *Rajić* Rule 61 decision, Sidhwa conceded in so many words that these proceedings were a consequence of political realities.⁷⁵ Realism here was a descriptive fact of international life.

The lack of state cooperation (and initial prosecutorial direction⁷⁶) resulted in the ICTY trying several lowly-ranked soldiers early on, including Erdemović, Tadić⁷⁷ and Landžo. Landžo challenged his arraignment, but the AC found no problem with the prosecutor's strategy to "focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences".⁷⁸ The descriptive use of realism again explained how state self-interest ensured that only lowly-ranked accused were tried early on. Only those accused were handed over whom the states were willing to apprehend. Per *Nikolić*, the ICTY conceded that it was initially seen as an 'academic or diplomatic response' embodying 'aspirational, if not academic, ideals'.⁷⁹ The culmination of these factors could also explain the functional reliance on the policy-oriented approach in *Erdemović* which was the first judgment rendered by the ICTY.⁸⁰ It was seemingly imperative for the ICTY to ensure a finding of guilt (especially after a plea of guilty) as this would be a confirmation of its ability to render judgment in future.⁸¹ These arguments reflected the difficulty a judicial body, tasked with determining individual criminal responsibility, faced in an arena where states were still the dominant role-players.

State cooperation was clearly essential for the Tribunals to fulfill their mandates.⁸² However, the ICL judiciaries were powerless to do anything more than note the refusal of state cooperation in the instances it occurred. For example, Croatia was subpoenaed in the *Blaskić* TC to produce certain documents. Croatia invoked various reasons, including national security concerns, why these

⁷⁴ *Prosecutor v Nikolić* (Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-94-2-R61 (20 October 1995) para 3.

⁷⁵ *Prosecutor v Rajić* (Rule 61 Decision Separate Opinion of Judge Sidhwa) IT-95-12-R61 (5 July 1996) para 7. On state-interest, see also Reus-Smit (n 8) 16; Moghalu (n 8) 137; Schiff (n 8) 4-5; Dunne and Schmidt (n 5) 92-93; Festenstein (n 5) 40.

⁷⁶ See, for e.g., A Cassese, 'The ICTY: A Living and Vital Reality' (2004) 2 *Journal of International Criminal Justice* 586, 595; Del Ponte (n 23) 124; WA Schabas, *The UN International Criminal Tribunals The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) 125-126.

⁷⁷ Whose lowly rank was considered in mitigation of punishment, *Prosecutor v Tadić* (Judgment in Sentencing Appeals) IT-94-1-A and IT-94-1-Abis (26 January 2000) paras 55-57.

⁷⁸ *Prosecutor v Delalić, Mučić, Delić and Landžo* (Judgment) IT-96-21-A (20 February 2001) para 614.

⁷⁹ *Prosecutor v Momir Nikolić* (Sentencing Judgment) IT-02-60/1-S (2 December 2003) para 88.

⁸⁰ As discussed in section 2.5.

⁸¹ For such an argument, see A Fichtelberg, 'Liberal Values in International Criminal Law A Critique of Erdemović' (2008) 6 *Journal of International Criminal Justice* 3, 18; Vulliamy (n 21) 225.

⁸² See Meron (n 21) 84; GK McDonald, 'Reflections on the Contributions of the International Criminal Tribunal for the Former Yugoslavia' (2001) 24 *Hastings International & Comparative Law Review* 160.

documents could not be made available.⁸³ It was only on appeal that access was gained to them.⁸⁴ State self-interest directly determined the documents made available to the TC and consequently the judgment which could be rendered. The TC could only helplessly reflect on the state's unwillingness to turn over the evidence, i.e. descriptively raise the realist limits of ICL judicial bodies.⁸⁵

Self-interested state cooperation also affected punishment. Žigić argued that his surrender to the ICTY, while incarcerated in Banja Luka, had to be viewed in mitigation of sentence. This argument, which found limited favour with the AC, relied on the 'lack of cooperation between the authorities of Republika Srpska and the Tribunal during the period under consideration'.⁸⁶ These findings also found favour in *Simić*⁸⁷ and, implicitly, in *Simić et al.*⁸⁸ In a series of cases, then, the Tribunal give some credit for the conduct of accused which contributed to cooperation with the Republika Srpska which, while technically not a state, is an entity traditionally opposed to the Tribunal due to its perceived prejudice against its citizens. Lack of cooperation, due to state self-interest, thus shaped the justice and punishment meted out in exemplary realist fashion.⁸⁹

As with the post-WWII IMTs, the selection of accused at the ICTY was ascribed to politics and addressed curially, necessitating its discussion here. The Tribunal rejected the defence argument in *Brđanin* that the ICTY 'may have developed an unintentional bias against Serbs' by reiterating its duty to 'decide what, if any, is the individual criminal responsibility to be ascribed to an accused, irrespective of nationality, religion, ethnicity or other grounds'.⁹⁰ The realist matter of state-interest influencing the ICTY was side-stepped in this case through a factual finding.

The last coded instance of realism at the ICTY appeared in *Šešelj*. *Šešelj* argued that politics and bias dictated the charges against him.⁹¹ These accusations moved Antonetti, in a concurring opinion, to question certain actions of both the registry and 'certain members of the tribunal'.⁹² Despite these

⁸³ *Prosecutor v Blaškić* (Judgment) IT-95-14-T (3 March 2000) paras 42-46.

⁸⁴ *Prosecutor v Blaškić* (Judgment) IT-95-14-A (29 July 2004) para 4.

⁸⁵ See McDonald (n 82) 164; Reus-Smit (n 8) 16; Moghalu (n 8) 137; Schiff (n 8) 4-5; Dunne and Schmidt (n 5) 92-93; Festenstein (n 5) 40.

⁸⁶ *Prosecutor v Kvočka et al* (Judgment) IT-98-30/1-A (28 February 2005) par 712.

⁸⁷ *Prosecutor v Milan Simić* (Sentencing Judgment) IT-95-9/2-S (17 October 2002) para 107. See also *Prosecutor v Dragan Nikolić* (Judgment on Sentencing Appeal) IT-94-02-A (4 February 2005) para 56.

⁸⁸ *Prosecutor v Simić, Tadić and Zarić* (Judgments) IT-95-9-T (17 October 2003) para 1110.

⁸⁹ See Reus-Smit (n 8) 16; Moghalu (n 8) 137; Schiff (n 8) 4-5; Dunne and Schmidt (n 5) 92-93; Festenstein (n 5) 40.

⁹⁰ *Prosecutor v Brđanin* (Judgment) IT-99-36-T (1 September 2004) paras 38-39, 42.

⁹¹ *Prosecutor v Šešelj* (Judgment) IT-03-67-T (31 March 2016) para 9; *Prosecutor v Šešelj* (Judgment) MICT-16-99-A (11 April 2018) para 26.

⁹² *Prosecutor v Šešelj* (Judgment) IT-03-67-T (31 March 2016) Concurring Opinion of Presiding Judge Jean-Claude Antonetti p 28-29.

reservations, for him, the judges were an obstacle to a conspiracy against the accused. The judge went so far as to state explicitly that, for his part, he never received orders from any quarters to decide in one way or another.⁹³ The implication of this concession was that the resultant decision was made on law, but that the accusations of interest necessitated this clarification.⁹⁴

The *Šešelj* case required an exception to the thesis study design which mainly focused on judgments. The decision on the disqualification of Judge Harhoff was particularly relevant for considerations of realism and directly shaped the final TC judgment (also by changing the composition of the bench). The *Šešelj* defence brought a motion to disqualify on the basis of a letter which Harhoff wrote that revealed ‘a strong inclination...to convict accused persons of Serbian ethnicity’.⁹⁵ In the letter, the judge criticised recent Tribunal jurisprudence which diluted joint criminal enterprise (JCE). This led to a departure from a ‘more or less set practice’ until 2012 to convict military commanders for their subordinates’ crimes.⁹⁶ Harhoff ascribed the change in JCE to the ‘pressure being exerted by the President of the Tribunal on his colleagues in deliberations, which...may form part of a broader American/Israeli plan to curtail JCE and other forms of responsibility’.⁹⁷ This explicitly suggested that state-interest shaped judgments.⁹⁸ In the decision, it was Harhoff’s belief in a ‘set practice’ of convicting accused, without evidentiary support, which led the majority finding reasonable grounds of bias.⁹⁹ Liu disagreed that there was an appearance of bias, but he criticised Harhoff for an ‘inarticulate critique of the recent jurisprudence of the Tribunal based on unsubstantiated speculations and insinuations of improper conduct by other colleagues in a fashion that is unbecoming of a judge’.¹⁰⁰ The firm political undercurrents in the Harhoff letter cannot be gainsaid. Harhoff’s letter engaged realism in two ways. First, he accused colleagues of requiring judgments to be shaped in accordance with certain state-interests. This argument was rejected for

⁹³ Ibid.

⁹⁴ See also the pressure to finish the case conceded by Judge Niang in *Prosecutor v Šešelj* (Judgment) IT-03-67-T (31 March 2016) Individual Statement by Judge Mandiaye Niang para 2. That the judges ‘succumbed to the accused’s blackmail’, see G Sluiter, ‘Compromising the Authority of International Criminal Justice’ (2007) 5 *Journal of International Criminal Justice* 534.

⁹⁵ *Prosecutor v Šešelj* (Decision of Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President) IT-03-67-T (28 August 2013) para 2.

⁹⁶ Ibid para 10. See also *Prosecutor v Gotovina et al* (Judgment) IT-06-90-A (16 November 2012) Dissenting Opinion of Judge Fausto Pocar para 30 questioning the aims of the Majority to undermine JCE rather than to consider the accused’s contributions thereto.

⁹⁷ Ibid para 11.

⁹⁸ See Reus-Smit (n 8) 16; Moghalu (n 8) 137; Schiff (n 8) 4-5; Dunne and Schmidt (n 5) 92-93; Festenstein (n 5) 40.

⁹⁹ *Prosecutor v Šešelj* (Decision of Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President) IT-03-67-T (28 August 2013) para 13.

¹⁰⁰ *Prosecutor v Šešelj* (Decision of Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President) IT-03-67-T (28 August 2013) Dissenting Opinion of Judge Liu para 2. On appeal from an earlier TC in which Judge Harhoff was a judge, the AC rejected that bias was proven, see *Prosecutor v Stanišić and Župljanin* (Judgment) IT-08-91-A (30 June 2016) paras 42-57; *Prosecutor v Stanišić and Župljanin* (Judgment) IT-08-91-A (30 June 2016) Separate Opinion of Judge Afande paras 12, 25.

lack of evidence. Secondly, he revealed his belief in a set practice to convict commanders. Without proof of such a practice this argument raised concerns that Harhoff was deciding on non-legal grounds (which directly contravenes Fuller's first rule of law principle).

The *Šešelj* TC provisionally released the accused on medical grounds prior to judgment.¹⁰¹ The accused never returned to the ICTY for the trial judgment (which resulted in an acquittal¹⁰²) or to the Mechanism for International Criminal Tribunals (MICT) for the appeals judgment.¹⁰³ *Šešelj's* acquittal was partly overturned on appeal.¹⁰⁴ But the sentence consequently imposed did not exceed the time he had already served pending trial.¹⁰⁵ This fact bore no small coincidence. A speculative reading of the matter might be that the overturn of the acquittal ensured that those groups upset about the TC acquittal could be somewhat appeased, yet the political difficulties of apprehending the accused again could be circumvented. While such speculation will not be counted in this study, the facts allow this possible realist interpretation.

Turning to the ICTR, selective prosecutions were argued in *Akayesu* as 'the Tribunal is prosecuting only the "losers" in the Rwandan conflict by failing to prosecute the perpetrators of "crimes of extermination of the Hutu" who enjoy "complete immunity" from prosecution'.¹⁰⁶ *Kayishema and Ruzindana* argued that 'as a result of the pressure from the Government of Rwanda, the Tribunal systematically delivers verdicts against one ethnic group'.¹⁰⁷ In both instances the submissions were found to be unsubstantiated.¹⁰⁸ *Ntakirutimana* likewise argued that only Hutus were indicted.¹⁰⁹ The TC understood the argument to show 'the Tribunal's "discriminatory purpose", which is to "inflict victors justice" on the surviving leadership and military of the former government of Rwanda...'.¹¹⁰ This argument was again dismissed by the TC for want of evidence.¹¹¹ On these arguments the defence consistently suggested that state-interest dictated arraignment. However, the ICTR

¹⁰¹ *Prosecutor v Šešelj* (Judgment) MICT-16-99-A (11 April 2018) para 39.

¹⁰² *Prosecutor v Šešelj* (Judgment) IT-03-67-T (31 March 2016) Disposition.

¹⁰³ *Ibid* paras 9, 39.

¹⁰⁴ *Ibid* paras 142-166.

¹⁰⁵ *Ibid* paras 176, 180.

¹⁰⁶ *Prosecutor v Akayesu* (Judgment on Appeal) ICTR-96-4-T (1 June 2001) para 93. See B Van Schaak, "'The Grass that Gets Trampled when Elephants Fight': Will the Codification of the Crime of Aggression Protect Women?" (2010) 15 *UCLA Journal of International Law & Foreign Affairs* 369 footnote 159 for a possible reading of this as a matter of just war.

¹⁰⁷ *Prosecutor v Kayishema and Ruzindana* (Judgment) ICTR-95-1-A (1 June 2001) para 53.

¹⁰⁸ *Prosecutor v Akayesu* (Judgment on Appeal) ICTR-96-4-T (1 June 2001) paras 94-95, rejected this argument for lack of evidential proof and deference to prosecutorial freedom. See *Prosecutor v Kayishema and Ruzindana* (Judgment) ICTR-95-1-A (1 June 2001) para 61.

¹⁰⁹ *Prosecutor v Ntakirutimana and Ntakirutimana* (Judgment) ICTR-96-10-T & 96-17-T (21 February 2003) para 760.

¹¹⁰ *Ibid* para 760.

¹¹¹ *Ibid* paras 760-761.

consistently rejected these realist concerns for lack of evidence. In sum, realism described international life for the defence, but it was not proven for the Tribunal.

An exception, similar to that in *Šešelj*, must be made here to consider the responses to the *Barayagwiza* motion to be released from pretrial detention on account of incarceration for an excessively long time before the initial hearing.¹¹² Although the TC rejected the *Barayagwiza* argument, the AC, with McDonald presiding, upheld his arguments and dismissed the charges against him ‘with prejudice’. This meant that the same charges could never be brought against him again.¹¹³ The particular AC exhibited greater concern for the liberal rights of the accused than the broader rights of the Rwandan genocide survivors (which links up with liberalism in the next section¹¹⁴). Because this decision was ‘so inherently unjust’, the prosecution filed a notice of intention to present a motion for review of the ruling.¹¹⁵ The AC decided that *Barayagwiza* would stand trial, but that he would be entitled to financial compensation in case he was found guilty.¹¹⁶ The TC duly found him guilty of several charges, including genocide. *Barayagwiza* took the independence of the ICTY to task on appeal, alleging that ‘political pressure was exerted on the Tribunal’.¹¹⁷ The AC responded to this realist charge of self-interest that ‘pressures were exerted is not enough to establish that the Judges who ruled in this context on the [Request for Review] were influenced by those pressures’.¹¹⁸ Like the defence allegations of selective arraignment earlier, the AC rejected this ground of appeal for want of evidence.¹¹⁹ The defence contention of state-interest dictating charges was again thwarted by the ICTR for want of evidence.

Realism at the ICC was only arguably visible in *Katanga*. The TC relied on regulation 55, a mechanism to recharacterise the mode of liability of the accused. For the defence this change, late in the proceedings, arose suspicion that the majority tried to convict the accused.¹²⁰ In a strong dissent, Van den Wyngaert took the majority to task for changing the mode of liability from

¹¹² Recounted in *Prosecutor v Nahimana, Barayagwiza, Ngeze* (Judgment and Sentence) ICTR-99-52-T (3 December 2003) paras 14-18.

¹¹³ Del Ponte (n 23) 72.

¹¹⁴ D Robinson, ‘The Two Liberalisms of International Criminal Law’ in Carsten Stahn and Larissa van den Herik (eds) *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010) 129-135. Strict legality was favoured over substantive justice as per Cassese (n 44) 22, 139-145.

¹¹⁵ Del Ponte (n 23) 73.

¹¹⁶ For a discussion on the tension between the common-law and civil-law traditions in this case, see Del Ponte (n 23) 80-81.

¹¹⁷ *Prosecutor v Nahimana, Barayagwiza, Ngeze* (Judgment) ICTR-99-52-A (28 November 2007) paras 21-30. See also Schabas (n 76) 31.

¹¹⁸ *Ibid* para 32. Some have found this argument unconvincing, see Sluiter (n 94) 534.

¹¹⁹ *Ibid* para 46.

¹²⁰ *Prosecutor v Germain Katanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) para 1532.

commission to common purpose liability. The judge felt the late recharacterisation indicated the majority's desire to mould the case against the accused. In fact, she referred to it as the 'majority's case'.¹²¹ The self-interested role of the majority was confirmed, for Van den Wyngaert, by its rejection of the stay motion brought by the defence against the recharacterisation even though no other party objected to the motion.¹²² Despite insufficient evidence before it, the majority betrayed a 'tendency to accept evidence supporting [its] theory of the case and reject anything else'.¹²³ The judge suggested the reason for the majority's argument was found in political considerations:

'Sympathy for the victims' plight and an urgent awareness that this Court is called upon to "end impunity" are powerful stimuli. Yet, the Court's success or failure cannot be measured just in terms of "bad guys" being convicted and innocent victims receiving reparation. Success or failure is determined first and foremost by whether or not the proceedings, as a whole, have been fair and just'.¹²⁴

The majority denied these allegations, noting that 'we should not find ourselves compelled to make clear that we in no wise sought to appropriate a "case", and even less, to take the place of the Prosecution.... As is the duty of any judge, we merely conducted, with objectivity and without preconceived ideas, as careful and thorough an examination of the evidence in the record as possible..'.¹²⁵ While the dissenting judgment accused the majority of a self-interested finding, thereby engaging in a critique of a perceived realism, the accused later discontinued his appeal proceedings as he 'accepted the judgment of the Court and its conclusions on its role as well as his conduct'.¹²⁶ This concession somewhat blunted the dissent. The challenge of interested adjudication remained, however. Underpinning *Katanga* is the systemic pressure to be seen as functional in the eyes of an international arena where states are sceptical of ICL judiciaries (which reminds of a similar sentiment in *Momir Nikolić*¹²⁷). If a judge is biased towards an accused or group, the question of interest emerges. Is the judge furthering the interests of other external parties? If such interest dictated how the case was decided, this would violate the Fullerian desideratum requiring rules to decide disputes.

¹²¹ *Prosecutor v Germain Katanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) Minority Opinion of Judge Christine Van den Wyngaert paras 12, 143.

¹²² *Ibid* para 114.

¹²³ *Ibid* paras 262, 313.

¹²⁴ *Ibid* para 310. See opening quote of *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/08 A (8 June 2018) Concurring Separate Opinion of Judge Eboe-Osuji and para 21; *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/08 A (8 June 2018) Separate Opinion Judge Christine Van den Wyngaert and Judge Howard Morrison para 76.

¹²⁵ *Prosecutor v Germain Katanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) Concurring Opinion of Judges Fatoumata Diarra and Bruno Cotte paras 2-3.

¹²⁶ Press Release: 25 June 2014 Defence and Prosecution discontinue respective appeals against judgment in Katanga case ICC-CPI-20140625-PR1021.

¹²⁷ *Prosecutor v Momir Nikolić* (Sentencing Judgment) IT-02-60/1-S (2 December 2003) para 88.

At the post-Cold War judicial bodies, clear trends could be identified surrounding arguments about state-interest, in particular. The ICTY consistently described the reality of international life in realist terms. The ICTR saw consistent arguments from the defence that interest dictated charges and selection. However, equally consistent were the Tribunal's rejection of such charges on the facts of the cases. Finally, the ICC delivered a negligibly small dataset, which could be construed as mixed at best.

To summarise, the post-WWII IMTs were created by states completely victorious in war and so there was no problem of state cooperation. Realism was consistently opposed at Nuremberg whether by the selected prosecutors or the IMT. This is perhaps because of functional reasons as the IMT was a watershed in international criminal justice and so necessitated a paradigm shift from the realist-dominant narrative in the international life of the time. At Tokyo, realism was likewise consistently opposed where it pertained to the legitimacy of the IMT's creation. However, the selection of accused raised realist concerns from most of the dissenting judges while Pal and Röling also used realism to describe the nature of international life. So, at best, Tokyo exhibited an inconsistent dataset, inclining towards realism as descriptor of actual international life. The situation post-Cold War was markedly different as these judicial bodies were not created by states victorious in war. State cooperation or the lack thereof became crucial to the functioning of these Tribunals and, obviously, directly impacted their judgments. Realism as descriptor of actual international relations was consistently recognised at the ICTY. At the ICTR, realist concerns were often raised by the defence but consistently rejected by the Tribunal for want of evidence. At the ICC a negligible dataset arguably suggested mixed realist concerns regarding the recharacterisation of charges.

Realism, descriptively at least, is inescapably part of the nature of international life. That state-interest will compete with the interest of judicial bodies will persist for so long as the judiciaries require states' cooperation in fulfilling their mandates. The measurement of coded data against the rule of law has to occur against this background. It needs reiterating that the findings here are relative to the selected ICL pronouncements and do not purport to address the holistic political pressures affecting the ICL judicial bodies.

While the data was again structured around consistency in argument, charges of power or politics determining decisions could be seen as pressuring Fuller's requirement for the existence of rules.

Such arguments on the level of the ICL judicial bodies were rare. Only *Šešelj*, *Barayagwiza* and *Katanga* were confronted with such claims of which only *Šešelj* conceded them. *Šešelj* revealed a dual accusation of bias towards the ICTY President (through the Harhoff letter) and bias on the part of Judge Harhoff himself. Only the latter claim was deemed to be proven. On this reading, in so far as it pertains to the selected pronouncements, only *Šešelj* revealed a decision on basis of interest rather than rules. The ICTY acted decisively and removed the judge from the proceedings, while the accusations he made in his letter were dismissed as unsubstantiated. The rule of law was thus protected where bias was actually found and short shrift was made of an unfounded claim of prejudice.

A perennial issue which partly played out in ICL judgments pertained to the selection of accused. While interest and cooperation played an inescapable role in this regard, only the Tokyo judges conceded such bias on the part of their Allied creators. The judicial role-players selected in this study could not have changed this selection. By noting the interest involved they contributed to transparency of the administration of justice.

On the descriptive front, claims of lack of state-cooperation, difficulty of obtaining evidence or political influence were noted and discussed in judgments. Such transparency should be lauded, from a curial perspective judges could not do much more to gain support for their judgments. If the rule of law was undermined institutionally thus, it was not undermined by the judicial pronouncements which were the focus of this study.

Overall, the judicial pronouncements on realism did not reveal a contravention of the rule of law. They consistently conceded, however, the challenging relationship between states and judicial bodies. The scrutiny next turns to the institutional design of these bodies and their own understanding thereof. The liberalism thus pursued should also be juxtaposed to the state-centric realism discussed above.

6.3 Liberalism

As noted in the preface to part D, the data coded from ICL pronouncements on liberalism was insufficient to confirm the IR version thereof. Even as political theory liberalism is much theorised.¹²⁸ While it is not the aim of this study to conclusively resolve the definitional

¹²⁸ R Cryer, T Hervey, B Sokhi-Bulley with A Bohm, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 44; D Robinson, 'A Cosmopolitan Liberal Account of International Criminal Law' (2013) 26 *Leiden Journal of International Law* 133; D Bell, 'What is Liberalism?' (2014) 42 *Political Theory* 683-706.

complexities at play, certain basic aspects are understood under this philosophy. The core ideas of liberalism include individual autonomy, the notion of universal rights, equal citizenship and democracy.¹²⁹ Respect for the individual's agency, dignity and autonomy places restraints on societal aims.¹³⁰ The importance of individual rights in the political order is paramount. Unlike consequentialist thinking, rights are not only respected in order to effect a particular end.¹³¹ For some the basic deontic commitment, already espoused by Kant, to 'respect...the moral agency of individuals' is foundational in ICL.¹³² Persons are understood as 'possessed of dignity and capable of directing their behaviour by reason'.¹³³ In sum, because of their inherent worth, individuals should be treated as ends unto themselves.¹³⁴

Liberalism is part of the design of ICL and all the pronouncements made by the ICL judicial bodies can be described as shaped by liberalism.¹³⁵ ICL judicial bodies were indeed part of the paradigm shift in the international arena from a state-centric system to one where individuals are now recognised too.¹³⁶ At first glance, coding for liberalism in ICL judgments may therefore seem redundant. At the very least, on this view, coding for liberalism in ICL constitutes an immanent critique as coding can reveal whether ICL 'is failing to live up to its own professed goals or principles'.¹³⁷

Yet liberalism has been the object of numerous critiques, including the meta-critique on the uncritical application of domestic political ideas to international law.¹³⁸ As a result of the transplant, in ICL there exists a fundamental tension between criminal law liberalism, on the one hand, and HR, on the other.¹³⁹ While both revolve around 'respect for the autonomy and integrity of individuals and protecting such individuals from misused state authority', which are the common

¹²⁹ Cryer, Hervey, Sokhi-Bulley with Bohm (n 128) 44 quoting from N Lacey, 'Feminist Legal Theory and the Rights of Women' in K Knop (ed), *Gender and Human Rights* (OUP 2004) 13, 19. See also C Reus-Smit, 'International Law' in John Bayliss, Steve Smith and Patricia Owens (eds), *The Globalization of World Politics* (4th edn, OUP 2008) 286-287.

¹³⁰ Robinson (n 114) 116; Robinson (n 128) 132-133.

¹³¹ Fichtelberg (n 81) 9.

¹³² I Kant, *Fundamental Principles of the Metaphysics of Morals* (Dover 2005) 45-46; Robinson (n 128) 129.

¹³³ Robinson (n 128) 131.

¹³⁴ Kant (n 132) 45-46; Robinson (n 114) 116; Robinson (n 128) 146.

¹³⁵ Reus-Smit (n 129) 285; Robinson (n 128) 140.

¹³⁶ For agreement, see T Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 239, 253. See also GP Fletcher and JD Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' (2005) 3 *JICJ* 542; Reus-Smit (n 129) 291.

¹³⁷ Cryer, Hervey, Sokhi-Bulley with Bohm (n 128) 44.

¹³⁸ Cryer, Hervey, Sokhi-Bulley with Bohm (n 128) 44-45; Robinson (n 128) 128-129.

¹³⁹ Robinson (n 114) 129-135. See also Fletcher and Ohlin (n 136) 540, 544.

elements enumerated above, they have incompatible aspects.¹⁴⁰ HR¹⁴¹ adopts broad constructions for the greatest protection of their beneficiaries but, unlike criminal law, are unaccustomed to ‘the special moral restraints which arise when fixing guilt upon an individual’.¹⁴² While both branches aim to protect individuals, HR focuses on individual victims whereas criminal law focuses on individual accused.¹⁴³

This section will firstly code for the characteristic elements of liberalism not yet captured elsewhere in this study. Arguments of individualism or collectivism; the shift from state-centric to individual-centric ICL; individual criminal responsibility; human rights and respect for moral autonomy will be noted. Secondly, coding will consider the tension inherent to liberalism in ICL. Liberalism as systemic philosophy provided the structure, within which ICL justificatory arguments were made. As was shown throughout the thesis, liberalism pervaded some of the earlier codes.¹⁴⁴ Brief cross-references will be made to such other codes at the end of this section.¹⁴⁵ In sum, liberalism in ICL will be coded both for its opposition to state-centrism, as well as the inherent tension between its constitutive branches, namely HR and criminal law.¹⁴⁶ It is the cumulation of these branches of inquiry which will be measured against the Fullerian desiderata.

The shift in international law from state-centric to individual-oriented was acknowledged at Nuremberg by counsel and the IMT. Regarding perpetrators, Shawcross suggested it was ‘both logical and right that...those individuals who shared responsibility for bringing such wars about should answer personally’.¹⁴⁷ Just deserts were thus afforded to the perpetrator, who had neglected their duties, in order to respect their moral autonomy.¹⁴⁸ Regarding victims, Shawcross echoed Lauterpacht ‘that there is a limit to the omnipotence of the state and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the state tramples upon his rights in a manner which outrages the conscience of mankind’.¹⁴⁹ Recognition for

¹⁴⁰ Robinson (n 114) 115-117.

¹⁴¹ Which, for this discussion includes international humanitarian law (IHL), see Robinson (n 114) 116 footnote 6.

¹⁴² Robinson (n 114) 131. See also Fletcher and Ohlin (n 136) 544.

¹⁴³ Robinson (n 114) 134.

¹⁴⁴ Robinson (n 128) 133, 148-149 alluded to interpretation and legality. See sections 2.5, 3.4, 3.5 and the prefaces to parts B and C.

¹⁴⁵ Especially JCE, command responsibility, interpretation and legality will be noted. These are also supported in literature, see Robinson (n 114) 119-129, 135-147.

¹⁴⁶ Robinson (n 114) 115-117.

¹⁴⁷ Shawcross Vol. III (n 35) 92, 105.

¹⁴⁸ Robinson (n 114) 134.

¹⁴⁹ Shawcross Vol. XIX (n 35) 471-472. See H Lauterpacht, ‘The Grotian Tradition in International Law’ (1946) 23 *British Year Book of International Law* 26-27; K Sellars, ‘Imperfect Justice at Nuremberg and Tokyo’ (2011) 21 *European Journal of International Law* 1087 who confirms the collaboration of Lauterpacht and Shawcross on the ideas of state and individual.

both the accused and the victims attested to the adoption of both criminal law and HR liberalism.¹⁵⁰ However, it seemed Shawcross favoured HR liberalism as he later subordinated the fate of the individual accused to the larger questions ‘of truth and righteousness between the nations of the world, the hope of future international co-operation in the administration of law and justice’ which their actions brought before the IMT.¹⁵¹

The shift to individualism logically led to considerations of individual criminal responsibility. Jackson justified the inclusion of individual responsibility in the Nuremberg Charter on logic and necessity ‘if international law is to render real help to the maintenance of peace’.¹⁵² Jackson argued that peace was only possible if international law applied vis-a-vis individuals, because then it could be enforced through measures other than war. This individual-centric argument was confirmed in ‘the idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes always are committed only by persons’.¹⁵³ Reading in his teleology here that Jackson favoured HR liberalism is probably too much, given that his claim was clearly to argue for the main shift towards the individual as such. Unsurprisingly, defence counsel Jahreiss opposed the notion of individual responsibility ‘as long as the sovereignty of states is the organisational basic principle of interstate order’.¹⁵⁴ The issue between counsel here revolved around individualism and state-centrism in international law. Jackson used teleology to favour the former, while Jahreiss retorted with a realist understanding of the international community.

While Jackson recognised the accused’s right to be presumed innocent, he later rejected the accused’s moral autonomy because it was not the individual persons contending before the judges, but rather ‘the forces which these defendants represent, the forces that would advantage and delight in their acquittal, [which] are the darkest and most sinister forces in society – dictatorship and oppression, malevolence and passion, militarism and lawlessness’.¹⁵⁵ The accused were ‘living symbols of racial hatreds, of terrorism and violence, and of the arrogance and cruelty of power.’¹⁵⁶ The cumulation of Jackson’s arguments revealed concern for the protection of the broader society. Such a HR liberalism would dovetail his function as prosecutor. This was seemingly repeated by

¹⁵⁰ Robinson (n 114) 129-135.

¹⁵¹ Shawcross Vol. XIX (n 35) 528-529.

¹⁵² Jackson (n 32) 149-150. Achieving peace through law has been labelled liberal, see Reus-Smit (n 129) 289.

¹⁵³ Jackson (n 32) 150. See also, although it lacked argument, RA Rudenko in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. XIX:577.

¹⁵⁴ H Jahreiss argument in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. XVII:478-479.

¹⁵⁵ Jackson (n 32) 102, 154.

¹⁵⁶ Ibid 99.

Dubost who also warned against treating the accused as ordinary offenders, rather suggesting sensitivity to the broader political context against which they perpetrated their crimes.¹⁵⁷

The Nuremberg IMT sided with the prosecution and broke with the state-centric approach to international law. The IMT recognised that individuals could have duties and liabilities alongside states in international law, arguing that international crimes ‘are committed by men, not by abstract entities, and only by punishing [these] individuals...can the provisions of international law be enforced’.¹⁵⁸ The IMT relied on several posited provisions to base individual responsibility on.¹⁵⁹ No findings on the tension inherent to ICL liberalism could be derived from the IMT.

At Tokyo, Keenan justified individual responsibility on the basis of domestic sources as there was no explicit codification thereof in international law.¹⁶⁰ After recognising that governments act through human organs who may not be shielded for criminal acts perpetrated thus, Keenan concluded that individual responsibility should be recognised as ‘a principle that follows the needs of civilisation and is a clear expression of the public conscience’.¹⁶¹ These arguments dovetailed those at Nuremberg and embodied the movement away from state-centrism in international law.

Regarding the recognition of moral autonomy, Keenan wanted to expose the accused as extraordinary symbols of aggression as well as ordinary criminals. It was hoped that branding and punishing the accused as common felons would deter future would-be aggressors.¹⁶² Their prosecution was due to their subscription to the rule of force.¹⁶³ The accused’s moral autonomy was subordinated to their symbolic worth. Keenan, hereafter, emphasised the individual’s sanctity which was ‘of the gravest moment and deserving of all reasonable efforts for its protection. The life of an individual...can never be lawfully sacrificed for immoral purposes’.¹⁶⁴ Parallel to denying any concern with the accused as individuals,¹⁶⁵ the lives of the victims were emphasised as sacred. Keenan thus echoed Jackson and favoured HR liberalism.

In what dovetailed Jahreiss at Nuremberg, Takanayagi countered that international law imposed

¹⁵⁷ C Dubost in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. XIX:548.

¹⁵⁸ Judgment in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, Vol. I:223.

¹⁵⁹ Ibid.

¹⁶⁰ Transcript of Proceedings 4 June 1946, 431-433 refers to *Ex parte Quirin* 317 United States Reports 1 and the *Yamashita* case.

¹⁶¹ Transcript of Proceedings 4 June 1946, 435.

¹⁶² Ibid 387-389 and 461-463. See also Boister and Cryer (n 20) 158.

¹⁶³ Transcript of Proceedings 4 June 1946, 463.

¹⁶⁴ Ibid 464-465.

¹⁶⁵ Ibid 463.

duties and responsibilities on states rather than individuals. Moreover, in the absence of a world state entrusted with a compelling universal law, individual guilt does not follow with the exception of piracy, blockade-runners, contrabandists and war criminals.¹⁶⁶ Takanayagi imputed the acts of individuals performed in pursuance of the state's command to the state. Individual responsibility would therefore not follow in the absence of explicit provisions to that effect. On this construction neither the Hague Convention III nor the Kellogg-Briand Pact established individual responsibility.¹⁶⁷ As was the case under the part A codes in chapters 2 and 3, the selected defence counsel thus opposed the prosecution on what was ostensibly functional grounds, namely to undermine the possibility of individual responsibility in international law. The defence's realist, state-centric opposition to the prosecution's liberalism was apparent.

Despite the absence of explicit individual liability in the 1907 Hague Convention and the 1929 Geneva Convention, in the context of duty to prisoners, the Tokyo majority submitted that it 'is not a meaningless obligation cast upon a political abstraction. It is a specific duty to be performed in the first case by those persons who constitute the government'.¹⁶⁸ Reflections on individual responsibility at Tokyo further appeared in the separate and dissenting opinions. Webb maintained that criminal responsibility arose, when a state perpetrated an aggressive war, in relation to 'those individuals through whom it acts'.¹⁶⁹ By enabling a criminal trial for crimes against the peace and the imposition of punishment if convicted, the Charter 'does not violate International Law or the Natural Law, but gives effect to it, as well as to the Potsdam Declaration and Instrument of Surrender'.¹⁷⁰ Webb thus exceeded posited instruments to vest his understanding of individual liability on. For Bernard, the principle ensuring that the responsibility of the individual could not be hidden behind the responsibility of the collective was 'inscribed in natural law and not in the constitutive acts of the Tribunal by the writers of the Charter, whose honour it is, however, to have recalled them'.¹⁷¹ Jaranilla adopted the normative position that the IMT may make provision for individual responsibility 'in accordance with law and justice'.¹⁷² Writing extra-curially several years later, Röling noted the increased role in positive law of the individual as both bearer of international rights and obligations.¹⁷³ Pal, contrary to his colleagues, took the dictum of Nuremberg to task since state practice, according to him, did not support the notion of individual liability for crimes of

¹⁶⁶ Transcript of Proceedings 3 March 1948, 42 206-42 208, 42 258-42 259.

¹⁶⁷ Ibid 42 208-42 212.

¹⁶⁸ Tokyo Majority Judgment 29.

¹⁶⁹ Webb Separate Opinion 6.

¹⁷⁰ Ibid.

¹⁷¹ Bernard Dissent 11.

¹⁷² Jaranilla Concurring Opinion 22. See also Boister and Cryer (n 20) 131.

¹⁷³ BVA Röling, *International Law in an Expanded World* (Djambatan 1960) xxii.

aggression.¹⁷⁴ Nonetheless, normatively, Pal stated that ‘the international relation has reached a stage where...it is high time that international law should recognise the individual as its ultimate subject and maintenance of his rights as its ultimate end’.¹⁷⁵ This view reflected normatively what ought to happen for Pal, conversely what was not yet the case. Congruent with his realist sympathies discussed earlier, Pal rejected individual criminal responsibility on the basis that sovereignty was still the supreme organising principle in international society.¹⁷⁶ The Tokyo judicial arguments overall favoured the shift in international law towards the individual, with only Pal siding with the defence’s state-centric realism. The internal tension under liberalism was not clearly addressed here.

This shift towards the individual in international law continued at the post-Cold War judiciaries even though individual criminal responsibility in international law was on much firmer ground in the 1990s. At the ICTY, Cassese argued in *Tadić* that: ‘A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well’.¹⁷⁷ Abundant support for this individualist approach can be found in several other judicial and extra-judicial views, including Meron who noted the law’s development from ‘an interstate to an individual-rights perspective’,¹⁷⁸ McDonald who approvingly reflected on the *Tadić* dictum¹⁷⁹ and Rodrigues’ conclusion in *Alekšovski* that post-WWII international humanitarian law (IHL) had developed ‘beyond its state-centered beginnings’ and that IHL now ‘recognises the legitimacy of attributing individual criminal responsibility for war crimes’.¹⁸⁰ His conclusion called for the understanding of ICL cognisant of the shift from a state-centric to an individual-oriented ICL, which had to further the aim of IHL to protect individuals during times of war.¹⁸¹ The *Nikolić* TC emphasised individual responsibility as opposed to group, whether ethnic, religious or political, responsibility.¹⁸² While all the noted instances merely reflected the overall shift to the individual in international law, Rodrigues showed a predilection for HR liberalism.

¹⁷⁴ Pal Dissent 193, 197. See also Boister and Cryer (n 20) 132.

¹⁷⁵ Pal Dissent 145.

¹⁷⁶ Pal Dissent 198. For Pal’s realism, see section 6.2.

¹⁷⁷ *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para 97. See also, *ibid*, par 96 where Cassese attributed the unequal protection regimes applicable in international and non-international armed conflicts to state-centred realism.

¹⁷⁸ Meron (n 21) 240, 247-251.

¹⁷⁹ GK McDonald, ‘The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Laws of War’ (1998) 156 *Military Law Review* 30, 34-35, 51.

¹⁸⁰ *Prosecutor v Alekšovski* (Judgment) IT-95-14/1-T (25 June 1999) Dissenting Opinion of Judge Rodrigues para 31.

¹⁸¹ *Ibid* para 53.

¹⁸² *Prosecutor v Nikolić* (Sentencing Judgment) IT-02-60/1-S (2 December 2003) paras 59-60. Quoted with approval in *Prosecutor v Brđanin* (Judgment) IT-99-36-T (1 September 2004) para 43.

As indicated earlier, human rights are central to ICL liberalism.¹⁸³ While the discussion here will not enter the ‘tonorial and agglutinative’ style by discussing references to human rights simply through repetition of earlier case law, a few philosophically relevant instances were coded where human rights were weighed up against competing considerations.¹⁸⁴ Meron linked the post-World War II shift from ‘an inter-state archetype to a homocentric system’ to several human rights treaties.¹⁸⁵ In *Tadić*, the AC suggested that it ‘would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights’.¹⁸⁶ The *Kupreškić* AC explicitly ascribed overly broad charges and the lack of a particular material fact to considerations of expediency. The AC noted that expediency should never trump the fundamental right of the accused to a fair trial.¹⁸⁷ Expedience was similarly subordinated to the human rights of an accused by Pocar in *Mrkšić* as ‘concerns about efficiency in the administration of justice can never be implemented to the detriment of human rights standards’.¹⁸⁸ These instances began to show some oscillation between support for the rights of the accused and victims.

Concerns of safeguarding moral autonomy appeared at the ICTY and played out especially in relation to victims. The *Plavšić* TC cautioned against the objectification of individual victims. The importance of noting that the crimes occurred against individuals rather than a nameless group was emphasised.¹⁸⁹ The *Stakić* TC, likewise, in an introductory statement showing awareness of the need not merely to objectify victims, stated that it did ‘not wish to reduce the victims to mere numbers in statistics. The victims were people – men and women with different backgrounds, histories and personalities’.¹⁹⁰ Hereafter, a whole section was devoted to the fate of two of the mentioned victims.¹⁹¹ The victims were upheld as symbols – all for one and one for all – yet, because of their small number and the intimate details revealed, their dignity and moral autonomy were protected against objectification as mere statistics. These arguments favoured the dignity of the victims. In

¹⁸³ Fichtelberg (n 81) 9.

¹⁸⁴ See tonsorial and agglutinative style noted by LV Prott, *The Latent Power of Culture and the International Judge* (Professional Books 1979) 177.

¹⁸⁵ Meron (n 21) 20, 44-45, 60-61. For the humanization of IHL through human rights, see T Meron, ‘Francis Lieber’s Code and Principles of Humanity’ (1998) 36 *Columbia Journal of Transnational Law* 269-281; Meron (n 136) 239-278; T Meron, *The Humanization of International Law* (Martinus Nijhoff 2006). That liberal values entered international law through human rights, see Orakhelashvili (n 11) 368.

¹⁸⁶ *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para 58.

¹⁸⁷ *Prosecutor v Kupreškić* (Appeal Judgment) IT-95-16-A (23 October 2001) paras 93-100.

¹⁸⁸ *Prosecutor v Mrkšić, Radić and Šljivančanin* (Judgment) IT-95-13/1-A (5 May 2009) Partially Dissenting Opinion of Judge Pocar para 10. See Schabas (n 76) 43.

¹⁸⁹ *Prosecutor v Plavšić* (Sentencing Judgment) IT-00-39&40/1-S (27 February 2003) para 126.

¹⁹⁰ *Prosecutor v Stakić* (Judgment) IT-97-24-T (31 July 2003) para 18.

¹⁹¹ *Ibid* paras 827-868.

two instances, the ICTY opposed the undermining of an accused's autonomy as well. In answer to 'whether the individuals who are called before this Tribunal as accused are simply an instrument to achieving the goal of the establishment of the rule of law', the ICTY answered with an emphatic no as 'deterrence should not be given undue prominence in the overall assessment of a sentence'.¹⁹² This can be contrasted with the arguments at the post-WWII IMTs where the selected prosecutors dehumanised the accused as inhuman forces.

At the ICTR the shift towards the individual was also recognised. Individual criminal responsibility was held by the *Muvunyi* TC to be a key indicator of the paradigm shift in international law from a state-only system to one which included individuals. The principle's heritage was traced to the Statute of the ICTR, the Versailles Treaty and the post-WWII IMTs.¹⁹³

Regarding accused and victim rights, the ICTR continued the oscillation just revealed at the ICTY. The *Kayishema and Ruzindana* AC rejected the prosecution's appeal as time-barred. Dissenting, Shahabuddeen argued that a strict interpretation of procedural rules should give way for doing substantive justice.¹⁹⁴ In *Ntagerura*, vague allegations against an accused were held by Dolenc to require dismissal without further consideration of the evidence thereon. In order to prevent an unchecked retribution determining justice, 'it is only through a fair trial that we can achieve any lasting justice'.¹⁹⁵ In contrast, Schomburg emphasised justice in the interpretation of the right to be informed in *Muhimana*. A slightly varied charge, which was substantively known to the accused, was acceptable.¹⁹⁶

At the ICC, in an argument reminiscent of *Nikolic*,¹⁹⁷ Van den Wyngaert took the majority to task in *Katanga* for ostensibly attributing common criminal purpose to ethnic animosity. Because ICL is ultimately concerned 'with specific individuals and their personal criminal behaviour', care should be taken to ascribe collective criminal intentions to individual members of a group merely because of such membership rather than based on solid evidence.¹⁹⁸ Guilt by association needed to give way

¹⁹² *Prosecutor v Nikolić* (Sentencing Judgment) IT-02-60/1-S (2 December 2003) para 90. See for the same sentiment, *Prosecutor v Obrenović* (Sentencing Judgment) IT-02-60/2-S (10 December 2003) para 52.

¹⁹³ *Prosecutor v Muvunyi* (Judgment and Sentence) ICTR-2000-55A-T (12 September 2006) para 459.

¹⁹⁴ *Prosecutor v Kayishema and Ruzindana* (Judgment) ICTR-95-1-A (1 June 2001) Dissenting Opinion of Judge Shahabuddeen para 14.

¹⁹⁵ *Prosecutor v Ntagerura, Bagambiki and Imanishimwe* (Judgment and Sentence) ICTR-99-46-T (25 February 2004) Separate Opinion of Judge Dolenc paras 3-6.

¹⁹⁶ *Prosecutor v Muhimana* (Judgment) ICTR-95-1B-A (21 May 2007) Partly Dissenting Opinion Of Judge Schomburg On The Interpretation Of The Right To Be Informed para 14 footnote 14.

¹⁹⁷ *Prosecutor v Nikolić* (Sentencing Judgment) IT-02-60/1-S (2 December 2003) paras 59-60.

¹⁹⁸ *Prosecutor v Germain Katanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) Minority Opinion of Judge Christine Van den Wyngaert para 258.

to individual responsibility. No more could be derived from this statement than support for the general shift towards individualism in international law. This shift was also confirmed in the *Bemba AC*.¹⁹⁹ Only in the separate opinion of Van den Wyngaert and Morrison in *Bemba*, was any explicit preference shown to the two liberalisms divide, the judges emphatically favouring criminal law liberalism above HR liberalism.²⁰⁰

Coding for liberalism, on elements not yet coded in this study, revealed functional uses thereof by the prosecution and the defence counsel. Individual-centrism and individual responsibility were consistently argued by the prosecution. However, the moral autonomy of the accused was uniformly offered upon the altar of the symbolic importance their prosecution would have. Nominally these arguments appear to be liberal and illiberal respectively. But they were uniformly directed at the objective of prosecuting the accused for serious atrocities and bringing the full weight of the matter into global conscience. Possibly, the apparent contradiction might be resolved on a reading in favour of HR liberalism underpinning the sentiments. This could explain the sacrifice of the accused for the greater protection of the victims. The defence counsel consistently denied individual criminal responsibility in international law based on a state-centric realism. This position, like those they adopted under positivism,²⁰¹ was congruous with their mandate to oppose the charges brought against the accused. Both IMTs accepted the shift towards the individual in international life. Pal alone, congruent with his realism, rejected individual responsibility in an international arena still comprised, according to him, only of states. The post-Cold War judicial bodies, including one negligible instance from the ICC, consistently favoured liberalism as opposed to statism. Under the elements of individualism, individual responsibility, human rights and moral autonomy only a few instances appeared relevant to the tension inherent to ICL liberalism. The data revealed an oscillation in preference at the post-Cold War judicial bodies for either HR liberalism or criminal law liberalism. The data was thus contradictory.

In sum, on these elements not yet considered, if the coding for liberalism is taken as an immanent critique, the ICL judiciaries would be in conformity with their status as liberal institutions as they are indeed premised on and elaborate the principle that all law, in the final instance, is directed at

¹⁹⁹ *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/08 A (8 June 2018) Concurring Separate Opinion of Judge Eboe-Osuji para 358.

²⁰⁰ *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/08 A (8 June 2018) Separate Opinion Judge Christine Van den Wyngaert and Judge Howard Morrison paras 4-5, 74-78.

²⁰¹ See sections 2.2, 2.3, 3.2, 3.3, 3.4.

the individual.²⁰² The preference between HR liberalism and criminal law liberalism seemed to oscillate between HR favouritism (by the IMT prosecutors) and contradictory views (from the post-Cold War judiciary).

This is, however, not the complete story. If codes discussed elsewhere in this study, which also reflected individualism, individual responsibility and human rights, are considered alongside the direct pronouncements on liberalism discussed in this chapter, possibly this tension between the two liberalisms can be resolved in favour of one approach.²⁰³ Throughout the study, references were made regarding other codes' relevance under this philosophical category. To reiterate, liberalism, as was shown in this section, constituted the framework of ICL judicial bodies. All the other arguments coded in this study occurred against this contextual framework. Several codes were engaged with individualism, responsibility and rights in addition to the specific philosophical categories they were coded under. For this discussion, the policy-oriented approach, *nullem crimen sine lege* (NCSL), interpretation, sentencing purposes and critical approaches were relevant. Possibly even the overall opposition between the selected prosecutors and defence counsel in earlier chapters could be understood as reflective of the interplay between HR liberalism and criminal law liberalism respectively.²⁰⁴ However, these positions were also tied to counsel's respective functions and so should not be unduly weighted here.

The use of the policy-oriented approach by McDonald and Vohrah and the opposition thereto by Cassese²⁰⁵ could be seen as aimed at respectively protecting the victims or accused along the HR/criminal law liberalism divide.²⁰⁶ NCSL, on the coded data, revealed an overall shift at the selected judiciaries from natural law to positivism.²⁰⁷ Ostensibly compliance with NCSL (with or without posited support) could be viewed as reflective of criminal law liberalism favourable to the rights of the accused, whereas non-compliance (despite codification or the lack thereof) often occurred to favour expansive protections in favour of the victims.²⁰⁸ Interpretation, on the coded data, likewise revealed a shift at the selected ICL judiciaries from natural law to positivism.²⁰⁹ Bearing in mind that the expansive, teleological interpretations mostly allowed expanded

²⁰² Lauterpacht (n 149) 26-27. M Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal A Judge's Recollection* (OUP 2012) 204-206.

²⁰³ Robinson (n 114) 129-135.

²⁰⁴ See sections 2.2, 2.3, 2.4, 3.2, 3.3, 3.4.

²⁰⁵ See section 2.5.

²⁰⁶ Robinson (n 114) 142-145 discusses this as a form of teleological interpretation with utopian aims.

²⁰⁷ See section 3.4.

²⁰⁸ Circumventing NCSL by equating a HR/IHL violation with criminality is relevant per Robinson (n 114) 148-149.

²⁰⁹ See section 3.5.

constructions in favour of protection and strict construction favoured the rights of the accused, the data here too seemed to reflect both liberalisms.²¹⁰ A principle like JCE, coded under interpretation, can be construed as in excess of criminal law liberalism.²¹¹ If the data under the NCSL and interpretation codes is considered without awareness of developments over time, both datasets clearly revealed the two liberalisms. Did the inter-curial shifts in each from natural law to positivism alter this fact? With NCSL increasingly based on social sources and its directives overruling teleological interpretations, on the one hand, and interpretation increasingly moving towards strict construction, it appears that both later inclined towards criminal law liberalism.

Deontology and utilitarianism tended to reveal the same divide between accused-centrism and victim-centrism, which naturally followed their respective concerns, viz, just deserts for the perpetrator or the maximising of happiness.²¹² Jackson's dual argument under self-reflexive ethical theories neatly embodied both approaches and both liberalisms.²¹³ Sentencing purposes were, however, important for the current discussion. If the coded data is considered quantitatively, it would appear utilitarianism exceeded deontology. However, most of the utilitarian purposes were recognised as secondary principles and utilised to individualise punishment through judicial discretion. Quantitatively there simply are more utilitarian than deontological sentencing purposes. A better reading bears in mind the general compatibility between utilitarian and deontological sentencing purposes (which should render it innocuous for the tension inherent to liberalism) and considers the instances where incompatibility was identified.²¹⁴ On the coded data, a contradiction was found in the manner retribution and deterrence, which are arguably the most important sentencing purposes, were supported (especially at the post-Cold War Tribunals).²¹⁵ This fluctuation in sentencing purposes might indeed be another embodiment of the fundamental divide in ICL liberalism.

Finally, even the arguments coded under the critical approaches of feminism and the antecedents to Third World Approaches to International Law (TWAAIL) can be construed in the context of the opposing liberalisms, although this was based on the coded data rather than being inherent to the theories. Feminist concerns revolved around women as victims and the need to improve their

²¹⁰ Robinson (n 114) 135-147.

²¹¹ See section 3.5. See also Robinson (n 114) 119-124.

²¹² JS Mill, *Utilitarianism* (Parker, Son and Bourn 1863) 24; J Hospers, *An Introduction to Philosophical Analysis* (3rd edn, Routledge 1990) 358.

²¹³ See section 4.2.

²¹⁴ HLA Hart, *Punishment and Responsibility* (Oxford 1968) 9.

²¹⁵ See section 4.3.

protection under ICL.²¹⁶ TWAIL revolved around the accused and the prejudice involved in the arraignment of some and exclusion of others. It is possible, however, to see the accused (as Pal surely did at Tokyo) as the victims of their political accusers.²¹⁷ While these respective areas of focus might in themselves be noteworthy, the fact remains that these positions could be divided along the HR and criminal law liberalism divide or both construed as HR.

Based on the totality of the coded data in this chapter and throughout the study, the contradictory pulls internal to ICL liberalism can be confirmed on the present research question.²¹⁸ This contradiction goes to the heart of ICL and while by no means the architects thereof, the judicial bodies have contributed to its entrenchment. Perhaps it was the inescapable consequence of criminal law and HR merging to create ICL.²¹⁹ Nonetheless, the inconsistency between the different liberalisms underpinning so many ICL justificatory arguments pressurised the rule of law. Considering Fullerian desiderata beyond the non-contradiction element, possibly these oscillating arguments make it difficult to keep abreast of which view would be accepted in a particular case. Maybe a more prosaic way of formulating the problem is that the current position establishes the rule of laws rather than the rule of law. So the question becomes which law is to be preferred? While the creation of the system is and was the responsibility of different role-players, the judicial role-players remain an important part of the process. They need to reflect on this matter as all of the justificatory arguments identified in this study were in their power to influence in a coherent manner.

This remains a contradiction at the heart of the ICL enterprise and the coded data throughout the study confirmed its existence in philosophical justificatory arguments as well. On a systemic level, therefore, ICL revealed a philosophical tension. However, as will be suggested in chapter 7, such a contradiction does not necessarily undermine the whole ICL enterprise. Foreseeability and predictability required by the rule of law might be found precisely in the smaller codes identified in this study relevant to the particular legal issues where they appeared.

6.4 Conclusion on the systemic philosophies of realism and liberalism under part D

Inductively, from the selected cases, two systemic philosophical categories were identified in this study.²²⁰ One was concerned with the larger environment within which ICL judicial bodies function

²¹⁶ See section 5.2.

²¹⁷ See section 5.3.

²¹⁸ This thus confirms Fletcher and Ohlin (n 136) 540, 544 and Robinson (n 114) 129-135.

²¹⁹ Ibid 115-117.

²²⁰ See section 1.2.2.

(realism) and one reflected an understanding of the internal structure of ICL judicial bodies (liberalism). The data precluded findings of liberalism on an IR level. Although they were concerned with different contexts, these philosophies exist in a tension around state-centrism versus individualism. This dataset also revealed an inherent tension within liberalism. Overall, realism produced a large dataset. Liberalism was coded for on principles not yet captured elsewhere in the study before briefly reflecting on relevant earlier codes as well. Liberalism thus also revealed a large dataset.

Unlike the majority of other philosophical categories coded, realism and liberalism were both used by judicial bodies descriptively to explain how ICL judicial bodies perceived the nature of the international community within which they function as well as how their structures were premised on the individual.²²¹ The philosophies under parts A, B and C tended to be used predominantly for argument rather than description.

Still various inter-and intra-curial trends could be identified between both philosophical categories. For realism, the post-WWII IMTs revealed a mixed dataset which inclined towards opposing realism. Nuremberg revealed consistent opposition to realism, but Tokyo began a shift by opposing realism regarding its creation and thereafter consistently using realism as descriptor of international life. Tokyo thus revealed a somewhat mixed dataset which inclined to the acceptance of realism. The position at the post-Cold War judicial bodies appeared to consistently accept realism as descriptor of international life. The ICTY consistently accepted realism. The ICTR was confronted by realist charges which it consistently rejected on the facts of the case (rather than in principle). Finally, the dataset at the ICC was small and, if anything, mixed.

For the rule of law considerations, the use of realism as descriptor of international life aided transparency. While the reality of realism is a concern for ICL judicial bodies, it often plays out in terms of structural matters over which the judiciary has no power (thereby excluding those concerns for this study with its focus on judicial pronouncements). For the judiciary, noting selective arraignment (as at Tokyo) can add pressure on those with the authority to change the impugned policies. The arguments made under antecedents to TWAIL also apply here.²²² The Fullerian rule of law principle requiring rules to determine a matter was only threatened directly in three instances. This was in *Šešelj*, *Barayagwiza* and *Katanga* where findings were attributed to politics and

²²¹ Both excel at explaining different aspects of international life and institutional design, see Orakhelashvili (n 11) 366.

²²² See sections 5.3, 5.5.

external pressures. Only *Šešelj* accepted bias and removed Judge Harhoff from the proceedings. The bias he alleged against the ICTY President was summarily dismissed as unfounded. This extremely limited instance did not undermine the overall rule of law as, of course, the judicial body acted decisively once bias was established.

Moving to liberalism, the data across all role-players (with the exception of the IMT defence counsel and Pal) showed consistent support for individualism and individual responsibility in international life. This could be expected based on the nature of ICL institutions,²²³ but the judicial pronouncements considered here confirmed this position. The judicial bodies were part of a shift in international relations from realism to liberalism.²²⁴ The shift in international life towards the individual and its responsibility through ICL judicial bodies can be seen as reflective of a shift in the interest-based extra-curial dynamic.²²⁵ Increasingly, the international community had warmed up to the idea of ICL judicial bodies. However, state-interest (i.e. realism) remains a challenge to the functioning of these bodies as the opposition to the ICC attests.²²⁶

A central tension within ICL liberalism between the rights and protection afforded to the victim or society, on the one hand, and the accused, on the other hand, was confirmed.²²⁷ This tension could be identified because it appeared from the philosophical justificatory narrative investigated here. As far as could be ascertained this tension has not yet been linked to the philosophical justificatory narrative thus. It was indicated that several of the study's codes, including policy-oriented approach,²²⁸ NCSL,²²⁹ interpretation,²³⁰ sentencing purposes,²³¹ feminism²³² and antecedents to TWAIL²³³ revealed oscillating support for a victim-centric or accused-centric approach to ICL.

To summarise for the rule of law, the realist concerns which impacted the first desideratum of Fuller were a small minority and appropriately addressed by the judiciary. Other realist concerns impacting the establishment of judicial bodies, their composition, funding, jurisdiction, and so on are beyond the control of the judicial bodies themselves. The judicial bodies could not do much

²²³ Reus-Smit (n 129) 285; Robinson (n 128) 140.

²²⁴ Moghalu (n 8) 10.

²²⁵ See section 1.2.3.2.

²²⁶ Schabas (n 24) 25-34; on the dissatisfaction of African states, see section 0.2.

²²⁷ Robinson (n 114) 129-135.

²²⁸ See section 2.5.

²²⁹ See section 3.4.

²³⁰ See section 3.5.

²³¹ See section 4.3.2.

²³² See section 5.2.

²³³ See section 5.3.

more about realism as reality in IR than their noting of it. Like the argument under the antecedents to TWAIL, this aided transparency which should aid legitimacy.²³⁴

The contradiction between the opposing liberalisms remains a bigger challenge. Some tension seems inescapable because HR and criminal law were both used historically to create ICL. It appears a useful political tool to reflect on the tendencies in ICL which differ from whichever position one holds self. This gives permanent rhetorical ammunition with which to oppose the ICL institution. This means the consent legitimacy afforded to a specific philosophical position on the liberalism conflict will tend to dovetail whether the particular role-player needs to side, based on self-interest, with a victim or perpetrator. Perhaps, then, an argument for the preference of either approach or a formalised combination is necessary to ensure that consent legitimacy only revolves around a single or structurally formalised dual regime. This matter will be revisited in the conclusion.

²³⁴ See sections 5.3, 5.5.

Chapter 7

Conclusion

This study adopted systematic content analysis (SCA) to identify philosophical justificatory arguments in a selection of international criminal law (ICL) pronouncements and measure them for compliance against the Fullerian rule of law standard. In line with SCA's tendency to focus on aspects of a case, the aim of this study was not to evaluate the legal correctness of the judgments under scrutiny, but rather to further analytical comprehension of philosophy as justification for decisions.¹ This position is in agreement with the sentiment of Foucault that '[t]he object of a critique is not a matter of saying that things are not right as they are. It is a matter of pointing out on what kinds of assumptions, what kinds of familiar, unchallenged, unconsidered modes of thought the practices that we accept rest'.² Some manner of systematisation was imperative to order a large dataset which covered several philosophies and appeared in conjunction with a legion of legal matters. SCA provided the tools required to comprehensively systematise said data.

As part (i) of SCA, a systematic selection of all possibly relevant cases (or the 'sampling frame') was identified and reduced to a smaller and more homogeneous number of cases through the 'selection method' articulated in section 1.2.1. To restate, for this study, the focus was on the judgments on merits and sentencing,³ whether on trial or appeal from the Nuremberg and Tokyo International Military Tribunals (IMTs), the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Mechanism for International Criminal Tribunals (MICT) and the International Criminal Court (ICC).⁴ The focus was on the judicial pronouncements and, at the post-WWII IMTs, selected prosecutors and defence

¹ That this is in line with the tendency of SCA to focus on selected aspects of cases, see MA Hall and RF Wright, 'Systematic Content Analysis' (2008) 96 *California Law Review* 88.

² M Foucault, *Politics Philosophy and Culture* (L Krizman ed, A Sheridan trs, Routledge 1988) 154 quoted in R Cryer, T Herve, B Sokhi-Bulley with A Bohm, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 72. Quality of reasoning as well as critique thereon influence reception, see R Cryer, 'Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study' (2006) 11 *Journal of Conflict & Security Law* 249.

³ Isolated exceptions, revolving around the Rule 61 decisions and a few interlocutory decisions at the ICTY, were also considered.

⁴ The MICT contributed very little of substance as of yet.

counsel. Within this focused selection, research revealed several cases at the ICTY,⁵ ICTR,⁶ MICT⁷ and ICC⁸ wherein no philosophical argument was found.

Part (ii) of SCA required coding for philosophical categories in the selected cases.⁹ This constituted the bulk of the present research chapters as the codes had to be identified and analysed for the reasoned identification of philosophical categories. It can be confirmed, on the study's evidence,

⁵ *Prosecutor v Tadić* (Opinion and Judgment) IT-94-1-T (7 May 1997); *Prosecutor v Mučić, Delić and Landžo* (Sentencing Judgment) IT-96-21-Tbis-R117 (9 October 2001); *Prosecutor v Sikirica, Došen and Kolundžija* (Sentencing Judgment) IT-95-8-S (13 November 2001); *Prosecutor v Mučić, Delić and Landžo* (Judgment on Sentence Appeal) IT-96-21-Abis (8 April 2003); *Prosecutor v Babić* (Judgment on Sentencing Appeal) IT-03-72-A (18 July 2005); *Prosecutor v Miodrag Jokić* (Judgment on Sentencing Appeal) IT-01-42/1-A (30 August 2005); *Prosecutor v Momir Nikolić* (Sentencing Judgment) IT-02-60/1-A (8 March 2006); *Prosecutor v Brđanin* (Judgment) IT-99-36-A (3 April 2007); *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-A (9 May 2007); *Prosecutor v Limaj et al.* (Judgment) IT-03-66-A (27 September 2007); *Prosecutor v Halilović* (Judgment) IT-01-48-A (16 October 2007); *Prosecutor v Zelenović* (Judgment on Sentencing Appeal) IT-96-23/2-A (31 October 2007); *Prosecutor v Hadžihasanović* (Judgment) IT-01-47-A (22 April 2008); *Prosecutor v Strugar* (Judgment) IT-01-42-A (17 July 2008); *Prosecutor v Delić* (Decision on the Outcome of the Proceedings) IT-04-83-A (29 June 2010); *Prosecutor v Haradinaj, Balaj and Brahimaj* (Judgment) IT-04-84-A (19 July 2010); *Prosecutor v Šljivančanin* (Review Judgment) IT-95-13/1-R.1 (8 December 2010); *Prosecutor v Haradinaj, Balaj and Brahimaj* (Judgment) IT-04-84bis-T (29 November 2012); *Prosecutor v Perišić* (Judgment) IT-04-81-A (28 February 2013); *Prosecutor v Stanišić and Simatović* (Judgment) IT-03-69-T (30 May 2013); *Prosecutor v Stanišić and Simatović* (Judgment) IT-03-69-A (9 December 2015); *Prosecutor v Prlić et al* (Judgment) IT-04-74-A (29 November 2017).

⁶ *Prosecutor v Serushago* (Judgment Appeal against Sentence) ICTR-98-39-A (14 February 2000); *Prosecutor v Serushago* (Reasons for Judgment) ICTR-98-39-A (6 April 2000); *Prosecutor v Kambanda* (Judgment) ICTR-97-23-A (19 October 2000); *Prosecutor v Bagilishema* (Judgment) ICTR-95-1A-T (7 June 2001); *Prosecutor v Musema* (Judgment) ICTR-96-13-A (16 November 2001); *Prosecutor v Bagilishema* (Judgment) ICTR-95-1A-A (3 July 2002); *Prosecutor v Bagilishema* (Judgment Reasons) ICTR-95-1A-A (3 July 2002); *Prosecutor v Rutaganda* (Judgment) ICTR-96-3-A (26 May 2003); *Prosecutor v Niyitegeka* (Judgment) ICTR-96-14-A (9 July 2004); *Prosecutor v Ntakirutimana and Ntakirutimana* (Judgment) ICTR-96-10-A & 96-17-A (13 December 2004); *Prosecutor v Semanza* (Judgment) ICTR-97-20-A (20 May 2005); *Prosecutor v Kajelijeli* (Judgment) ICTR-98-44A-A (23 May 2005); *Prosecutor v Gacumbitsi* (Judgment on Appeal) ICTR-2001-64-A (7 July 2006); *Prosecutor v Mpambara* (Judgment) ICTR-01-65-T (11 September 2006); *Prosecutor v Rwamakuba* (Judgment) ICTR-98-44C-T (20 September 2006); *Prosecutor v Ndindabahizi* (Judgment) ICTR-01-71-A (16 January 2007); *Prosecutor v Simba* (Judgment) ICTR-01-76-A (27 November 2007); *Prosecutor v Seromba* (Judgment) ICTR-2001-66-A (12 March 2008); *Prosecutor v Muvunyi* (Judgment) ICTR-2000-55A-A (29 August 2008); *Prosecutor v Karera* (Judgment) ICTR-01-74-A (2 February 2009); *Prosecutor v Zigiranyirazo* (Judgment) ICTR-01-73-A (16 November 2009); *Prosecutor v Nsengimana* (Judgment) ICTR-01-69-T (17 November 2009); *Prosecutor v Nchamihigo* (Judgment) ICTR-2001-63-A (18 March 2010); *Prosecutor v Kalimanzira* (Judgment) ICTR-05-88-A (20 October 2010); *Prosecutor v Rukundo* (Judgment) ICTR-2001-70-A (20 October 2010); *Prosecutor v Renzaho* (Judgment) ICTR-97-31-A (1 April 2011); *Prosecutor v Muvunyi* (Judgment) ICTR-2000-55A-A (1 April 2011); *Prosecutor v Nyiramasuhuko et al* (Judgment and Sentence) ICTR-98-42-T (24 June 2011); *Prosecutor v Munyakazi* (Judgment) ICTR-97-36A-A (28 September 2011); *Prosecutor v Setako* (Judgment) ICTR-04-81-A (28 September 2011); *Prosecutor v Bagasora* (Judgment) ICTR-98-41-A (14 December 2011); *Prosecutor v Ntawukulilyayo* (Judgment) ICTR-05-82-A (14 December 2011); *Prosecutor v Ndahimana* (Judgment and Sentence) ICTR-01-68-T (30 December 2011); *Prosecutor v Karemera and Ngirmpatse* (Judgment and Sentence) ICTR-98-44-T (2 February 2012); *Prosecutor v Kanyarukiga* (Judgment) ICTR-02-78-A (8 May 2012); *Prosecutor v Hategekimana* (Judgment) ICTR-00-55B-A (8 May 2012); *Prosecutor v Nzabonimana* (Judgment and Sentence) ICTR-98-44D-T (31 May 2012); *Prosecutor v Nizeyimana* (Judgment and Sentence) ICTR-2000-55C-T (19 June 2012); *Prosecutor v Gatete* (Judgment) ICTR-2000-61-A (9 October 2012); *Prosecutor v Ngirabatware* (Judgment and Sentence) ICTR-99-54-T (20 December 2012); *Prosecutor v Mugenzi and Mugiraneza* (formerly *Bizimungu et al*) (Judgment) ICTR-99-50-A (4 February 2013); *Prosecutor v Ndahimana* (Judgment) ICTR-01-68-A (16 December 2013); *Prosecutor v Ndindilyimana et al* (Judgment) ICTR-00-56-A (11 February 2014); *Prosecutor v Bizimungu* (Judgment) ICTR-00-56B-A (30 June 2014); *Prosecutor v Karemera and Ngirmpatse* (Judgment) ICTR-98-44-A (29 September 2014);

that philosophical justifications are indeed an important part of the larger ICL justificatory regime.¹⁰ If any doubt remained, a brief comparison of the arguments considered in this study from Judges Bernard and Pal at Tokyo will show how different philosophies can help justify different findings.¹¹ Bearing in mind the volume of data reflected in this study, the fact that these arguments are largely under-explored in academic literature will hopefully begin to change.

Whether such philosophical justifications, as part of a judicial body's overall justificatory narrative, complied with or impeded the Fullerian rule of law standard was investigated under part (iii) of the SCA.¹² The Fullerian non-contradictory or consistency principle served as structuring element through which arguments could initially be compared before measurement against the remaining desiderata occurred. On this study's premises, increased compliance with the rule of law is accepted to improve outcome-based legitimacy. Improved outcome-based legitimacy, in turn, enables a more persuasive argument for consent legitimacy to be afforded to the relevant institutions.¹³

In addition to briefly summarising the results of the SCA, this conclusion will attempt to consolidate the overall findings pertaining to the impact these philosophical justifications had on the rule of law and on institutional legitimacy. Finally, this conclusion will present some tentative meditations on the relevance of these findings for the ICC.

The thesis set out to identify philosophical justifications used by a selection of ICL role-players. As noted in section 0.2, in the 'problems of the penumbra',¹⁴ the philosophies used by judicial bodies were significant for the conceptualisation and reading given to specific rules.¹⁵ The philosophies identified in the selected ICL cases were natural law, legal positivism, deontology, utilitarianism, feminism, antecedents to Third World Approaches to International Law (TWAIL), realism and liberalism. Analysis revealed the most abundant philosophical categories in the selected ICL

Prosecutor v Nizeyimana (Judgment) ICTR-2000-55C-A (29 September 2014); *Prosecutor v Nzabonimana* (Judgment) ICTR-98-44D-A (29 September 2014).

⁷ *Prosecutor v Ngirabatware* (Judgment) MICT-12-29-A (18 December 2014).

⁸ *Prosecutor v Mathieu Ngudjolo Chui* (Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to Article 74 of the Statute") ICC-01/04-02/12 A (27 February 2015).

⁹ Methodological discussion in section 1.2.2.

¹⁰ Noted preliminarily in section 0.2.

¹¹ See e.g. their views on cosmopolitanism and crimes respectively in section 2.4 and 3.3.

¹² Articulated in section 1.2.3.

¹³ See sections 0.1, 0.2; S Dothan, 'How International Courts Enhance Their Legitimacy' (2013) 14 *Theoretical Inquiries in Law* 457-458.

¹⁴ HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 607.

¹⁵ Cryer, Hervey, Sokhi-Bulley with Bohm (n 2) 5. For confirmation see also LV Prott, *The Latent Power of Culture and the International Judge* (Professional Books 1979) 119; MDA Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Thomson Sweet Maxwell 2014) 12.

judicial bodies to be natural law and legal positivism. The data was detailed enough to reveal instances of the Grotian approach to international law, inclusive legal positivism (ILP) and exclusive legal positivism (ELP).¹⁶ The data indicated that despite the theoretical lines between natural law and positivism blurring, they remained viable in ICL practice. Some arguments could be read as either theory, but once an opposing argument was brought to bear on the matter, clear differences could be identified. Normative ethics was also a comprehensive philosophical category, especially in relation to sentencing considerations. Both deontology and utilitarianism appeared in noteworthy datasets. Critical approaches, in the form of feminism and antecedents to TWAIL, were less extensively found through the coding process because they tended to accompany calls for changes in the status quo of ICL protections. Once the new position 'normalised' (e.g. feminism), further justificatory arguments were unnecessary. If the required position did not change, renewed arguments for change could be expected (e.g. TWAIL at the ICC). Coding finally also revealed the pervasive nature of realism and liberalism in ICL adjudication. Although they originated externally, whether in international relations (IR) theory for realism or political theory for liberalism, they were addressed *per curiam* at times thereby conceding the situatedness of ICL judiciaries and necessitating their inclusion in this study.

It needs repeating that this study did not purport to establish the definitive theoretical versions of these philosophies. The philosophies identified here, and the specific versions thereof, were the result of the coded data. In other words, these were the subjective philosophies utilised by the selected ICL role-players. Because the judicial bodies rarely entered into elaborate philosophical discourses, in many cases the data could not reveal specific versions of the philosophy identified. There was some correlation between the volume of data and the degree of nuance with which a particular philosophy could be identified.

The volume of data identified throughout this study and the understanding of the rule of law adopted, prevents a simple holistic, undifferentiated answer to the research question on the compliance of philosophical justificatory arguments with the rule of law. The various philosophies involved as well as the plethora of legal contexts (or codes) wherein they appeared required some degree of differentiated evaluation. Simply, not all philosophies were commensurate because they revolved around different issues.¹⁷ If compliance with the rule of law requires law to be applied in a predictable and foreseeable manner which gives effect to the moral agency of the person to act in

¹⁶ See preface to part A.

¹⁷ Cryer, Hervey, Sokhi-Bulley with Bohm (n 2) 13.

accordance with the law,¹⁸ it seems that a more accurate solution to this research question will be found in a differentiated answer. In this regard, the systematisation allowed by SCA was crucial to make sense of the data. This means that commensurable philosophical categories have to be separately measured against the rule of law standard. Indeed, the use of one philosophy might comply with the rule of law, while the use of another philosophy might be in conflict with it. Moreover, due to volume of data, measuring natural law and positivism against the rule of law required further nuance to the level of the codes to reflect sensible findings. It made less sense to ask whether natural law or positivism was consistently used then to ask if natural law or positivism was consistently used in conjunction with matters arising from just war, cosmopolitanism or any of the other relevant codes.

The discussion will briefly revisit the substantive findings of the study on compliance with the rule of law (especially on the ground of consistency) before considering the impact of the findings on institutional legitimacy. In order to show two possible cross-cuts of the data, the findings will be presented per commensurable philosophical category (per the value-based extra-curial and inter-curial dynamics) first and thereafter per selected ICL role-player (per the intra-curial dynamic).¹⁹ This conclusion allows the findings to be juxtaposed for an overall understanding of the compliance with the rule of law which was not possible in the individual chapters.

Across all role-players, coding for natural law and legal positivism revealed that philosophical justifications pertaining to the self-reflexive, just war, cosmopolitanism, ICL sources, *nullem crimen sine lege* (NCSL) and interpretation codes were noteworthy. The policy-oriented and substantive crimes datasets were too small for purposes of overall findings (they remained important for the first point of study significance, viz, the identification of philosophical justifications²⁰). Philosophical justificatory arguments pertaining to interpretation and NCSL exhibited natural law beginnings before shifting and settling into consistent positivism. Just war was consistently positivist. Cosmopolitanism started with mixed arguments before settling into consistent natural law. While revelatory of small datasets, self-reflexive statements revealed some preference for Grotian natural law (if only judicial bodies are considered and counsel are excluded) and sources showed a mixed to natural law approach.

¹⁸ HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (OUP 1968) 181; LL Fuller, *The Morality of Law* (Yale University Press 1969) 162; J Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) 272.

¹⁹ See section 1.2.3.1.

²⁰ See section 0.2.

Coding for the ethical theories of utilitarianism and deontology delivered one negligible code on self-reflexive statements and one large, significant, code on sentencing purposes. Evaluating the overall consistency of ethical theories therefore coincided with the investigation into the code on sentencing purposes. The sentencing purposes of utilitarianism and deontology were often compatible because of complementary aims.²¹ Sometimes they were used together through judicial discretion in individualising punishment. Nonetheless, this study still found either deterrence or retribution to be inconsistently privileged from time to time without any overarching framework explaining said oscillation. This most likely reflected the inherent tension in ICL liberalism between human rights (HR) law and criminal law.

Coding revealed that feminism and antecedents to TWAIL were significant under critical approaches. The technique of othering was also identified in the selected ICL pronouncements but it was omitted for testing against the rule of law because it produced a negligible dataset (almost exclusively from post-WWII counsel). Feminism revealed a shift from no initial recognition post-WWII to clear recognition post-Cold War. This was partly influenced by the role of international organisations and judges which enabled the judicial bodies to readjust ICL to reflect the extra-curial value interest which had turned towards HR. Antecedents to TWAIL revealed a small dataset (limited to Tokyo), so inter-curial consistency was not measurable. Engaged with the rule of law on an institutional level where interest determined the charges and accused, the ICL role-players both recognised these concerns and advocated for increased fairness in ICL proceedings thereby ensuring a greater degree of transparency in the matter.

Coding revealed systemic philosophies in the guises of international relations (IR) realism and political liberalism. Realism was consistently rejected at Nuremberg. At Tokyo the realist challenge of victor's justice was rejected before consistently resorting to realism as descriptor of actual international life. The reliance on the descriptive use of realism was consistent at the ICTY. At the ICTR realism was consistently rejected on the facts of each case rather than in principle. Finally, a negligible dataset appeared at the ICC. Liberalism revealed a large dataset revolving around, firstly, the shift towards the individual in international life and, secondly, the inherent nature of ICL liberalism. Barring the ICTR and ICC, which produced small datasets, all other role-players produced consistent findings in support of the movement towards individualism in international life. On the second point coded under liberalism, a contradiction inherent to ICL liberalism was

²¹ Hart (n 18) 9. See also CR Snyman, *Criminal Law* (4th edn, Butterworths 2002) 22-23; R Cryer, H Friman, D Robinson and E Wilmshurst, *An Introduction to International Criminal Law and Procedure* (CUP 2014) 29-30 on the combination theory.

identified with HR liberalism and criminal law liberalism revealing opposing views of what ICL should be. Various other datasets, like the policy-oriented approach, NCSL, interpretation, sentencing purposes, feminism and antecedents to TWAIL, were also engaged, revealing overall oscillating support for the respective liberalisms.

Adopting a different cross-cut of the research data, the findings of different ICL role-players can be identified (i.e. intra-curial dynamic).²² This addresses foreseeability and predictability of philosophical arguments per role-player. Thus, turning first to the selected prosecutors and defence counsel, they respectively adopted consistent natural law (frequently inclining towards a Grotian approach) and positivism across self-reflexive statements, just war theory, cosmopolitanism, sources, crimes and NCSL. These positions reflected their respective functions to prosecute or defend and can be explained functionally thus. This data can also be read as reflective of the HR and criminal law divide in ICL liberalism. A negligible dataset appeared for the selected counsel regarding self-reflexive statements and sentencing purposes in relation to ethical theories. Likewise, feminism did not appear in the philosophical justificatory arguments of counsel. Under antecedents to TWAIL a small dataset appeared at Tokyo only with the prosecutors arguing for a homogeneous world-society and the defence conversely arguing for pluralism. Othering as technique was almost exclusively used by the selected prosecutors to harmonise Other with Self with defence counsel resisting the synthesis. As to the systemic theories, realism resulted in a small dataset which reflected a divide of prosecutors rejecting realism in favour of law and the defence conceding realism as reality. Finally, regarding liberalism, the selected prosecutors all favoured individualism and individual criminal responsibility. Moreover, they unanimously construed the accused as symbols, thereby undermining their moral autonomy for the purpose of vindicating the rights of the victims. This revealed HR liberalism. The defence contested the shift from a state-centric international life to individualism. Throughout, the respective positions adopted were consistently informed by the objectives to prosecute or defend. This would constitute the common denominator over all the data from counsel.

On the post-WWII judicial level,²³ the scrutiny first turned to the Nuremberg IMT. Regarding natural law and legal positivism, the IMT produced a small dataset. In sum, natural law was ostensibly favoured across sources, crimes and NCSL. Positivism appeared under cosmopolitanism. No data appeared from the IMT in relation to either of the codes on ethical theory. Neither was any

²² See section 1.2.3.1.

²³ Thus excluding the counsel arguments.

data coded from the critical approaches of feminism or the antecedents to TWAIL. Of course, under feminism such a silence was, in fact, relevant.²⁴ Realism, however, appeared in a small number of instances. The IMT favoured law over power and rejected the victor's justice challenge, but conceded Kranzbuehler's arguments exonerating Dönitz and Raeder. On liberalism, the IMT accepted the shift in international law towards the individual. Overall, only a small dataset appeared at Nuremberg. The philosophical justifications adopted appeared, moreover, focused on enabling the Tribunal to conduct its business of conducting a trial and meting out punishment. Its arguments were unified in their aim to keep the IMT functional.

The Tokyo IMT produced a significant dataset.²⁵ Comprising both a majority judgment and several individual opinions, a tentative overall finding will be suggested as well as a more detailed breakdown of the different constituent arguments. Overall (intra-curially), in terms of natural law and positivism, the dataset was mixed. More sense can be made on the level of the codes. Thus, a Grotian natural law approach was favoured under self-reflexive statements; just war theory, sources and crimes delivered mixed justifications; cosmopolitanism revealed a slight preference for positivism and NCSL produced consistent support for natural law. The number of role-players involved probably explains the number of disparate findings. Because they were forthright about their positions, specific findings relative to each relevant judge (intra-and inter-jurist dynamic²⁶) could also be ventured. Webb delivered a small dataset, involving self-reflexive statements and crimes, wherein he consistently utilised a Grotian natural law approach. Bernard invoked consistent natural law in relation to cosmopolitanism, sources, crimes and NCSL with only his self-reflexive statement moving into a natural law-favoured Grotian approach. Röling produced a mixed dataset. He favoured natural law regarding self-reflexive statements, sources and NCSL, turned to positivism under cosmopolitanism, crimes and just war theory. This confirmed the finding about Röling's eclecticism in literature in another context.²⁷ Jaranilla delivered a small dataset, which seemingly favoured natural law. Natural law appeared in relation to his arguments about just war theory, cosmopolitanism and NCSL. Only regarding sources did Jaranilla use positivism. Finally, Pal utilised a largely consistent positivism across self-reflexive statements, cosmopolitanism, sources, crimes and NCSL. While he proposed a positivist understanding of just war, the consequences of his arguments justifying Japan's conduct was revealed to embody some natural

²⁴ H Charlesworth, 'Feminist Methods in International Law' in Steven Ratner and Anne-Marie Slaughter (eds), *The Methods of International Law* (ASIL 2004) 162.

²⁵ Also noted by N Boister and R Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008) 271-300.

²⁶ See section 1.2.3.1.

²⁷ Also noted by Boister and Cryer (n 25) 283-285.

law. This reaffirms the findings made on Pal in literature as more nuanced than simply espousing positive law.²⁸ The dataset under self-reflexive statements on ethical theories was negligible despite Jaranilla's utilitarian argument being the only instance from the post-WWII IMTs on this code. Under sentencing codes, the Tokyo IMT delivered a small dataset wherein only Webb and Röling ventured findings. Both utilised utilitarianism. No data appeared at Tokyo on feminism. As with Nuremberg, such a silence was relevant for feminism.²⁹ Tokyo was the only role-player to produce intra-curial data on the antecedents to TWAIL. While not a large dataset, as a critical approach, its appearance rather than the quantity thereof was noteworthy. While the majority appeared to suggest the existence of a homogeneous world, Pal and Röling both adopted arguments anticipating TWAIL to expose Western hegemony and argue for value pluralism in the international arena. Finally, Tokyo produced a noteworthy dataset on realism which could be measured overall for consistency. While the majority, Webb, Jaranilla, Bernard and Pal all rejected realism in terms of the victor's justice challenge, the rest of the coded dataset revealed the consistent use of realism by Webb, Bernard, Röling and Pal as descriptor of actual international life. In sum, the dataset was slightly mixed, yet with a strong inclination towards realism as descriptor. On liberalism, the Tokyo IMT consistently favoured individualism and individual responsibility in international life. Only Pal rejected the argument that the state-centric system of international law had already given way to individualism. It is suggested that by considering specific role-players and codes at Tokyo, more sense can be made of the findings. Still, the number of voices involved resulted in an overall dataset with no clear common denominator.

The ICTY also produced a significant dataset. Overall, in terms of natural law and positivism, just war theory and NCSL (albeit the latter with initial natural law) were consistently addressed through positivism; cosmopolitanism and sources were addressed through consistent natural law arguments. The policy-oriented approach, which was a small dataset only extant at the ICTY, was inconsistent. Coding for philosophical argument pertaining to crimes delivered a mixed dataset. Interpretation techniques shifted from natural law to positivism. The importance of noting this shift qualitatively is evident on a principle of liability like joint criminal enterprise (JCE). If the data is read simply for quantity of philosophical justifications, the data must be read to support positivism. However, a qualitative reading reveals that while subsequent justifications might have relied on posited

²⁸ E Kopelman, 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial' (1991) 23 *New York University Journal of International Law and Politics* 375-376, 411-424; A Nandy, 'The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability' (1992) 23 *New Literary History* 49-65; Boister and Cryer (n 25) 285-291; K Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2011) 21 *European Journal of International Law* 1095.

²⁹ Charlesworth (n 24) 162.

material, the initial principle was firmly vested in natural law (in excess of posited material) thereby shaping the subsequent readings as well. Finally, a negligible dataset appeared on self-reflexive statements. In terms of self-reflexive statements on ethical theories a mixed dataset was produced with support for both utilitarianism and deontology. The sentencing purposes, under the ICTY, comprised a significant proportion of the total findings under that code and thus reflected the same contradiction mentioned above in terms of the overall findings. Thus, despite the possibility of a combination theory,³⁰ the inconsistent preference for retribution at times and then later for deterrence could not both be correct without an overarching framework of some sort. The ICTY dataset revealed a moderate dataset under feminism, which consistently advanced the protection afforded to women (even if more could be done in that regard³¹). The ICTY produced no data on the TWAIL-type arguments. The dataset on realism from the ICTY was very consistent in its reliance thereon as a descriptor of international affairs and the concerns pertaining to state cooperation in particular. Finally, the ICTY delivered consistent support for the shift towards the individual in international life under liberalism. The ICTY further revealed liberalism by going to some effort to acknowledge the moral autonomy of both victims and accused. Both criminal law liberalism and HR liberalism were used at the ICTY.

The ICTR delivered a much smaller dataset, most likely because its judgments largely revolved around the Genocide Convention and matters of fact.³² In terms of natural law and positivism, no datasets appeared under self-reflexive statements, sources or crimes, while a negligible dataset appeared for NCSL and interpretation. Very small datasets occurred for just war theory which reflected positivism and cosmopolitanism which reflected natural law. No data appeared for self-reflexive statements under ethical theories. However, a significant dataset appeared regarding sentencing purposes. Unlike the ICTY, however, this code did not reveal fluctuating support for retribution or deterrence at different times and, on the combination theory,³³ most of the remaining factors were compatible. If anything, an overall inclination towards utilitarianism might be derived from the coded data. The ICTR revealed a small dataset on feminism, which was still noteworthy because it contributed to the advancement of women in ICL (and indeed preceded the pronouncements on feminism from the ICTY). The ICTR produced no data on the TWAIL-type

³⁰ Hart (n 18) 9. See also Snyman (n 21) 22-23; Cryer, Friman, Robinson and Wilmshurst (n 21) 29-30 on the combination theory.

³¹ Charlesworth (n 24) 159 et seq.

³² R Cryer, 'The Philosophy of International Criminal Law' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 251.

³³ Hart (n 18) 9. See also Snyman (n 21) 22-23; Cryer, Friman, Robinson and Wilmshurst (n 21) 29-30 on the combination theory.

arguments. A consistent dataset pertaining to realism appeared under the ICTR, with defence arguments often alleging a realist state of affairs and the ICTR consistently rejecting realism on the facts of the particular cases. A small dataset appeared under liberalism, with individualism in international law recognised and both criminal law liberalism and HR liberalism used.

Finally, the limited output to date from the ICC can also be considered for consistency. No data appeared in relation to the natural law and positivism codes of self-reflexive statements, just war theory, cosmopolitanism, sources or crimes. A small dataset appeared under NCSL which favoured positivism. A large dataset revolved around interpretation which was consistently positivist (with a hint of ILP). Self-reflexive statements under ethical theories produced no data. Sentencing purposes also revealed a large dataset which favoured utilitarianism. The sentencing purposes at the ICC were not inconsistently privileged as occurred at the ICTY. A small dataset appeared under feminism, which, like the ICTY and ICTR, advanced the protection afforded to women. No intra-curial instances of TWAIL appeared, although the discussion at the end of this conclusion will revisit some of the future philosophical challenges, including the external TWAIL critique, facing the Court. Turning to realism, the ICC revealed a small, negligible dataset. Finally, under liberalism a very small dataset confirmed individual responsibility in international life. The two liberalisms could be identified with arguments on merits reflecting criminal law (through strict positivist versions of NCSL and interpretation) and the sentencing considering communal interest (through utilitarianism) in the vein of HR liberalism.

While the overall trends in the use of philosophy generally and the use of philosophy per selected ICL role-player are thus identified, the query needs to move into the effect the identified trends had on the rule of law. Obviously consistency through trends or, in Fullerian terms, refraining from using contradictory justifications was not the only obstacle to compliance with the rule of law (albeit in this study it was central). The measurement against the rule of law must be understood as an analysis of the outcome-based legitimacy of the ICL pronouncements as well. As argued earlier,³⁴ giving effect to the rule of law ensures that the institution of law complies with the requirement of outcome-based legitimacy.³⁵ The output of the judiciaries, including their judgments (and attendant justificatory arguments on the thesis pursued here), need to be clear and consistent to comply with outcome-based legitimacy.³⁶ The desiderata of the rule of law therefore directly link it to

³⁴ In sections 0.2 and 1.2.3.2.

³⁵ T Treves, 'Aspects of Legitimacy of Decisions of International Courts and Tribunals' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 172.

³⁶ *Ibid.*

considerations of legitimacy as compliance with the rule of law enables the law to fulfil its purposes. Conversely, subjects of a regime will feel discontent if the requirements of law are unclear, contradictory, impossible to comply with or inconsistently applied.³⁷

Comparing the data for compliance with the remaining rule of law principles, it needs reiterating that the manner through which the data is collated will be crucial to the subsequent finding. Different approaches could be pursued depending on different research questions. The argument pursued here compares the data, over all the role-players and relative to the commensurable philosophical categories and the coded instances thereof, against the rule of law standard in order to answer the research question of whether the ICL justificatory regime enhanced outcome-based legitimacy or not. This also means that negligible small datasets, which included the policy-oriented approach, crimes and self-reflexive theories under ethical theories, will be discarded in this evaluation. Such negligible datasets remain important for the identification of philosophical arguments pursued as the first-mentioned point of significance in section 0.2.

The arguments under natural law and positivism, relative to their respective coded appearances, gave effect to the majority of the Fullerian requirements (including rules being created, public, clear, stable, *intra vires* and congruent with their administration³⁸). While the desideratum against retrospectivity was pressured by the early natural law beginnings of NCSL, this might have been unavoidable in a new legal regime wherein the principle itself was not codified until 1998. In addition, initial interpretation favoured expansive teleology. It is suggested that while this did put pressure on the rule of law, the overall aim to focus on the enhanced protection of victims (to invoke one of the branches of liberalism) quickly became apparent in justificatory rationale and ensured that subsequent justifications remained foreseeable and predictable as required by the rule of law.³⁹ In sum, while the different codes under natural law and positivism revealed different degrees of support for either theory, relative to those codes foreseeability and predictability was assured because consistency (ensured through the Fullerian desiderata of non-contradiction and stability of rules) existed relative to those codes (and as indicated in the preceding discussion on trends). The moral autonomy of the legal subject was thus protected as long as he or she was aware broadly of which type of concern their actions might engender.

³⁷ C Murphy, 'Lon Fuller and the Moral Value of the Rule of Law' (2005) 24 *Law and Philosophy* 239, 242.

³⁸ Fuller (n 18) 39-94. See generally Murphy (n 37) 239-247; J Waldron, 'The Rule of International Law' (2006) 30 *Harvard Journal of Law & Public Policy* 17; S Beaulac, 'The Rule of Law in International Law Today' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009) 205-220. See section 1.2.3.2.

³⁹ Hart (n 18) 181; Fuller (n 18) 162; Finnis (n 18) 272.

The first significant concern (on the Fullerian principles of public, clear, non-contradictory rules or justifications⁴⁰) arose in relation to the ethical theories and, more specifically, regarding sentencing purposes. It is true that the respective sizes of the datasets slanted the overall finding in that the much larger ICTY dataset meant that the smaller, yet non-contradictory, datasets of the post-WWII IMTs, ICTR and ICC were assimilated into a larger narrative wherein a particular problem appeared. This is also the result of intentionally looking at the overall philosophical justification here. This problem needs proper delineation as utilitarianism and deontology in sentencing are often compatible because of complementary aims⁴¹ or individualising punishment. Yet, this study found contradictory privileging of deterrence and retribution from time to time without any overarching framework explaining said oscillation. While both may be compatible, both can not be simultaneously most important. The Fullerian desiderata in play were thus the requirements of non-contradiction and clarity. It was suggested that a part of the reason for these opposing arguments might be the opposing views on ICL through either HR liberalism or criminal law liberalism. But absent any explanation, there was a lack of clarity as to the reason for the different views. While this tension undoubtedly pressured the rule of law, one further requirement played out at both post-Cold War Tribunals, namely whether the philosophical justificatory regime was genuinely made public. Both institutions were guilty of frequently referring to sentencing purposes with rich philosophical subtexts yet omitting any reference to such subtexts. The pressure on a Fullerian rule of law standard cannot be denied here. However, with the focus of these matters pertaining to the contours of sentencing, the concern is alleviated somewhat. Foreseeability and predictability of punishment was assured, it was just the delineation of the punishment itself which left something to be desired. Perhaps this is an instance where compliance with the rule of law occurred ‘to a degree’.⁴² Therefore, this is an area of concern which might be identified as in need of greater theoretical clarification.

Regarding the critical approaches, feminism was consistently argued across the coded data and none of the Fullerian desiderata were in contention. The fact was that a protection regime which already existed was merely reiterated because it had been neglected through silence. In the case of the antecedents to TMAIL a small dataset appeared, but its significance remained for the challenge it directed towards institutional legitimacy. As was noted in section 5.4, these critical arguments did not directly engage the Fullerian principles because the matter under contention was not one of

⁴⁰ Fuller (n 18) 49-51, 63-70.

⁴¹ Hart (n 18) 9. See also Snyman (n 21) 22-23; Cryer, Friman, Robinson and Wilmshurst (n 21) 29-30 on the combination theory.

⁴² Fuller (n 18) 42-45, 122-123, 145; J Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 211-222. Finnis (n 18) 276-281 also noted that legal systems and the rule of law exist as a matter of degree.

making law or proposing a justification. Rather the focus here was on those who had created the institution and the prejudice which accompanied decisions like the selection of accused. While the rule of law, in an institutional sense was therefore engaged, this study focused on the rule of law through the law-making model of Fuller. What can be noted, was that the judicial arguments anticipating TWAIL furthered transparency in ICL and its institutions. Both feminism and the antecedents to TWAIL could be construed as ‘thicker’ approaches to the rule of law, directing what the substance of the law should look like.⁴³ At the least, for this study, both arguments under critical approaches should be construed as bolstering the rule of law and, consequently, outcome-based legitimacy.

Finally, the systemic philosophies of realism and liberalism require consideration as they also revealed concerns for the rule of law pursued here. These theories provided the contextual space within which the other arguments were made. Especially liberalism, as was shown in section 6.3, cuts across many other codes. Nonetheless, both need to be measured against the Fullerian requirements as well. Realism was initially opposed, before consistent acceptance followed to describe actual international life. Like the antecedents to TWAIL, the admission of realism aided in the transparency of the ICL regime, whether pertaining to difficulty in obtaining state cooperation or selection of accused. Because many of these matters fell outside the power of the selected role-players to do anything about, the explicit recognition of these factors gave effect to the Fullerian principle of clarity and the requirement of public justifications. Judgments simply did not hide or obscure the fact that, due to the significant role of states in international life, judgments were sometimes shaped by their actions. Such transparency should be viewed as supportive of the Fullerian rule of law. This does not dispute the serious pressures these actions exert on the institutional level, but simply points to the fact that in their justificatory arguments, the selected role-players did what was in their power to do. In three instances, the Fullerian desideratum requiring rules rather than, for e.g., politics to regulate was directly challenged. In two cases, the challenges of bias were rejected but in one it was conceded. However, the judicial body acted decisively and the judge was removed. This was, therefore, an aberration which did not undermine the rule of law. In fact, the prompt response of the judicial bodies suggested the rule of law was enhanced. Outcome-based legitimacy should therefore be strengthened on these arguments.

Turning to liberalism, two points of reference need measurement against the rule of law standard.

⁴³ Beaulac (n 38) 201. See also PP Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) *Public Law* 467.

First, the acceptance of a shift in the international arena away from a state-centric system to one based on individualism and individual responsibility was consistently maintained. No concerns thus occurred under the rule of law. The matter was much more complicated under the second point regarding the internal contradiction identified in ICL liberalism.⁴⁴ It needs clarification at the outset that the contradiction in liberalism, which played out over several of the other codes, did not in itself undermine all other findings on philosophical consistency. Simply, the other findings reveal predictability relative to those specific philosophical categories. Liberalism might even help make sense of some of those inconsistencies (e.g. regarding sentencing purposes). Although liberalism functions on a systemic level, it should also not be overstated. The pull between HR and criminal law, or the rights of the victims and the rights of the accused, is also applicable to domestic criminal law in the modern, rights-based world. Pertaining to the contradiction, these fundamentally opposing views played out over a range of philosophical arguments as coded in this study. Hence, the policy-oriented approach, NCSL, interpretation, sentencing purposes, feminism and antecedents to TWAIL revealed oscillating support for these respective views. The requirement that justifications not be contradictory is central for Fullerian rule of law. The fact of the matter is that two systems of law compete (partly because they were directly used in the historical creation of ICL⁴⁵) without it necessarily being clear which is to be preferred or how the contradictory views are to be regulated. This places significant pressure on the rule of law and, by implication, outcome-based legitimacy. It is suggested that this contradiction requires attention on the part of everyone involved with the ICL endeavour, including the judicial role-players under scrutiny in this study.

In sum, outcome-based legitimacy, based on a formal rule of law favouring foreseeability and predictability, exists for the philosophical arguments pertaining to natural law, positivism, critical approaches and realism. However, the concerns for rule of law, and thus outcome-based legitimacy, revolve around ethical theories and liberalism. The subsequent discussion will venture some suggestions as to how these concerns might be improved upon for consent legitimacy. To reiterate, what was stated in section 1.2.3.2, consent legitimacy is comprised of various factors, including self-interest, which might not be swayed by arguments simply suggesting that following a regime which complies with the rule of law is preferable. If compliance with rule of law is significant, however, then at least this element of the justificatory rationale would add pressure to accept the legitimacy of the regime.

⁴⁴ D Robinson, 'The Two Liberalisms of International Criminal Law' in Carsten Stahn and Larissa van den Herik (eds) *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010) 129-135. See section 6.4.

⁴⁵ *Ibid* 115-117.

It seems that a solution to the inherent tension in ICL liberalism might resolve the contradiction in ethical theories too. Put differently, if the tension is clarified it might provide the overarching framework for ethical theories which is currently lacking. While both HR liberalism and criminal law liberalism might coexist in theory, for the question about compliance with rule of law (i.e. outcome-based legitimacy) leading to improved consent legitimacy, a side might have to be chosen to solve the contradictory regimes in play. This is especially true if the added strain of realism in IR is taken into account.

Consent legitimacy will be shaped differently depending on whether the judicial body in question is 'unsafe' or 'safe', i.e. whether that body might be able to try a state's own nationals or not. HR liberalism tends to be more popular when a judicial body is 'safe', i.e. not directed at one's own nationals. This was evident from the expansive interpretations and less stringent requirements under NCSL at Tokyo and the ICTY.⁴⁶ But with an 'unsafe' judicial body, such as the ICC, consent legitimacy will most likely be furthered by the more conservative approach, i.e. criminal law liberalism. The data bore this notion out too as ICC interpretation was stricter and the codification of a rigid version of NCSL was achieved in the Rome Statute.⁴⁷ In sum, expansive HR liberalism might have been possible at a time when the judicial bodies were 'safe', i.e. post-WWII and the post-Cold War Tribunals, in addition to the rudimentary nature of ICL, but stricter application and safeguards will become important if states are to buy into an 'unsafe' ICL regime.⁴⁸

As long as realist self-interest remains a core part of international life, criminal law liberalism will be preferable. The implications for the coded data include that codes favouring strict construction and the rights of the accused are to be preferred. Yet this becomes problematic where, like with interpretation and NCSL, the basis was expansive natural law and a shift occurred in favour of posited sources established on the earlier expansive basis. This preference for criminal law liberalism would also favour deontology over utilitarianism in sentencing purposes. TWAIL arguments might still be acceptable especially if it ensures that accused are not unequally charged.

These findings necessitate a brief discussion on the ICC, which is positioned as the permanent ICL Court for the future. Of all the judicial bodies considered in this study only the MICT and ICC are

⁴⁶ See sections 3.4, 3.5. See Robinson (n 44) 119; 135-147; AM Danner, 'When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War' (2006) 59 *Vanderbilt Law Review* 22, 33.

⁴⁷ Articles 22, 23.

⁴⁸ F Pocar, 'Criminal Proceedings before the International Criminal Tribunals for the Former Yugoslavia and Rwanda (2006) 5 *Law and Practice of International Courts and Tribunals* 93 argued for criminal law liberalism at the 'safe' ICTY for legitimacy and rule of law purposes.

still active, with the MICT mandated to finish its proceedings soon.⁴⁹ This means that the findings of this study take on added significance for the ICC. As alluded to in section 0.2, the ICC is a phase in the continuous struggle between justice and sovereignty.⁵⁰ Some have suggested that while the ICC ‘seeks to build legitimacy, hence support, by acting transparently and on purely judicial grounds’ it will not escape politics because of the ‘vague boundary between political and legal judgment, and the compulsions of organization behaviour’.⁵¹ Considering that both intra-curial and external philosophical arguments have already appeared before the ICC, this study’s claim that such philosophical narratives matter is confirmed. While the intra-curial philosophical arguments were coded for in this study, a brief overview of some of the current external philosophical pressures will follow. The position of the ICC in the ICL landscape relative to the philosophical justificatory narrative investigated in this study will also be considered. It is hoped this further entrenches the study’s premise about the importance of philosophy for ICL and indicates some of the more immediate future instances wherein it will be invoked.

Four external concerns which have already been raised pertain to feminism, TWAIL, realism and just war. Concern has been expressed that aggression, for example, contains no gender-specific charging elements. Acts of aggression are confined to actions perpetrated between states which undermines the protection of the individual.⁵² Prosecuting aggression may lead to an emphasis on perpetrators in a leadership role rather than direct perpetrators which could weaken the gender-sensitive prosecution regime advocated for by feminists.⁵³ The TWAIL concern, as mentioned in section 0.2, entails that because all the accused before the ICC are from Africa, the Court shows bias towards punishing Africans.⁵⁴ Concerns of realism have been raised in relation to the crime of aggression. The amendments to this crime enable state parties to refer each other to the ICC on account of contravening the prohibition on aggression. Possibly this referral mechanism could render the Court open to self-interested state manipulation. The result would be a politicised and delegitimised Court.⁵⁵ While the aggression provision in the ICC Statute requires states to ratify the new provisions, it has been suggested that the (eventual) prosecution of aggression will possibly demotivate compliance with the rules applicable during armed conflict since states labelled

⁴⁹ Para 17 of S/Res/1966 of 22 December 2010.

⁵⁰ KC Moghalu, *Global Justice The Politics of War Crimes Trials* (Stanford Security Studies 2008) 126, 129.

⁵¹ BN Schiff, *Building the International Criminal Court* (CUP 2008) 9-10.

⁵² B Van Schaak, “‘The Grass that Gets Trampled when Elephants Fight’: Will the Codification of the Crime of Aggression Protect Women?” (2010) 15 *UCLA Journal of International Law & Foreign Affairs* 350-352.

⁵³ *Ibid* 334-335.

⁵⁴ See for example A Cassese, ‘Soliloqui’ in Heikelina Verriijn Stuart and Marlise Simons, *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese: Interviews and Writings* (Amsterdam University Press 2009) 174. See section 0.2.

⁵⁵ Van Schaak (n 52) 327, 335.

‘aggressors’ would see little benefit in complying with the *ius in bello* after having already fallen foul of the *ius ad bellum*.⁵⁶ The judges would have to firmly separate *ad bellum* and *in bello* analyses so that combatants do not perceive bias in relation to how the law is applied to them.⁵⁷

Several challenges thus lie ahead of the ICC. Backing up for a moment, the structure of the ICC relative to the philosophical narrative evaluated in this study needs renewed scrutiny. On the research data, sentencing purposes under ethical theory and the two liberalisms inherent to ICL were identified as the most significant challenges to the rule of law (and, by implication, outcome-based legitimacy) which would impede consent legitimacy in turn as well. The ICC, more than any other judicial body discussed in this study, may have coherent structures in place at least in so far as this study’s argument pertaining to philosophical arguments in ICL are concerned. This discussion purports to only address this particular context. Accordingly, the ICC data already revealed that the same contradiction found at the ICTY regarding sentencing purposes does not exist. In fact, the ICC sentencing purposes showed a direct preference for utilitarian arguments. On the second concern pertaining to the inherent tension in ICL liberalism, the ICC did not deliver direct data. Based on the suggestion earlier, in relation to an ‘unsafe’ judicial body, in the broader context of realism, states will not likely condone an expansive court.⁵⁸ In this regard, the positivism of the ICC in relation to interpretation can be noted as well as the strict understanding of NCSL contained in the ICC Statute.⁵⁹ Yet, an institution dispensing ICL cannot ignore the rights of the victims of atrocities. The judicial body occupies the place of the aggrieved in society. So the same liberalism tension requires attention here. It is suggested that the ICC structure is probably the best solution to this conundrum. Adopting strict, accused-centric rights for the findings on merits should give way to broader victim-centric concerns under sentencing (while, of course, still affording the perpetrator their just deserts). In the process both parts of the ICL liberalism equation can be complied with on a structural level. The philosophical structure of the ICC seems to alleviate much of the general theoretical issues identified earlier. On this alone, it could be argued that consent legitimacy for this institution should be improved.

In conclusion, the thesis closes with a sentiment from Judges Van den Wyngaert and Morrison in the *Bemba* AC which embodies the pervasiveness of philosophy in ICL, stresses the importance of rule of law in international law, shows concern for institutional legitimacy and confirms the position of

⁵⁶ Van Schaak (n 52) 334-335, 367-369.

⁵⁷ Ibid 368.

⁵⁸ GP Fletcher and JD Ohlin, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’ (2005) 3 *JICJ* 540, 561 also advocated a victim-centric Court.

⁵⁹ Articles 22, 23.

this thesis by solving the main philosophical incongruity detected between the two liberalisms of ICL in favour of criminal law liberalism:

‘However, even if Aristotle’s dictum that law should be reason, free from passion, may strike us in the 21st century as somewhat inhuman, it remains true more than two thousand years later that, as humans, we can only hope to establish the rule of law if we discipline ourselves to be guided by rationality and resist the urge to allow emotions to determine judicial decisions’.⁶⁰

⁶⁰ *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/08 A (8 June 2018) Separate Opinion Judge Christine Van den Wyngaert and Judge Howard Morrison para 79.

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