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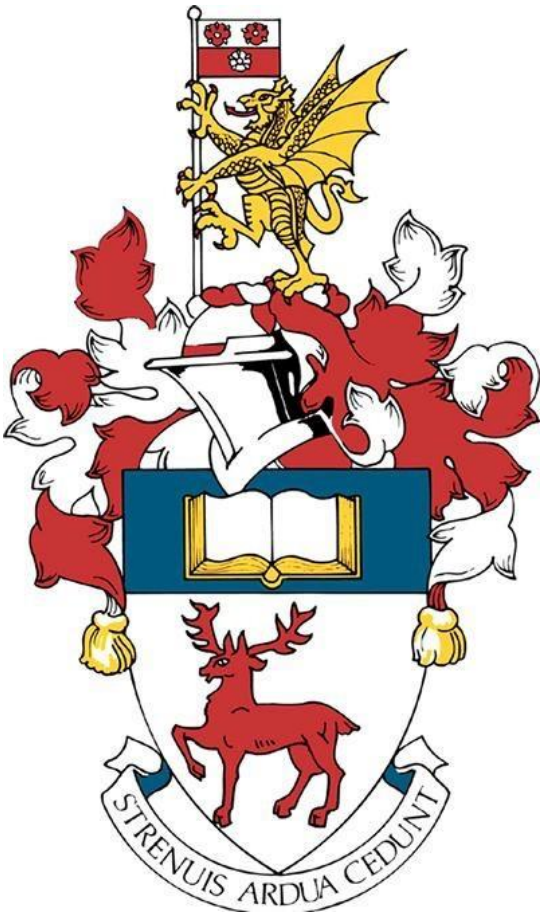

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The Editors also wish to thank all members of Southampton Law School who have aided in the creation of this volume.

Ali Ulvi Sahin and Hwon Lee
Editors-in-chief, Southampton Student Law Review
September 2023

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Foreword

Having been involved in the Southampton Student Law Review from its early beginnings in 2010, I have somehow never before been assigned the task of writing the foreword. With a blank piece of paper before me, I wish first to highlight the important function the Review fulfills in enrichment: our undergraduate and postgraduate taught students aim to publish their best work and learn – by doing it – how to rework it for publication; postgraduate students have the opportunity of a first taste of the editing and editorial board roles, with all the reminders and thankless stress, and the satisfaction at the final product out there in the annals of law, forever. The Law Review is very much a part of the legal education and life at Southampton, just as much as mooting, marshaling, internships, and the requisite long hours in the library.

The contributions in this issue are varied and have no doubt offered a stimulating challenge to this year's editors. The issue quite literally extends from the definition of 'ship' to the definition of the crime of genocide. The many varied definitions of 'ship' in context are reviewed in the first article (*Prarthana Balasubramanian*). A variety of facets of contract law are considered starting with the implications of recent case law on demurrage (*Siyang Zhou*) and moving onto the utility of learning from relational contract theory (*Jamie Bowers*). The gravity-defying contract-making practices in the insurance sector are considered next (*Evgenia Darmani*). The issue concludes with two longer articles, one on deterrence of the crime of aggression in International Criminal Court practice (*Isabella Elliott*) and the aforementioned exploration of the definition of genocide (*Imogen Hughes*). With such a variety of subjects covered, it is appropriate to express my admiration for the editors (*Ulvi Sahin* and *Lee*) and their efforts to complete this, the 13th edition of the Southampton Student Law Review. I hope you will explore it with interest and pleasure.

Southampton, 4 September 2023

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Determining a Comprehensive Test for Defining a Ship

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Abstract

A ship is one of the core elements of the maritime industry. However, the international maritime industry and academia do not agree upon a single, universal definition of this term. International conventions like the UNCLOS are silent about this definition, while others give a very purposive definition incapable of universal application. Similarly, a study of the English jurisprudence related to this definition establishes navigational ability as a *sine-qua-non* for an object's categorization as a ship. Canadian and Australian courts substantially align with English law. However, European jurisdictions like France and Germany emphasize on the ability to float. Characters of a ship cannot be restricted to navigational and floating ability. Through a comparative analysis of English law with these jurisdictions, this paper proposes that 'the elephant test' or layman's perspective maybe the logical way of defining a ship, considering the contradictory opinions and variety of approaches. This test adopts the viewpoint of a gentleman who may not be able to define an elephant or a ship but will recognize them when he comes across one.

Introduction

A word is the skin of a living thought.[1] The dynamic nature of the human mind is prone to new ideas aimed towards increased sophistication in this era of technology and a single word cannot capture this dynamism. However, the regulation of industry demands standardization using representative terms. Thus, the legal academia and courts of admiralty often struggle while deciding whether the subject matter of a case is a ship or not. The line from My Fair Lady, 'Words! Words! Words! I'm so sick of words. I get words all day through, first from him, now from you! Is that all you blighters can do?'[2] is a good illustration of the situation. Indeed, the following discussion on the definition of the term ship would illustrate that the blighters, within the legal field, rely on common sense after being extremely verbose.

International organisations, domestic legislations, jurists, and the academia has endeavoured to discern a common definition of a ship. Organisations like the United Nations and the International Maritime Organisation have adopted several universal conventions and many national jurisdictions have special laws governing ships or vessels. Scholars like Gahlen have given a definition ship based on particular characteristics of maritime trade[3] while others[4] are still arguing about an all-encompassing definition. Though definitions exist in international conventions, national judgments, and scholarly works, they lack a universal character. However, as maritime law endeavours to be internationally uniform to regulate transnational

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[1] *Towne v. Eisner*, 245 US 418, 425 (1918), Justice Oliver Wendell Holmes.

[2] Alan Jay Lerner, *Show Me*, in the musical play, My Fair Lady (1956).

[3] Sarah Fiona Gahlen, 'Ships revisited: a comparative study' (2014) 20 JIML 252, 2.

[4] Richard Shaw, 'What is a ship in maritime law?' (2005) 11 JIML 247; Simon Rainey, 'What is a ship under the 1952 Arrest Convention?' [2013] LMCLQ 50; Sarah Fiona Gahlen, 'Ships revisited: a comparative study' (2014) 20 JIML 252; Gotthard Mark Gauci, Is it a vessel, a ship or a boat, is it just a craft or a mere contrivance? 47 JMLC 479 (2016).

businesses, the lack of a definition for the term ship renders the scope of maritime law diffuse.[5] Moreover, considering that maritime law has developed over a few centuries,[6] this lack of a single definition for something so integral to this industry, is perhaps indicative of the obsolete nature of this endeavour to find a single fit-for-all definition.

This paper begins by searching for a universal definition of a ship under international conventions. It proceeds to analyse some national legislations to search for some common characteristics among these local definitions used for defining a maritime object as a ship. This analysis examines English jurisprudence on this issue in detail and draws a comparison with other jurisdictions. Through this overview, this paper attempts to look for a universal test, if any, for defining a ship, and concludes that this definition is like a fractal[7], whose contour can never be defined.

A. Interpreting International Convention – Search for a universal definition

While conventions like the United Nations Convention on the Law of the Sea[8] constitute one end of the spectrum by being silent about this definition, conventions such as the International Convention on Civil Liability for Bunker Oil Pollution Damage[9] are at the other end as they define a ship to mean any seagoing vessel and seaborne craft, of any type *whatsoever*.[10] To ensure their harmonious construction and in the absence of any indication to the contrary, these conventions are interpreted using the Vienna Convention on the Law of Treaties[11] by looking at the text of the convention, its object, and purpose and interpreting it in good faith.[12]

The UNCLOS is one of the most relevant treaties for the law of the sea and lays down rights and duties reflective of customary international law.[13] However, it does not provide any definition of a ship. Considering its overreaching application and repeated mention of the term, the absence of this definition from UNCLOS is perhaps indicative of a deliberate attempt at defining ships contextually instead searching for a single, universal definition. Similarly, the

[5] Sarah Fiona Gahlen, 'Ships revisited: a comparative study' (2014) 20 JIML 252, 2.
[6] Ibid.
[7] The fractal idea has previously been analogized to legal issues, but in rather different ways than that outlined here. *See* David G Post & Michael B Eisen, 'How Long Is the Coastline of the Law? Thoughts on the Fractal Nature of Legal Systems' (2000) 29 J LEG STUD 545 (describing the fractal quality of legal citation patterns); Alan L Durham, The Fractal Geometry of Invention, (2012) 53 BC L REV 489 (contending that the process of invention has a fractal nature).
[8] United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396 (UNCLOS).
[9] International Convention on Civil Liability for Bunker Oil Pollution Damage, IMO document Leg/CONF.12/DC/1 (adopted 23 March 2001) (BOPC).
[10] BOPC, art 1(1) (emphasis added).
[11] Vienna Convention on the Law of Treaties (adopted 27 January 1980, opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).
[12] VCLT, art 31(1).
[13] Robin R Churchill, 'The 1982 United Nations Convention on the Law of the Sea' in Donald R Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) 24, 37–8.

Brussels Convention on the Arrest of Ships[14] and the Basel Convention[15] regulate the movement of ships without providing any definition of the same. Though the Arrest Convention is silent about this definition, Rainey argues that the terminology of its title indicates certain characteristics which are integral for anything to be considered as a ship under the Arrest Convention. The intended scope of the convention, as demonstrated from its official title, makes it applicable to the arrest of sea-going ships which are registered in a Contracting State.[16] English courts have given an inclusive meaning this term under the Arrest Convention as 'a craft which might not be regarded as "used in navigation" in the conventional sense might none the less be appropriately categorised as a ship.'[17] The basic nature and purpose of the craft when in operation determines whether it is a ship or vessel under the Arrest Convention.[18] This perspective of defining a ship moves away from the usual practice of giving a definition keeping in mind the purpose of the law, which will shortly become evident.

Somewhere in the middle of this spectrum of definitions can be found conventions like the International Convention on Civil Liability for Oil Pollution Damage[19] and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage[20] which define a ship as any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo.[21] Though it begins as an inclusive definition, the requirement for the vessel to be actually carrying oil narrows down its scope. By virtue of its proviso, this definition applies to both oil tankers and combination carriers but excludes oil rigs. While interpreting this definition, the IOPC Fund has focussed on the aspect of carriage of oil by any vessel to or from a port or terminal.[22] However, this interpretation questions the application of CLC and IOPC to vessels used for offshore storage. For instance, this interpretation of the term ship as defined in CLC and IOPC was put to test in the *Slops* incident, wherein a fire on an offshore waste oil reception facility caused damage to the port facilities. The IOPC Fund rejected the claim for the cost of the clean-up operations as the vessel was not a ship under the CLC. However, the Greek Supreme Court granted this claim. It rejected the interpretation given by the IOPC and adopted its own interpretation, finding that it was

[14] International Convention relating to the Arrest of Sea-going Ships (adopted 10 May 1952, entered into force 24 February 1956) 439 UNTS 193 (Arrest Convention).
[15] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted on 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57 (Basel Convention).
[16] Simon Rainey, 'What is a ship under the 1952 Arrest Convention?' [2013] LMCLQ 50, 53 (emphasis added).
[17] *The Von Rocks*, [1998] 2 Lloyd's Rep 198, 208 (citations omitted).
[18] *The Von Rocks*, [1998] 2 Lloyd's Rep 198, 200.
[19] International Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969, entered into force 19 June 1975) 973 UNTS 3, as amended by the Protocol of 1992 (adopted 27 November 1992, entered into force 30 May 1996) 1956 UNTS (CLC).
[20] International Convention on the establishment of an International Fund for Compensation for Oil Pollution Damage (adopted 18 December 1971, entered into force 16 October 1978) 1110 UNTS 57 as amended by the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage (adopted 27 November 1992, entered into force 30 May 1996) 1956 UNTS (IOPC or IOPC Fund).
[21] CLC, art 1(1) (emphasis added).
Ship is defined in the treaties as 'any sea-going vessel and sea-borne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard'.
[22] James Harrison, 'Conflicting Interpretations—The "Slops" Incident and the Application of the International Oil Pollution Liability and Compensation Regime to Offshore Storage and Transfer Operations' [2008] JEL 455-64.

sufficient for the vessel to have the capability of carrying oil in bulk as cargo.[23] Though they adopt a broad interpretation, the need for the presence of oil seems to unnecessarily restrict this definition as it may not be something integral to the objectives of CLC and IOPC. The BOPC was also implemented with a similar purpose of regulating bunker oil pollution. However, the BOPC provides a more inclusive definition, as mentioned above. These conventions provide a definition from the perspective of oil pollution, instead of focussing on the purpose of the craft. Regulations like the International Regulations for Preventing Collisions at Sea[24] use the term vessel instead of ship. 'Vessel includes every description of water craft, including non-displacement craft ..., used or capable of being used as a means of transportation on water.'[25] The terminology of this definition indicates that it is not an exhaustive definition. However, its universal applicability is doubtful as it was enacted to promote safe navigation and necessitates enhanced applicability to most objects moving in water. This wider purpose questions the use of this definition in areas where safe navigation of objects is not an issue.

While COLREGS gives a simplistic definition, the International Convention for the Prevention of Pollution from Ships[26] defines a ship in a specific, yet inclusive way, to mean any type of a vessel operating in the marine environment including hydrofoil boats, air-cushion vehicles, submersibles, floating crafts, and platforms.[27] Similarly, the International Convention for the Safety of Life at Sea[28] is more specific as it defines a cargo ship, passenger ship, and nuclear ship separately.[29] Though these definitions reflect the specific objectives of these conventions, independently they offer little help in defining a ship comprehensively.

B. National Legislations – Search for common characteristics

Considering the pace of technological development, either definitions of a ship under international regimes need an evolutionary interpretation[30] or cases involving maritime inventions need to find recourse under national laws. However, an analysis of a few jurisdictions reflects a similar tendency to define a ship based on specific characteristics.

Under English law, the Merchant Shipping Act 1995[31], the Supreme Court Act 1981[32] and the Harbours Act 1964[33] define a ship exclusively based on its use for navigation. The application

[23] IOPC Fund, Document 92FUND/EXC.34/7, paras 2.6-2.11.
[24] Convention on the International Regulations for Preventing Collisions at Sea (adopted 20 October 1972, entered into force 15 July 1977) 1050 UNTS 16 (COLREGS).
[25] COLREGS, rule 3(a).
[26] Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships (adopted 17 February 1978, entered into force 2 October 1983) 1340 UNTS 61.
[27] Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, art 2(4).
[28] International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184, 1185 UNTS 2.
[29] International Convention for the Safety of Life at Sea, Annex, reg 2.
[30] Simon McKenzie, 'When Is a Ship a Ship? Use by State Armed Forces of Uncrewed Maritime Vehicles and the United Nations Convention on the Law of the Sea' (2020) 21(2) *Melbourne Journal of International Law* 373.
[31] Merchant Shipping Act 1995 (MSA 1995), s 313.
[32] Supreme Court Act 1981, s 24.
[33] Harbours Act 1964, s 57.

of the definition under MSA 1854[34] was first tested in *Ex p Ferguson*[35] where Blackburn J. held that a fishing cobble was a ship under this definition, finding that the term may have a more extensive meaning. He held that every vessel engaged in the business of substantially going to sea, if it is not propelled by oars, shall be considered a ship.[36] However, it has been held that a banana raft going up and down a bay cannot be a sea-going vessel as it is not capable of a long voyage.[37] Moving away from the aspect of the vessel's sea-going ability, in *the Andalusian,*[38] the English court analysed whether a pre-launch vessel could be included under the definition of a ship under MSA 1854. The vessel did not have engines, boilers, and other portions of her machinery on board, and thus was not registered. The court Sir Robert Phillimore was 'disposed to consider that a ship of this character, in the imperfect state of a launch, might be included under this provision',[39] but the lack of registration of this vessel precluded it from the limitation of liability provisions under MSA 1854 as its tonnage could not be calculated. Subsequently, in *the St. Machar,* a newly launched vessel was considered as a ship used for navigation under the MSA 1854,[40] thereby indicating that the stage of the launch of the vessel is not a determining factor for defining it as a ship.

Focussing on the navigational aspects of the definition under MSA 1854, the English court awarded salvage for a hopper-barge in *the Mac.*[41] The judges considered the indirect use of the hopper-barge in navigation[42] and the adverse consequences of not recognising it as a ship,[43] thereby rejecting salvage award. However, subsequently, *Southport v Morris*[44] interpreted the term navigation restrictively as it held that a vessel moving in an artificial lake could not be a ship. It was essential for the vessel to be engaged in navigation, a term which in common parlance could not be used in connection with an artificial lake.[45] This case was distinguished in *Weeks v Ross*[46] where the navigation was linked to the sea-going ability to consider a motor boat as a ship as it sailed in canal linked to the sea.[47] Both these cases were discussed in *Curtis v Wild* where it was held that a sailing dinghy used in a reservoir for pleasure could not be a ship under MSA 1854.[48] Further, Lord Herschell in *the Gas Float Whitton No. 2,*[49] defined a ship as something 'constructed for the purpose of being navigated',[50] that is, having the ability to navigate itself. It was not enough that the object in question could be used for purposes

[34] To present a comprehensive analysis, several English cases discussed in this paper are based on the definition of a ship under the Merchant Shipping Act 1854 (MSA 1854) and Merchant Shipping Act 1894 (MSA 1894). However, these definitions have been substantially retained in the latest MSA 1995.
[35] *Ex p Ferguson* (1871) 6 LR 280 (QB).
[36] *Ex p Ferguson* (1871) 6 LR 280, 291 (QB) (emphasis added).
[37] *McEwan v Bingham* [2000] 7 WLUK 864.
[38] *The Andalusian* (1878) 3 LR 182 (PD).
[39] *The Andalusian* (1878) 3 LR 182, 189 (PD).
[40] *The St Machar* (1939) 65 Lloyd's Rep 119, 125.
[41] *The Mac* [1882] 7 PD 126.
[42] *The Mac* [1882] 7 PD 126, 130 (emphasis added).
[43] *The Mac* [1882] 7 PD 126, 128.
[44] *Southport v Morris* [1893] 1 QB 359.
[45] *Southport v Morris* [1893] 1 QB 359 (emphasis added).
[46] *Weeks v Ross* [1913] 2 KB 229.
[47] *Weeks v Ross* [1913] 2 KB 229, 233.
[48] *Curtis v Wild* [1991] 4 All ER 172.
[49] *The Gas Float Whitton No 2* [1897] AC 337.
[50] *The Gas Float Whitton No 2* [1897] AC 337, 343 (emphasis added).

connected with navigation. Thus, navigation arises as the standard for being a ship in English jurisprudence. The meaning of navigation itself has been restricted from an object's indirect use for navigation to its ability to navigate itself. Moreover, a common thread in these contradictory decisions by the English courts appears to be that the court implicitly examined the vessel from a layman's perspective, given the special circumstances of each case.

The English courts shifted their perspective in *Polpen Shipping Company v Commercial Union Assurance Company,*[51] to define a ship based on the intention of the parties arising from the insurance policy. Atkinson J. attempted to define a ship and held that,

> 'I think a ship or vessel does involve two ideas, and if I had to define them I should say a vessel was any hollow structure intended to be used in navigation, that is, intended to do its real work upon the seas or other waters, and which is capable of free and ordered movement from one place to another.'[52]

This definition re-iterates the wider interpretation of navigation previously discussed in *the Mac.* However, it questions the inclusion of vessels like jet skis within the ambit of this definition.

Having linked navigational ability as an integral part of being a ship, the court gave a nuanced definition of the term navigation in *Steedman v Scofield*. 'Navigation is the nautical art or science of conducting a ship from one place to another. ... "[U]sed in navigation" conveys the concept of transporting persons or property by water to an intended destination.'[53] Here, navigation was no longer restricted to a vessel's working on water. Rather, it was linked to the ability of conducting passengers or cargo from one place to another. Thus, a jet ski was not a ship as it was not used for the purpose of going from one place to another.[54] However, a jet qualifies as a ship under the definition given by Atkinson J. as a jet ski can move on water and it is capable of free and ordered movement from one place to another, even though it is not actually used for transporting people from one place to another. Moreover, this can be contrasted with American jurisdiction where a jet ski has been recognised as a vessel.[55]

The Von Rocks[56] presented an opportunity for English Courts to move away from the narrow approach of defining a ship. Neither navigation nor the carriage of cargo or passengers were decisive considerations for an object to be a ship as long as they were built to do 'something on water'.[57] Alternatively, so long as navigation was a significant part of the function of the structure, the mere fact that it was incidental to another function did not take the structure outside the definition of a ship.[58] Though the court focussed on navigation (perhaps constrained

[51] *Polpen Shipping Company Ltd v Commercial Union Assurance Company Ltd* [1942] 74 Lloyd's Rep 157 (Polpen Shipping).
[52] *Polpen Shipping Company Ltd v Commercial Union Assurance Company Ltd* [1942] 74 Lloyd's Rep 157, 160, 161.
[53] *Steedman v Scofield* [1992] 2 Lloyd's Rep 163, 166; *R v Goodwin* [2006] 2 All ER 519.
[54] *Steedman v Scofield* [1992] 2 Lloyd's Rep 163; See also *R v Goodwin*, [2006] 1 Lloyd's Rep 432.
[55] Keys Jet Ski, Inc. v. Kaye, 893 F. 2d. 1225 (11th Cir. 1990).
[56] *The Von Rocks*, [1998] 2 Lloyd's Rep 198.
[57] *The Von Rocks*, [1998] 2 Lloyd's Rep 198, 207.
[58] *Perks v Clarks* [2001] 2 Lloyd's Rep 431, 439.

by the statutory definition), they recognised that the determination of whether a maritime structure was a ship or not was a factual enquiry,[59] hinting towards the contextual nature of this definition.

Like English Law, jurisdictions such as Canada[60] and Australia[61] also define a ship based on its use in navigation. In *Cyber Sea Technologies,*[62] Canadian courts held that a submersible is a ship as it navigates through water, under its own power. In *Guardian Offshore,*[63] a Remotely Operated Vehicle could not be a ship due to its limited ability to navigate, among other reasons.[64] However, based on an analysis of most of the cases discussed above, the Australian court recognised that 'the decided cases eschew any attempt at a comprehensive definition of characteristics of a vessel used in navigation by water. They reveal that the terminology is not confined to vessels that are used to transport cargo or passengers.'[65]

Moving away from navigation, Germany defines a ship as every vehicle of more than insignificant size, capable of floating and provided with a hollow, the purpose of which is to be moved on water.[66] The loi du 5 juillet 1983 in France defines "ships" as all vessels whatsoever, including floating devices.[67] Dutch law defines a ship as all things, not being an aircraft, that are intended for floating.[68]

Neither navigation, the ability to transport cargo or passengers, nor floating can individually provide a universal, all-encompassing definition of the term ship, necessary for the transnational field of maritime law.[69] In addition to the variety of definitions, another possible commonality emerging from these multitude of cases is the extremely factual nature of this definition, which is supported by the characterisation of this issue as an issue of fact by the English courts.

Conclusion

An analysis of the several maritime international conventions reflects the confusion regarding the definition of the term 'ship'. The wide spectrum of definitions found in these conventions is indicative of the purposive approach adopted in defining this term within the maritime industry. As mentioned above, a lack of definition for this term within the UNCLOS also supports this conclusion. Further, inclusiveness is infused with the purposive definition only when it serves the overarching purpose of the convention. For instance, the inclusive definition

[59] *Perks v Clarks* [2001] 2 Lloyd's Rep 431, 437.
[60] *Federal Courts Act*, RSC 1985, c F.7, s 2(1).
[61] *Admiralty Act 1988* s 3(1).
[62] *Cyber Sea Technologies, Inc v Underwater Harvester Remotely Operated Vehicle*, 2002 FCJ No 1061.
[63] *Guardian Offshore AU Pty Ltd v Saab Seaeye Leopard 1702 Remotely Operated Vehicle lately on board the ship "Offshore Guardian"* [2021] 1 Lloyd's Rep 201.
[64] *Guardian Offshore AU Pty Ltd v Saab Seaeye Leopard 1702 Remotely Operated Vehicle lately on board the ship "Offshore Guardian"* [2021] 1 Lloyd's Rep 201, 212.
[65] *Guardian Offshore AU Pty Ltd v Saab Seaeye Leopard 1702 Remotely Operated Vehicle lately on board the ship "Offshore Guardian"* [2021] 1 Lloyd's Rep 201, 211.
[66] Bundesgerichtshof *I ZR 84/51* (1951) [1952] *Neue Juristische Wochenschrift* 1135 (emphasis added).
[67] Sarah Fiona Gahlen, 'Ships revisited: a comparative study' (2014) 20 JIML 252, 255.
[68] Dutch Civil Code 1991, art 8.1.
[69] Sarah Fiona Gahlen, 'Ships revisited: a comparative study' (2014) 20 JIML 252, 252-53, 269.

given under COLREGS as compared to the restrictive definition under IOPC and CLC. This selective application of inclusiveness to the definition questions the utility of definitions found in any one convention to a general factual scenario such as to influence the jurisprudence on this issue within states. Due to these limitations of existing definitions of a ship within international maritime law, the purpose approach has influenced national interpretations of this term. An overview of the English cases confirms this wherein the courts began with a broad definition but narrowed it to the navigational purpose of a ship. This English jurisprudence influenced Canada and Australia. However, other European countries like Germany focus on the floating ability of a ship.

Considering recent maritime innovations, it is argued that the term ship cannot be defined purposively. The analysis of this definition is increasingly shifting from an issue of law to a factual issue. In the absence of objective criterion, it is better to categorise vessels as ships from the perspective of whether a reasonable observer, looking at a craft, would practically designate it for carrying people or things over water.[70] One might take the position similar to a 'gentleman who dealt with the elephant by saying that he could not define an elephant, but he knew what it was when he saw one.'[71] In view of the contradictory opinions, maritime law specialists should realise that the adoption of this subjective test, that is, the elephant test, maybe the only way for providing a universal standard for defining the term ship. The dynamism of technological development in the marine industry cannot be captured by laying down a single objective definition.

[70] Lozman v. City Riveria Beach, 138 S. Ct. 1945 (2018).
[71] *Merchants Marine Insurance Company Ltd v North of England Protection & Indemnity Association* [1926] 26 Lloyd's Rep 201, 203.

An analysis of the one breach, two kinds of loss scenario in terms of the demurrage

Siyang Zhou

Abstract

Demurrage is liquidated damage stipulated in the voyage charterparty for compensating the shipowner if the charterer failed to complete cargo operation within the laytime. However, when the charterer's failing to load or discharge in time causes loss other than the detention, what damages demurrage can compensate is in dispute. In the case *Eternal Bliss,* [72] Andrew Baker J, the High Court judge, refused to follow the long-standing case *The Bonde,* [73] holding that Potter J (judge in *The Bonde*)'s understanding of the case *Suisse Atlantique*[74] is wrong. He concluded that demurrage only covers the loss of the detention of the ship after the analysis of former case law. However, the Court of Appeal's approach is in different prospect, mainly focusing on maintaining commercial certainty. Both approaches have their own strong reasons, and this article will analyse both points of view by adopting a critical approach.

Introduction

In *Navico AG V rontados Naftiki Etairia PE,* [75] Lord Donaldson J illustrated the nature of demurrage clause in detail:

> 'They are contracts for the carriage of goods in consideration for the payment of freight. The freight covers the passage between the loading and discharging ports and an agreed conventional period of time for loading and discharging the cargo (the 'laytime') … Almost all charter-parties go on to make provision for adjustment in the payment due from or to the charterers according to whether the processes of loading and discharging take more or less than the laytime. All the overhead and a large proportion of the running costs of a ship are incurred even if the ship is in port. Accordingly, the shipowner faces serious losses if the processes take longer than he had bargained for and the earning of freight on the ship's next engagement is postponed. By way of agreed compensation for these losses, the charterer usually contracts to make further payments, called demurrage, at a daily rate in respect of detention beyond the laytime.'

This is a clear definition of demurrage, illustrating the commercial bargain contained in the voyage charterparty. However, in practice, what loss demurrage clause compensates for is complex. For example, in one scenario, the charterer may breach the obligation to load and discharge in time and the obligation to load full cargo, but the only loss is the detention of the ship. In another scenario, the charterer's mere breach of the cargo operation obligation may lead to the shipowner's detention of the ship and the cargo deterioration. To make the presumption more logical, it is important to categorize the position by asking whether there is

[72] [2020] 2 Lloyd's Rep. 419
[73] [1991] 1 Lloyd's Rep. 136
[74] [1966] 1 Lloyd's Rep. 529
[75] [1968] 1 Lloyd's Rep. 379, 383

a separate breach or whether there is a separate loss. [76] Given the two propositions, there are logically four possible positions[77] (shown directly in the grid below) worth discussing regarding the general topic 'what damages demurrage liquidates' and this article will mainly focus on 'one breach, two loss scenario'.

1. The scope of this article

Things to be discussed in this article	Loss for the detention of the ship	Other loss
Fail to load or discharge in laytime	☑	☑
Other breaches		

As from what is shown in the grid, the article will mainly focus on discussing the scenario that the mere charterer's breach of his obligation to load and discharge cargo in laytime leads not only to the shipowner's loss for the detention of the ship, but also other types of loss which in nature totally different from the detention. In other words, whether the shipowner is entitled to additional indemnity other than the demurrage when there is a "one breach, two kinds of loss scenario". To make the concept of "one breach, two loss" scenario clearer and more definite, several cases which might cause misunderstanding will be discussed first.

1.1 *Inverkip Steamship Co v Bunge & Co*[78] and *Chandris v Isbrandtsen-Moller*[79] *Cases*

In the *Inverkip Steamship* case and *Chandris* case, the charterers, in addition to failing to load and discharge the cargo in laytime, also have separate breaches as failing to provide cargo and shipping dangerous goods. However, the shipowner's indemnity was limited in the scope of demurrage as the only loss suffered by him was the detention of the ship. As mentioned before, we are focusing on `one breach, two kinds of loss scenario so the 'two breach, one loss' scenario is not the focus of this article.

1.2 *Reidar v Arcos Ltd*[80] Case

Reidar v Arcos Ltd case is a case which arose so much chaos and conflicts in reading. The failure of the charterer's loading in laytime caused the capacity of loading changing from summer to winter season, which, as a result, arose the question of dead freight. In deciding the case, 3 judgements read as if they had been delivered *ex tempore*.[81] Bankes LJ refused to recognize the separate breach of the charterer's obligation to load a full and complete cargo

[76] Robert Gay 'Damages in addition to demurrage' [2004] LMCLQ 72, 74
[77] ibid.
[78] [1917] 2 K.B. 193
[79] [1951] 1 K.B. 240
[80] [1926] 25 Ll.L. Rep. 513
[81] [1965] 1 Lloyd's Rep. 533, 541

while Sargant LJ had the reverse view. The third judge Atkin J's word is so ambiguous that the leading experts have two ways of interpretation.[82]Also, the court of appeal held that 'It is better to recognise that fact than to continue to search for a clarity which does not exist'.[83] So in this article, the argument regarding what Atkin actually said will be set aside.

2. The present case in discussion: *The Eternal Bliss*[84]

In *The Eternal Bliss*,[85] the charter's failure to discharge in laytime has unfortunately caused the deterioration of the goods. The shipowner, who was entitled to the demurrage stipulated in the contract, found it not enough for compensating their loss when facing the cargo claims raised by the cargo owner. The shipowner thus sued for additional indemnity from the charterer to recourse their extra expenditure arose from the cargo damage. Lord Andrew Baker J, when facing this case, was trying his best endeavour to set the law in 'one breach(the charterer's falling to discharge in laytime, two kinds of loss(loss for detention of the ship and the liability of the cargo damage)scenario.

2.1 *The Bonde*[86] and *Suisse Atlantique*[87], where the conflicts arose

After stating that 'it was, in turn, a by-product of the delay to the ship does not stop the cargo damage (or liability in respect of it) from being a different kind of loss',[88] Lord Andrew Baker J briefly distinguished the different nature of the cargo liability and the loss for detention of the ship, thus recognized two types of loss, which did not arise conflicts when the case came to the court of appeal. As aforementioned, the conclusion of the court of appeal and the High Court in this case was totally different, with Court of Appeal standing with the exclusive effect of the demurrage clause while the high court being in favour of the additional compensation for the shipowner when the mere breach of the charterer is failing to discharge in laytime. The main ground for their conclusion lay in their different understanding of Potter J's judgement in The *Bonde*. [89] In this case, the buyer sued for additional damage for the seller's mere breach of the obligation to load in laytime, which not only triggered the demurrage term but also caused buyer's additional fees in sale contract. Potter J on page 142 stated that, in such a 'one breach, two types of loss' scenario, the establishment of an additional breach is needed for the shipowner to claim compensation other than demurrage stipulated.[90] That is to say, if *The Bonde* is thought of as a binding case with good reasoning, what Lord Andrew Baker J to do is simply follow the precedent case and rejected the shipowner's additional indemnity in the present case. However, in *dicta*, the reason for Lord Andrew Baker J's rejection to follow *The Bonde*, is that Potter J, when judging *The Bonde*, besides wrongfully using his personal

[82] David Foxton and others, *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2021) 583
[83] [2022] 1 Lloyd's Rep. 12 [30]
[84] [2020] 2 Lloyd's Rep. 419
[85] ibid.
[86] [1991] 1 Lloyd's Rep. 136
[87] [1966] 1 Lloyd's Rep. 529
[88] [2020] 2 Lloyd's Rep. 419 [41]
[89] [1991] 1 Lloyd's Rep. 136
[90] Ibid 142

understanding of the Atkin J's judgement (which is thought of as ambiguous and the judgement is better to be set aside), has a misreading[91] of *Suisse Atlantique*, a case decided by House of Lords. Therefore, it is important to see what the judges said in the case. On page 549 of this case, when discussing the *Aktieselskabet Reidar v. Arcos*, Lord Hodson's original word was that 'there was a breach separate from although arising from the same circumstances as the delay, and it was in these circumstances that damages were awarded.'[92]

Also, in page 555 of the case, Lord Upjohn's original word[93] towards *Reidar v. Arcos* was that:

> 'In the view of Mr. Justice Greer at first instance and the majority of the Court of Appeal there were in that case breaches of two quite independent obligations; one was demurrage for detention (as here) the other was a failure to load a full and complete cargo.'

As was stated by Potter J in *The Bonde*, the words of the judges aforementioned 'were of a similar view'[94] that a separate obligation is needed for the shipowner to sue for additional damage when in the 'one breach' scenario, while Lord Andrew Baker J held in the present case *The Eternal Bliss*[95]:

> 'What was said about the nature of demurrage and what it covers does not amount to any conclusion, even obiter, that a separate and different breach of contract is required before unliquidated damages may be recovered for loss additional to and different in kind than the loss of the use of the ship for earning freight.'

Now it is comparatively clear to see why Lord Andrew Baker J refused to follow *The Bonde*. The ground and reason for his rejection mainly resulted from his different understanding of the literal meaning of the speeches of the House of Lords. The Court of Appeal, however, instead of discussing about whose understanding was to be recognized as the authority, ingeniously found a new perpestive to solve this discrepancy.

2.2 Court of Appeal: law serves the commerce

Instead of further analysing the reasons Potter J gave for judgement in *The Bonde*, the Court of Appeal chose to affirm the effect of *The Bonde* in the perspective of its outcome and certainty. Males LJ, in his judgement, stated that *The Bonde* had not caused dissatisfaction from the market since 1991.[96] And in *The Luxmar*,[97] Longmore LJ held that demurrage can not only compensate the loss for detention of the ship, but also the general damages to the shipowner. Appreciation from both the market and the judicial field rendered *The Bonde* as a successful judgement, which meant that departing from it might arose unnecessary chaos (the

[91] [2020] 2 Lloyd's Rep. 419, 442
[92] [1966] 1 Lloyd's Rep. 529, 549
[93] [1966] 1 Lloyd's Rep. 529, 555
[94] [1991] 1 Lloyd's Rep. 136, 141
[95] [2020] 2 Lloyd's Rep. 419, 435
[96] [2022] 1 Lloyd's Rep. 12 [56]
[97] [2007] 2 Lloyd's Rep. 542 [22]

dispute about whether a loss is of the same kind as the one for the detention of the ship).

As to the nature of the demurrage, the Court of Appeal admitted that Lord Andrew Baker J's statement that demurrage is the compensation for the shipowner's loss flowing from the detention of the ship is true.[98] But the judge further stated that although demurrage in most cases was used for compensation to the shipowner for his detention of the ship, it was, however, not all what demurrage could do.[99] He went on to say that unlike the freight rate which always flows up and down, the demurrage rate is always fixed, and it is negotiated by both parties with all factors bearing in mind, not just the freight rate.[100] So letting the case law give the demurrage clause an exclusive effect and then letting parties to agree with extra provision made by their own is the approach which contributes to legal certainty, according to Court of Appeal's opinion[101].

2.3. Practitioner's view: in chronological order

After the judgement of *The Bonde*, Robert Gay, a professional arbitrator for maritime contracts, published his article 'Damages in addition to demurrage'. After a detailed analysis of the reasons stated by Potter J, he found that what Potter J had done was just establishing that there surely existed a separate breach in *Reidar v Arcos* case. [102] However, how the 'existence' of a separate breach was transformed to the 'requirement' of a separate breach is unclear. Robert Gay suggested that Potter J's conclusion is not supported by his reasoning[103] and the judgement is not a persuasive one to be followed. [104] This article later strongly influenced Andrew Baker J's judgement in the Eternal Bliss, [105] in which he made a bold departure from *The Bonde* and held that demurrage can only compensate the loss flowing from the detention of the ship.

Andrew Baker J's view is also supported by the famous practitioner's book 'Scrutton on Charterparties and Bills of Lading'. It is found that Scrutton's view favoured the shipowner in the scenario for nearly 40 years, from 1931~1974. [106] And since 1996, the shipowner has received even more favourable. [107] In its latest version, it is adopted that the better interpretation of Raidar v Arcos is that other losses can be recovered in addition to demurrage without the need to establish a separate breach. [108] Besides the Scrutton's support, the book 'Laytime and Demurrage' also agree with the judgement given by Andrew Baker J, stating that the outcome of the High Court judgement is commercially favoured. [109] However, this practitioner's book did not give detailed reasons why Andrew Baker J's opinion is more commercially favoured.

[98] [2022] 1 Lloyd's Rep. 12 [54]
[99] ibid.
[100] ibid.
[101] [2022] 1 Lloyd's Rep. 12 [53]
[102] Robert Gay, 'Damages in addition to demurrage' [2004] LMCLQ 72, 88
[103] ibid 83
[104] ibid 86
[105] [2020] 2 Lloyd's Rep. 419 [3]
[106] ibid [96]
[107] ibid [102]
[108] David Foxton and others, *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2021) 584
[109] John Schofield MA, *Laytime and Demurrage* (8th edn, Informa Law from Routledge 2021) 462

Then follows the Court of Appeal's overruling judgement. Court of Appeal listed reasons strengthening the importance of recognizing the commercial certainty and insurance arrangements.[110] The book 'Voyage Charter' strongly supports the Court of Appeal's conclusion. It is stated that the commercial certainty approach is to be commended and is a persuasive one. [111] It also worth to be noted that in its previous edition, The Bonde is favoured and the High Court and Court of Appeal's judgement in Suisse Atlantique is highlighted as the authority for the opinion that a separate breach is needed for the shipowner to gain extra compensation[112].

However, there are academic commentators who expressed their different opinion on Court of Appeal's judgement. Edwin Peel, a professor in Oxford university, when facing the Court of Appeal's reason regarding the commercial certainty, pointed out that uncertainty would resurface[113] if the court gives the exclusive meaning first and then let the parties make their own provision, as it is still needed to construe the meaning of the certain provision. [114] It is also stated by another commentator that the Court of Appeal had not adopt a meaning which reasonable person will understand by giving the demurrage clause an exclusive effect. [115]

Conclusion

In a nutshell, the Court of Appeal and the High Court took different approaches in analysing the same question. The High Court focused more on the former case law, discussing the legal nature of demurrage clause and giving detailed reason for departing from the former case law, while the Court of Appeal solved the question as a matter of principle, laying more emphasis on reaching the commercial certainty in shipping practice instead of finding what the former case law had actually said. The two different approaches adopted by the courts both won their own supporters in academic area, with authority textbooks choosing different side to stand and academic commentators forming different opinion regarding the same approach. It can be seen that both arguments worth in-depth discussion and the dispute regarding the 'one breach, two loss' scenario might never stop.

[110] [2022] 1 Lloyd's Rep. 12 [55], [56]
[111] Timothy Young KC and others, Voyage Charters (5th edn, Informa Law from Routledge 2022) 508
[112] Julian Cooke and others, Voyage Charters (4th edn, Informa Law from Routledge 2014) 450
[113] Edwin Peel, 'The scope of a demurrage clause' [2022] L.Q.R. 348, 351
[114] ibid.
[115] Jonas Atmaz Al-Sibaie and Justin Jun Xiang Tan, 'Demurrage and the meaning of words' [2022] LMCLQ 216, 219

Long-term Property Relationships: Evaluating the utility of learning from Relational Contract Theory

Jamie Bowers

Introduction

This essay seeks to answer three questions. Is traditional property theory adequate for understanding all types of property relationships? For what type of property relationship is it not sufficient to understand? And can Relational Contract Theory be beneficial in enhancing our understanding for this type of property relationship? It will be concluded that an understanding of Relational Contract Theory can help us to improve upon the limitations of the Bundle of Sticks Model to aid in the understanding of long-term relationships in property.

1. The Bundle of Sticks Model

Hohfeld's account of property as an aggregate of rights and duties, which became the now well-known 'bundle of sticks' model, was considered all there was to know about property for much of the twentieth century.[116] Here we will show that it is not sufficient for understanding long-term relationships in property. That is not to say that one should ignore the bundle theory, but rather that one should understand its limitations and improve upon it by viewing it through the lens of a relational model.

The bundle theory views aggregate rights as individual sticks, having no substantive connection to one another. The extent to which they are each connected is thought to be incidental rather than intrinsic. This approach is too formalistic in that it fails to acknowledge that for those in lived property relationships, the rights that any two stakeholders have in a property are essentially fluid. They may change informally, and burdens and rights will be transferred between stakeholders without considering their original agreement. Cohabitation is a perfect example of this, as, even while only one partner may hold legal title, both partners will share the burden of maintaining the property in a joint enterprise. Neither partner has so rigid an aggregate of rights that they would enforce upon the other that they could be said to have their one individual 'bundle of sticks'. The rights of these stakeholders are inherently interlinked, in a way the bundle model is not able to show.

Critics of this argument may posit that the Bundle model is a relational step away from the absolutist Blackstonian conception of property. Blackstone saw property as the "sole and despotic dominion which one man claims over all external things"[117]. In contrast to this, Hohfeld's account of property rights is highly flexible. Rather than an absolute notion of property rights, Hohfeld presents a model of property rights that is not fixed, but instead is liable to change to accommodate new rights as society changes. Should Parliament grant leaseholders a new right against eviction, for instance, they could add this new right to their

[116] A MacLeod, 'Bridging the Gaps in Property Theory' [2014] 77(6) MLR 1009, 1011
[117] W Blackstone, *Commentaries on the Laws of England Volume II* (Clarendon Press, 1765) 2

pre-existing 'bundle' of rights. This allows for a more nuanced understanding of the precise rights of different stakeholders in property than under the Blackstonian school of thought. It still, however, supposes that each stakeholder has some aggregation of rights rigid enough to be called their own bundle. Over extended periods of time, the legal rights making up a bundle may differ increasingly from the rights any stakeholder believes themselves to have. For example, a landlord may informally allow renovations or a leaseholder may informally pay rent late in certain circumstances. These norms become more relevant in understanding their day-to-day interactions than the strict legal rights outlined in the initial contract.

Penner argues that the bundle model is inadequate in another respect.[118] Property subsists in a particular piece of physical land that is in itself indivisible. By dividing property up into the sticks of the bundle, the model, in his view, disguises that indivisibility.[119] Though the model allows us to see the fragmentation of rights within the property, that vision denies, or at least sidelines, the physicality of the underlying land itself. But this physicality is the context in which lived relationships form and develop. So in ignoring it, the bundle model cannot be satisfactory.

Glackin, however, defends the bundle model.[120] He argues that those who criticise the theory are misinterpreting it. As critics of the theory, we must test his argument. His position is that critics tend to underestimate the sheer number, and miniscule scope, of each of the rights composing a bundle. Each of the sticks, he claims, is decomposable into separate spatial and temporal parts indicating the limited durations for which an interest can be conveyed.[121]

Penner's suspicions of the model stem share this view that the rights are so numerous and so indeterminate that the 'bundle of sticks' analogy breaks down[122]. But Glackin disagrees and indeed suggests taking the analogy further, by seeing individual rights not as *sticks*, but *atoms*.[123] This image defuses some criticisms of the model: if some of the individual rights are lost, the bundle can still be envisaged as a definitive physical, and whole, 'thing'. However, Glackin does not deal with a central shortcoming of the model: it does not reflect how the rights of stakeholders in the land are interlinked. Furthermore, whilst he acknowledges that rights in the bundle have a duration, he acknowledges only a limited duration[124]: lived property relationships, however, are characterised by their open-ended, enduring nature[125]. It is in that open-ended temporal context that stakeholders' relationships evolve. A theoretical model that cannot account for this evolution is unsatisfactory (by itself) for understanding dynamic relationships.

In summary, for long-term relationships in the land, the bundle model is frozen in time;

[118] J Penner, *The Idea of Property in Law* (OUP, 1997) 1
[119] ibid., 2
[120] S Glackin, 'Back to Bundles, Deflating Property Rights, Again' [2014] 20(1) Legal Theory 1
[121] ibid., 24
[122] ibid., 17, 24 and J Penner, 'The "Bundle of Rights" Picture of Property' [1996] 43 UCLA L Rev 711-720
[123] See (5) 9
[124] ibid., 24
[125] S Blandy, S Bright and S Nield, 'The Dynamics of Enduring Property Relationships in Land' [2018] 81(1) MLR 86

lacking an appreciation of how the temporal element affects the rights and duties of stakeholders in land, and for that reason is not suitable, by itself, for understanding long-term and dynamic relationships in property. We can therefore begin to see that a new model, that seeks to explain the relationships between stakeholders - as it is these relationships changing over time that makes the temporal element a necessary inclusion - is needed to modify the existing Bundle of Sticks. Relational Contract Theory (RCT) has not become mainstream in property theory. It will be argued that it is RCT that is needed to help inform the classic bundle model so that it may be usefully applied to lived relationships in property.

2. Lived Relationships of Property

Lived relationships in property are best understood as relationships between stakeholders in land that have a temporal element. The nature of these relationships may be repeatedly shaped, and reshaped, over time. There is no natural expiry date, as there is in the relationship between the buyer and seller of freehold land for instance; as in that scenario once a contract has been signed, there is only the execution of obligations and then 'the deal is done'. Rather, the relationship between joint purchasers of property is an example of a lived relationship, as when the joint enterprise commenced the rights and responsibilities they each assumed aligned neatly with the rights and responsibilities they had each agreed to when contracting. However, through norms developed by the parties' interactions with one another, combined with their informal understandings that develop as time progresses, the responsibilities and rights they each believe they have will have changed. It is this sort of dynamic and enduring relationship that is meant by a *lived* relationship.[126]

To use a phrase coined in the discussions about Relational Contract Theory, we are looking at marriages, not one-night stands.[127] It is for this type of long-term property relationship where it can be seen that the Bundle of Sticks Model has come up short.

3. Relational Contract Theory

MacNeil presented a theory to help understand enduring contractual relationships.[128] To understand Relational Contract Theory (RCT) we must envisage two types of agreements. The first type is a wholly discrete transaction whereby the parties meet, exchange goods or services for consideration, and then go their separate ways. This type of agreement lacks any element of futurity. The other type of agreement is a relational contract. These are less discrete because they are designed to exist for a longer period of time, and so they are accompanied by an integration of the contracting parties' business models through a course of dealings. RCT helps us to understand the true nature of the parties duties towards one another in the second type of contract. It does this through viewing the initial contract as only one source of obligation, which is augmented by norms coming from the social and economic

[126] ibid.
[127] R Gordon, 'Macaulay, MacNeil and the Discovery of Solidarity and Power in Contract Law' [1985] Wis L Rev 565, 569
[128] I Macneil, 'Contracts Adjustments of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law' [1978] 72 Northwestern University Law Review 854

context in which the parties do business.[129]

In this section, we will consider the characteristics of RCT. We will determine it is possible to expand it outside of commercial law and into property, where it has not entered the mainstream.

First, let's consider how relationships determine how contracts are enforced. Sociologist Macaulay wrote about how trust between parties makes the foundation of commercial relationships[130]. He argued that the formal contract was essentially incomplete as it was unable to anticipate all eventualities in a long-term commercial partnership. As such, something more than the contract itself is needed for their agreement to be enforced. This is the gap which allows norms to play a role in conflict resolution. When these norms are determinative in dispute resolution, judicial proceedings are avoided as the most effective mechanism of enforcement is the continued need for the parties to do business with each other.

This is complemented by Kimel's analysis.[131] In his view commercial contracting aims not only to allocate risks, but to signal a willingness to cooperate.[132] Whilst we must qualify his argument with the fact that commercial partners are not wholly altruistic, his main point still stands. In tough times, the rebuke to a partner insisting upon specific performance instead of allowing flexibility in good faith is the refusal to deal with them again, hurting their future commercial prospects.

This raises the question: as the relational model is typically only used in commercial settings to explain the dynamics of legal relationships that happen outside of the courtroom, how can it be applied to property law? To answer this we must consider the distinct way lived property relationships are similar to long-term commercial contracts. Economist Kay describes the modern business as a nexus of contracts.[133] The contracts are the connecting factors, or *relations*, between parties in commercial relationships, which allow a relational approach to be used. We must therefore consider whether lived property relationships have some similar connecting factors between stakeholders which allow us to use a relational approach.

In our criticisms of the Bundle Model, we considered that one of its failings was its inability to account for how the rights of stakeholders in the land are interlinked. These rights are interlinked as they are tethered to one another through their mutual connection to the land itself. This mutual connection to the physical land is the connecting factor between all stakeholders, and their duties, which allows a relational approach to be used within property law even though it does not have the same commercial basis which is usually present when

[129] J Wightman, Contract: A Critical Commentary (Pluto Press 1996) 44
[130] S Macaulay, 'The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules' [2003] 66(1) MLR 44
[131] D Kimel, 'The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model' [2007] 27(2) Oxford Journal of Legal Studies 233
[132] ibid.
[133] J Kay, 'Think before you tear up an unwritten contract' [2010] (online) Financial Times

RCT is applied.

4. Criticising the Relational Approach

In this section criticisms of RCT will be considered and should they stand up to scrutiny it will also be considered how best to engage with these limitations when applying RCT into the new area, property law.

Economists Mouzas and Blois write that businesses presume long-term relationships bring additional benefits over short-term ones[134]. For them, this is why the relationships between long-term contracting partners, as well as their original contracts, ought to be studied. However, in their view, to study relational contracting one can "leave the governance structure alone"[135]. In advocating this approach, they fall into the trap of examining the internal dynamics of commercial relationships at the expense of the external factors. Regulations and statutes will both also play a role in shaping the relationship between long-term commercial partners[136], and so ought not to be neglected when studying their relationships. As such, governance, as a factor external to the relationship, needs to be actively considered when examining the relationship between long-term stakeholders in land too to avoid falling into one of the problems that have tripped up scholars of RCT.

The need to consider the governance framework in which these relationships exist, however, leads us to consider another drawback of RCT. It casts a wide net in seeking to understand every aspect of a relationship. In discussions about RCT, a common theme is that contractual relations are embedded within a broader normative context.[137] This means that to understand a relational contract, one must give recognition to the whole context in which that contract lives. All aspects of the parties' relationship are therefore relevant to understanding their interactions. This means it is a particularly labour-intensive approach, making it more difficult for a court or government body to undertake. Kimel supports this view. He criticises the excess which creeps into relational analyses.[138] Dealing with this tendency of RCT to create an excessive workload is therefore a key consideration when using a relational approach in property law.

To advocate using a relational approach in all areas of property law is therefore impossible. Rather, the relational approach needs to be contained to areas where there can be a real contribution to the understanding of a contract that can only be given through examining how norms, created through a course of dealings, can shed light on the meaning of the contract. The only property relationships that fit this category are long-term relationships. Using a relational approach therefore ought to be an option, should the nature of the legal relationship

[134] S Mouzas and K Blois , 'Relational Contract Theory: Confirmations and Contradictions ' [2008] X(X) Paper presented at 24th IMP Conference, Uppsala, Sweden 8
[135] ibid., 7
[136] Regulatory Policy Committee, 'How to measure the impacts of regulation on business' (RPC Blog, 13 Sep) <https://rpc.blog.gov.uk> accessed 2 March 2023
[137] See (16) 237 and I Macneil, 'Contracts Adjustments of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law' [1978] 72 NULR 854
[138] See (16) 238

being considered require it, rather than an obligation.

5. Relational Approaches to Property in Literature

This section will consider how relational approaches have been adopted in property literature. It will then draw out the key features of the approaches discussed in the literature that are needed for using a relational approach to property.

Geographer Blomley suggests that property entails a set of relations between people[139]. In his view, the fact that it is commonplace to refer to property as a bounded object (it is "*my* land" for instance) speaks to a connection between physical space and property. This underlines the necessity for any model for understanding property to be able to demonstrate the tangibility of property. This idea underscores a weakness of the Bundle of Sticks model, which is that it cannot easily display the physicality of land.

It is through this spatial analysis that Blomley arrives at a consideration of the temporal dimensions of property. In his view, temporality has relevance to relationships in land because how the physical space has been shaped over time affects its nature.[140] He falls short of considering the more tangible way in which temporality shapes the relationships founded on property. This is through the development of social norms which shape individuals' day-to-day interactions with the property.

A typical example is *Bradley v Heslin*[141], a dispute regarding easements. The owner of a property divided the land into two parts (A and B), and sold A whilst keeping B. He also maintained possession of a driveway leading to both plots of land, whilst granting the owner of A an easement to use that driveway. The owner of A subsequently rebuilt the driveway in the course of related building works (even though it was not his to do so) and in doing so he changed its dimensions so that it now was wide enough to be in both of the plots rather than just plot B. He also installed a gate on the driveway.[142]

Over many years A and B changed ownership several times. Through periods of time the gate was kept shut and for other periods it was left open. However in 2011 the owners of A and B could not decide whether the gates should be kept open or closed. The issue was petty, but ended up before the High Court.[143] Their strict legal rights, which originated from the initial easement, no longer reflected the layout of the plots of land. Nor did it reflect the way in which norms about the usage of land had been developed over time. As such Norris J determined the original easement could no longer hold the solution to their case[144]. The norms were such that their strict legal rights had faded from relevance. The importance of understanding how norms affect the stakeholder's legal relationships is therefore

[139] N Blomley, Property, Law and Space. in S Bright and S Blandy (eds), Researching Property Law (Palgrave 2016) 134, 138
[140] ibid.
[141] *Bradley v Heslin* [2014] EWHC 3267
[142] ibid., [2] - [7]
[143] ibid., [1]
[144] ibid., [78]

underscored.

Blandy, Bright, and Nield also draw significance on temporality in their study of dynamic property relationships.[145] Unlike Blomley, they do not view the physicality of land as the source of the relevance of time. Instead, they draw significance from the norms themselves, making their piece more convincing. For instance, they draw attention to how there may be no legal relationship between the occupants of different flats within the same building, however in reality the residents develop shared understandings of how communal space is to be used. These shared understandings may often even be regarded as binding by the residents.[146]

Next, it is prudent to look at the power dynamics considered in different authors' relational analyses. Qiao and Upham offer a perspective founded in Chinese property law.[147] They argue that property is dynamic in how it mirrors ever-changing relationships between the government, the community and the individual.[148] As such, to understand a relational property theory one must consider not just the relationships between individuals but also the relationship the property has to the government.

Similarly, Blandy, Bright and Nield offer a view of the importance of taking governance into account when considering relationships founded on property[149]. They support the view that formal governance arrangements which provide strict legal rules are most appropriate for economic institutions of land, whereas the law acts in less strict ways to inform the governance of social property institutions. The relevance of the nature of governance when looking at lived property relationships is therefore underscored.

Blomley again offers a different perspective.[150] His analysis of the power dynamics of stakeholders in property looks to power inequalities between individuals, rather than individuals and their common relationship to their governing bodies. Disputes in land can conceal these inequalities. For instance, by focusing on the substantive disputes over impersonal spaces and things (like boundaries and gates, as was the case in *Bradley v Heslin*[151]) one's attention is diverted from the source of the dispute. This source is the multifaceted relations between people. The triviality of the dispute in *Bradley v Heslin*[152] shows this, as the fact that the issue was ever taken to court may show that social relations between neighbours had deteriorated to a point of no return, rather than there being any major legal problem in need of a judicial solution. The social issue is a symptom of the partys' power dynamics.

[145] See (10)
[146] ibid.
[147] S Qiao and F Upham, 'The Evolution of Relational Property Rights: A Case of Chinese Rural Land Reform' [2015] 100(6) Iowa Law Review 2479, 2490
[148] ibid.
[149] See (10) 96
[150] See (24) 139
[151] See (26)
[152] ibid.

In summary, a review of literature analysing relationships of property demonstrates that to understand those relationships we need to consider the temporality of the relationship and how it is shaped by evolving norms as well as the role of power relationships - both between the individual and the government and between the individual and other individuals.

Conclusions

In conclusion, it is evident that Hohfeld's Bundle of Sticks conception of property rights is in some ways unsatisfactory when studying long-term property relationships because it can lack an appreciation of how the temporal element can affect the rights and duties of stakeholders in land. It has been argued that learning from MacNeil's Relational Contract Theory can help to mitigate the shortcomings of the Bundle of Sticks model in this regard by encouraging us to understand this type of property relationship through studying all of its essential elements, not just an initial contract. This involves taking account of the norms developed from the social and economic context in which the parties have conducted their business together. It has been argued that taking this alternative approach could allow one to develop a more nuanced understanding of long-term property relationships.

The insurer should be liable for any losses suffered by the assured after scratching a MRC/Slip, discuss

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Insurability is an essential issue, especially in the maritime industry. The assets and the liabilities concerning that area of law correspond to extremely high amounts of money. Thus, it seems impossible to proceed to transactions without a solid insurance cover. On the opposite side, the underwriter is required to protect also his own interests in the relationship between him and the assured, which means that he cannot be liable for anything which might occur whatsoever. In this essay the statement whether the insurer should be liable for any losses suffered by the assured after scratching an MRC/Slip will be examined. The topics further analysed will be the definition of an MRC and a Slip. Then the issue of when the liability of the insurer starts is going to be examined. And most importantly, arguments will be provided on how extended this liability is, after explaining the term "subscription" as well as for which losses is the insurer liable and if he is the only one.

Firstly, the terms "Slip" and "MRC" need to be clarified. "Slip" as Özlem Gürses explains it is a document handed over to the insurer by the broker -the agent of the assured. This document contains essential information about the cover of the risk asked. However, he continues saying that after 2007 the Market Reform Contract (MRC) appears and is fast widespread. The MRC, he makes clear, serves basically the exact same purpose as a slip, but there is a difference to be noted: The former also contains the insurance policy and that is the reason why it is an insurance contract, after scratched by the insurer,[153] as it fulfills the requirement of section 22 of the Marine Insurance Act 1906. As stated: "… a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act…". Overall, in this paragraph it was established that the MRC is broadly used nowadays, and it provides more efficiency.

In order to establish whether the insurance company should be liable for any losses, it is crucial to examine when her liability commences. The insurer is obliged to indemnify the assured for the losses after the scratching of the MRC contract. This is the moment when both parties enter into a binding agreement, as established in *The Galatea* case.[154] "Scratching" the contract occurs when the insurer signs the paper and stamps it too. Also, from this point as the subsection 2 of section 24 of MIA 1906 denotes: "When a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured". In other words, we have as many contracts with the assured as the number of the subscriptions. In that stage, a clarification of the term "subscription" is needed. As Gilman declares: "each underwriter in turn confirms subscription by signing the MRC. In each case the scratch connotes acceptance, so that there is normally no binding contract at any earlier stage"[155]. As Gürses mentions, the risk will not be coved by only one

[153] Özlem Gürses, *Marine Insurance Law* (2nd edn, Routledge 2017) 22
[154] Involnert Management Inc v Aprilgrange Limited & Others, (The Galatea) [2015] 2 Lloyd's Rep. 289 [65]
[155] J Gilman QC, et al, Arnould, *Law of Marine Insurance and Average* (20th edn., Sweet and Maxwell Ltd

underwriter and it is very common that many underwrites subscribe to the MRC with a specific percentage, the so called "line".[156] To conclude, it was analyzed above from which stage is an insurance contract binding and what is the subscription.

There is an issue, however, on whether the contract is binding, if there is a loss before the subscription of the risk in total. This was discussed in the case *Jaglom v Excess Insurance Co Ltd.,*[157] where as Donaldson J argued, each subscription reflects an offer and the insurance contract starts existing when the document is subscripted for the full risk, meaning for 100%. The notion of "distinct contract" is established as well in the Marine Insurance Act.[158]

Most important though is to demonstrate to what extent will the underwriters be liable to compensate the assured. As Francis Rose mentions, every underwriter will be entitled to indemnify the assured only to the extent of the percentage which he has subscribed to cover.[159] These subscriptions are not the same for everyone. This argument can be supported by the case *The Zephyr*[160], where Hobhouse J stated that this is " a mechanism whereby the assured can be put, by means of a single contractual document, in direct and distinct contractual relations with a large number of insurers; what might seem to be a single contract is in fact a bundle of a large number of distinct contracts on the same terms except as to the amount of each individual's liability". And here is when the terms "leading underwriter" and "following underwriter" is introduced. According to Burling, the former is the insurance company with the highest reputation in the specific risk which the broker, on behalf of the assured, is looking to cover. This underwriter is more likely to "convince" also other following underwriters to subscribe to the specific MRC.[161] Therefore, it can be concluded that this mechanism benefits both parties and that the subscription identifies the extent of liability.

The connection between the leading and the following underwriters also changes the part of liability that each of them has. There are two theories developed around that topic, mentioned by Gilman, the first one is "the agent theory", where with his clause the leading underwriter is going to accept the risk on behalf of all the following ones. On the other hand, the second theory, he continues, which is preferred in English law is the "trigger theory" and states that there is no agent relationship between those two groups and that the leading underwriting clause only triggers the following ones.[162]

As far as the wide range of losses is concerned, the importance of the insurance contract is always to be kept in mind. The broker, when he first issues the slip, he is trying to find an

2021), Chapter 2 para 2-13

[156] Gürses, (n 1) 23

[157] Jaglom v Excess Insurance Co Ltd. [1971] 2 Lloyd's Rep. 171

[158] Marine Insurance Act 1906, s 24 (2)

[159] Rose D. Francis, *Marine Insurance Law and Practice* (2nd edn, Informa 2012) 132

[160] General Accident Fire & Life Assurance Corp Ltd v Tanter (The Zephyr) [1984] 1 Lloyd's Rep. 58. CA [1985] 2 Lloyd's Rep. 529

[161] Julian Burling, Helen Ashenden and Jacqueta Castle, "London Market Issues: Leaders, Followers and Layers", issue 124 Journal of the British Insurance Law Association, p.18, < https://bila.org.uk/wp-content/uploads/2019/04/Issue-124-Burling.pdf>

[162] J Gilman QC, et al, Arnould, *Law of Marine Insurance and Average* (20th edn., Sweet and Maxwell Ltd 2021), Chapter 2 para 2-18

insurer for a specific kind of risk most of the times, as described by Gilman.[163] For example, some of them are the cargo insurance and the hull and machinery, Thus, it is to be ascertained that the underwriters are committed to indemnify the assured only for the specific kind of cover which is clearly stated in the insurance contract.

Finally, the role of the broker needs to be examined further, because it is not only the insurer liable for the losses suffered by the assured, but it might occur a situation, where it is also the broker's fault. An example is the case *The Galatea*[164]. There, the vessel was valued for 8.000.000€. Nevertheless, the insurance contract scratched was referring to the vessel insured for 13.000.000€. It was held that the insurer was not liable for this loss, because there was a misrepresentation of the assured object. As it was explained on the judgement, the placing broker -who was based in Lloyd's market in London- has no duty of care, since he has no contract relationship with the assured. On the contrary, the producing broker -the one who was based in Greece and not in London Lloyd's Market- was liable against the claimant since he was negligent as the rationale of Leggatt J showed.

Considering the exhaustive examination of the topic, the conclusion can be reached that after scratching the MRC, the insurer should not be the only liable neither for the whole risk nor for any kind of risk whatsoever. His obligation to compensate -if occurred- is restricted to the specific type of cover and to his subscription percentage. The above are all in complete alignment with the realization that insurers form and should form a profitable company. They have their own interests to protect and hence it is not possible to be liable for any risk and with no limit. In case something like that happened the concept of insurance companies and insurance contracts would not have any valid grounds. All the parties in the industry should never forget that the maritime economy, transactions, and industry flourish based on the profit.

[163] Ibid. para 2-06
[164] Involnert Management Inc v Aprilgrange Limited & Others, (The Galatea) [2015] 2 Lloyd's Rep. 289

The Impact of the International Criminal Court's Juridical Context and Jurisdiction on its Ability to Effectively Deter the Crime of Aggression

Isabella Elliott[*]

Abstract

International law is not bound by statutes, making it a fragmented legal framework rather than a unified code. It operates on the principle of state cooperation in upholding justice in good faith. This article aims to explore the judicial challenges that the ICC encounters in effectively deterring the Crime of Aggression, while also addressing broader structural limitations within the international legal system. The study adopts a qualitative approach, delving into theoretical issues that underpin the ICC, such as the absence of precedents and limited jurisdiction. The recent Russian invasion of Ukraine presented an opportunity for the ICC to demonstrate its role in promoting accountability and justice; unfortunately, this expectation was not met. Although the obstacles faced by the ICC do not diminish its moral significance and symbolic influence, they undermine the court's ability to fulfil its primary objective of ending impunity.

Introduction

'A person stands a better chance of being tried and judged for killing one human being than for killing 100,000.'

- *José Ayala Lasso, Former United Nations High Commissioner for Human Rights* (1996).

The International Criminal Court (ICC), as the first court of its kind, bears the responsibility of delivering justice for the most heinous crimes. Among these crimes, the Crime of Aggression is a severe violation of international law. However, despite its significance, the Crime of Aggression remains less discussed compared to other international crimes due to its recent inclusion under the jurisdiction of the ICC. Nonetheless, the ICC plays a pivotal role in the global pursuit of justice, specifically in deterring and addressing heinous crimes. This article focuses on the concept of general deterrence, with a particular emphasis on the Crime of Aggression. To effectively fulfil its mandate of deterring this crime, the ICC must overcome multifaceted challenges and meet prerequisites, which include establishing historical precedents and implementing an authoritative and codified jurisdiction.

In order to provide a comprehensive understanding of the ICC's function, this article explores the foundations of the court in conjunction with case studies from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). These case studies help illustrate the juridical context of the ICC and highlight the significance of historical precedent. Furthermore, the latter part of this article delves into the importance of an authoritative jurisdiction and examines the jurisdictional challenges that arise

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from the Rome Statute. By exploring the credibility and coherence of the ICC, we gain valuable insight into their impact on the court's effectiveness in deterring the Crime of Aggression.

By analysing these aspects, this article aims to shed light on the interplay between the ICC's juridical context, jurisdiction, and its role in deterring the Crime of Aggression. It is through understanding these dynamics that we can develop a more comprehensive understanding of the ICC's function in the pursuit of global justice.

The Prelude to the ICC

Blanton and Kegley[165] broadly define international law as rules that govern states' conduct and inter-relations. Unlike many national or domestic laws, international law is not based on statute or a cohesive criminal code but is continuously constructed through treaties, conventions, and other agreements. Theories and traditions of international law and transnational justice can be traced back to Hugo Grotius (1625).[166] Grotius theorised that international relations exist within a global society in which states are bound by rules such as law and morality. In the mid-nineteenth century, running parallel to the development of laws on armed conflict, the notion of international prosecution began to emerge. The founders of the Red Cross proposed the establishment of an international criminal court that would prosecute violations of the 1864 Geneva Convention.[167] However, this suggestion was considered too radical to be ratified at the time.

Throughout contemporary history, there have been many failed attempts to deter the commission of atrocities. While aggressive war-making is omnipresent, many legal scholars remain hesitant to place the Crime of Aggression into this category.[168] International laws on war were first codified through the 1899 and 1907 Hague Conventions. As these conventions also act as international treaties, they were intended to instil moral obligations upon states without creating criminal liability for individuals and without sanctions for violations. However, the principle of state sovereignty enshrined in the Treaty of Westphalia (1648) established that states had the right to wage war whenever they deemed it appropriate for reasons of state; the Hague Conventions were thus widely disregarded.[169] For instance, during the First World War, many egregious crimes took place that violated both Hague Conventions. However, as these conventions were not credible sources of law, prosecution did not occur at the time. Another international effort to prevent aggressive war took place in August of 1928 with the signing of the Kellogg-Briand Pact.[170] In Article 1, this pact states that signatories 'condemn recourse to war […] and renounce it, as an instrument of national policy in their

[165] Shannon Blanton and Charles Kegley, World Politics Trends and Transformation (Boston: Cengage Learning, 2017).
[166] Claire Cutler, 'The 'Grotian Tradition' in International Relations', Review of International Studies, [online] 17(1).
[167] Richard Falk, Mark Juergensmeyer, and Vesselin Popovski, Legality and Legitimacy in Global Affairs, (1st ed., New York: Oxford University Press, 2012).
[168] Mauro Politi and Giuseppe Nesi, The International Criminal Court and the Crime of Aggression, (2nd ed., Oxford: Ashgate Publishing, 2017).
[169] Anthony Arend and Robert Beck, International Law and the Use of Force Beyond the U.N. Charter Paradigm, (1st ed., Abingdon: Routledge, 1993).
[170] Waldo Chamberlin, 'Origins of the Kellogg-Briand Pact', The Historian, [online] 15(1).

relations with one another.'[171]

The Kellogg-Briand Pact is a useful example of an early advancement of new norms of international behaviour and multilateralism, which both played an active part in the post-war prosecutions of aggressive war-making. However, it was incredibly brief, did not specify what constituted an attack on another state and, most importantly, had no penal sanctions in the case of breaches.[172] It also contained several procedural and institutional defects, which meant that it had little to no effect in halting the rising militarism that occurred in the 1930s across Europe and Asia and ultimately could not prevent the breakout of war.[173] Many jurists still conveyed the need to establish a 'High Court of International Justice.'[174] Although in the years to come, this was furthered by specialist associations such as the International Association of Penal Law (1924), due to insufficient numbers of signatories, this never came into force.[175] What distinguishes international attempts to prevent aggression is their singular lack of success. Nonetheless, idealists have persisted in trying to impose international norms to curb aggressive policy on the part of nations and governments.

The crimes committed during the Second World War shattered prior standards of justice. In October 1945, twenty-four Nazi officials were served with indictments for the crimes they had committed in the years prior. This novel use of retroactive justice demonstrates the extempore character of international law. A similar tribunal also took place in Tokyo that followed this pattern. The jurisdiction of the International Military Tribunal (IMT), as decreed in Article 6, was limited to the following: crimes against peace, war crimes, and crimes against humanity.[176] Kertsen asserts that it is not often acknowledged that the crime pursued with the most vigour at the IMT was crimes against peace[177] — referred to recently as the Crime of Aggression. The prosecution at the IMT deemed this 'the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole.'[178] Before 1945, as it had not been defined, aggression was not considered a crime under existing international law. As the charter for the IMT was established after the crimes had been committed, the architects of the trials faced immense criticism for allowing *ex post facto* criminalisation.[179] A deterrent effect would have been strengthened if a credible legal system had been established after the post-war tribunals, which enforced new principles of international law. However, as Judge Sang-Hyun Song, a previous president of the ICC, conveyed, the Cold War period only

[171] Kellogg-Briand Pact 1928, [Treaty] The Avalon Project: Documents in Law, History, and Diplomacy, Yale Law School Lillian Goldman Law Library. Online.
[172] Victor Tsilonis, The Jurisdiction of the International Criminal Court, (1st ed., Switzerland: Springer Nature, 2019), [ebook].
[173] *Ibid.*
[174] William Schabas, An Introduction to the International Criminal Court, (5th ed., Cambridge: Cambridge University Press, 2017).
[175] *Ibid.*
[176] Nuremberg Trial Proceedings Vol. 1 Charter of the International Military Tribunal 1945, [Charter] Yale Law School Lillian Goldman Law Library, The Avalon Project: Documents in Law, History, and Diplomacy. Online.
[177] Mark Kertsen, 'Making War Illegal – The Crime of Aggression and the ICC', [online] Justice in Conflict.
[178] *Ibid.*
[179] Charles Wyzanski, 'Nuremberg: A Fair Trial? A Dangerous Precedent', [online] The Atlantic.

further imposed *ex post facto* justice.[180] One of the core principles of the ICC is that its jurisdiction is non-retroactive, something which the IMT was entirely reliant on, not to mention the fact that the ICC works on an ongoing basis. While the IMT allowed for the future prosecution of the Crime of Aggression, the events that took place were unprecedented, and the ICC cannot emulate this. While an example of exemplary punishment, the deterrent power produced by the trials was, at best, indirect, and merely manifested in the Convention on the Prevention and Punishment of the Crime of Genocide (1948). Preoccupied with the Cold War, the Nuremberg and Tokyo Trials were confined to historical memory as an example of victor's justice and procedural irregularity.[181] It is evident that while there have been sporadic attempts to deter international aggression, there is little successful historical precedent for doing so. It can therefore be extrapolated that unless the ICC adopts a distinct approach from these earlier examples, it will fail to deter the Crime of Aggression effectively.

The ICTY & ICTR

For decades after 1945, the concept of an international criminal court remained a distant objective of a handful of human rights activists, legal scholars, and idealist academics. The ICTY and the ICTR were the first courts to be created after the Cold War and were vivid representations of 'political contrition' following the failures to swiftly tackle the situations.[182] According to Canadian humanitarian Roméo Dallaire, the international community had 'largely ignored the Rwandan genocide, labelling it an internal conflict.'[183] It is necessary to acknowledge and explore these courts as, like the IMT, they were underpinned by very different principles to those of the ICC, further highlighting a lack of precedent for deterrence.

The ICTY was established in May 1993 upon the recommendation of the United Nations Security Council (UNSC) following the breakout of the Bosnian War in April 1992.[184] The Council's Resolution 827 states that the tribunal would attempt to rebuild peace and deter further war crimes by 'ensuring that such violations are halted and effectively redressed.[185] Page two of the Resolution conveys how the prosecution of individuals 'responsible for serious violations of international humanitarian law' will be traced back to 1991, meaning that the ICTY would prosecute crimes committed before its inception.[186] This was mirrored by the ICTR, as although it was established through the UNSC's Resolution 955 in November 1994, the Rwandan genocide occurred between April and July of that year. By contrast, in accordance with the principle of temporal jurisdiction, the ICC cannot prosecute crimes which occurred

[180] Sang-Hyun Song, 'From Punishment to Prevention Reflections on the Future of International Criminal Justice Wallace Wurth Memorial Lecture', [pdf] Online: International Criminal Court.
[181] Ralph Zacklin, 'The Failings of Ad Hoc International Tribunals', Journal of International Criminal Justice, [online] 2(2).
[182] *Ibid.*
[183] United States Holocaust Memorial Museum, 'Pleading for Help', [online].
[184] Sabrina Ramet, 'The ICTY – Controversies, Successes, Failures, Lessons', Southeastern Europe, [online] 36(1).
[185] Resolution 827 (1993) / Adopted by the Security Council at its 3217th Meeting, on 25 May 1993, [Resolution] United Nations Digital Library, United Nations Security Council. New York.
[186] *Ibid.*

before the creation of the Rome Statute.[187] The ICTY and the ICTR derived their jurisdiction from the UNSC as codified under Chapter VII of the UN Charter.[188] Additionally, as both courts dealt with internal state atrocities rather than state-on-state aggression, jurisdiction was far simpler to assert. These courts were also established *ad hoc*, meaning that their responses to atrocities were not sustainable.[189] As recalled by the ICTY's first President, Judge Antonio Cassese, 'we had no seat, no courtroom, no prison, […] and no set of rules governing the criminal procedure.'[190] The problematic lack of power and organisation illustrated through this quote conveys how the ICC lacks precedent—which in itself can be considered an authoritative source of law and, more specifically, deterrence.[191]

The Crime of Aggression was not prosecuted at the ICTY or the ICTR, as they did not have the authority to do so. This responsibility was assigned to the International Court of Justice (ICJ). The specific outcomes and prosecutions reached by the ICJ are not of particular interest here. Instead, for comparative reasons, it is crucial to recognise that as of the Kampala Review Conference in 2010, provisions were adopted that allowed the ICC to exercise its jurisdiction over the Crime of Aggression. Furthermore, in July 2018, the ICC finally activated its jurisdiction over said crime.[192] The role of the ICC is unprecedented, particularly when it comes to prosecuting and deterring the Crime of Aggression, as this role was typically outsourced to other judicial bodies. As stated by Kertsen, 'the codification of laws against aggression has the potential to be one of the most profound shifts in the underlying institutional architecture of international society.'[193] The ICTY and the ICTR had important roles in catalysing the creation of the ICC. However, the makeshift nature of both courts is evident; the ICC was, therefore, primarily born out of frustration that the international community could not prevent these acts in the first place.[194]

The Rome Statute

Following the United Nations Diplomatic Conference of Plenipotentiaries in June/July 1998, 'the first permanent treaty-based international criminal court' was established with the jurisdiction to indict and prosecute individuals.[195] This created a new paradigm of international and transnational justice. As Adam Bower states, the Rome Statute created an institution whereby international practices could be consolidated, and appropriate punishment could deal

[187] Catherine Gegout, 'The International Criminal Court: limits, potential and conditions for the promotion of justice and peace', Third World Quarterly, [online] 34(5).
[188] Talita de Souza Dias, 'The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations: An Appraisal of the Existing Solutions to an Under-discussed Problem', Journal of International Criminal Justice, [online] 16(1).
[189] Stuart Ford in M. Sterio and M. Scharf, The Legacy of Ad Hoc Tribunals in International Criminal Law, (1st ed., Cambridge: Cambridge University Press, 2019), [ebook].
[190] Janine Clark, 'The ICTY and the Challenges of Reconciliation in the Former Yugoslavia', [online] E-International Relations.
[191] Sebastian Lewis, 'Precedent and the Rule of Law', Oxford Journal of Legal Studies, [online] 41(4).
[192] Meagan Wong, 'Aggression and State Responsibility at the International Criminal Court', International and Comparative Law Quarterly, [online] 70(4).
[193] Kertsen (n 13).
[194] Council of Europe, 'International Criminal Court Needs Robust and Long-Term -Support', [online]
[195] United Nations, 'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', 1st ed., [pdf] United Nations.

with egregious violations of humanitarian and international law.[196] The Statute is composed of a preamble and thirteen sections, including 128 articles, within which the architects had to try and balance the efficacy of the court alongside state sensitivities.[197] Three fundamental legal principles can be seen to underpin the Statute, and each needs to be examined in turn to grasp how they may complicate the ability of the ICC to deter the Crime of Aggression.

The first, and most important principle, is described in Article 1: 'the Court shall be complementary to national criminal jurisdictions.' In short, the principle of complementarity means that the ICC can only assume jurisdiction when domestic legal systems cannot or do not exercise their own jurisdiction.[198] However, this raises the question of how the ICC functions effectively when it does not have the apparatus of a national justice system.[199] When creating the court, 'the international community had to choose between granting it with either primary or complementary jurisdiction.'[200] While primary jurisdiction would create a more credible system of deterrence, it would, in turn, violate the sanctity of state sovereignty, and so a compromise was necessary. Therefore, in principle, in cases of concurrent jurisdiction between the ICC and domestic courts, the latter would have priority.[201] Regardless, national systems are still expected to adhere to international standards and morality. However, as will be explored below, not all signatories have ratified the Statute, meaning that while these states have expressed their intentions to abide by the treaty, they are not legally bound to do so.

The second principle is codified in Articles 5, 6, 7, 8 and 9. This principle states that the ICC can only be involved when the crimes committed are particularly egregious (such as the Crime of Aggression).[202] This design mechanism was tactical in that limiting the court's jurisdiction to four core crimes encourages complementarity, facilitates a coherent approach to jurisdiction, and requires state collaboration.[203] The third and last principle is closely intertwined with this: the Statute should 'remain within the realm of customary international law.' [204] Customary international law is independent from treaty law, and instead, consists of rules that are derived from international obligations. However, what remains critical is that not all states observe or recognise such 'international obligations.'

While the three principles underpinning the Rome Statute appear moral and rational, an enforcement apparatus is missing. This leaves the Statute open to exploitation and blatant

[196] Adam Bower, 'Assessing the Diffusion of International Norms: Evidence from State Incorporation of the Rome statute of the International Criminal Court', European Journal of Legal Studies, [online] 6(2).
[197] Bruce Broomhall, International Justice and the International Criminal-Court, (1st ed., Oxford: Oxford-University Press, 2003).
[198] The Rome Statute of the International Criminal Court 17 July 1998, [pdf] The Hague: The International Criminal Court, 2011.
[199] Mahnoush Arsanjani, 'The Rome Statute of the International Criminal Court', American Journal of International Law, [online] 93(1).
[200] International Center for Transitional Justice, 'Criminal Justice', [online].
[201] *Ibid.*
[202] Broomhall (n 33).
[203] Arsanjani (n 35).
[204] Yudan Tan, 'The Identification of Customary Rules in International Criminal Law', Utrecht Journal of International and European Law, [online] 34(2).

disregard by states.[205] When the Rome Statute was adopted in 1998, it required a minimum of sixty state ratifications to come into force; seven countries voted against it, including the United States, China, and Iraq.[206] As of 2020, there are 123 state signatories of the Statute, 118 of which have ratified it.[207] This begs the question of jurisdiction, in that if a state is not a signatory to certain treaties or conventions, can it be held to account for violating them? Over a decade ago, Murphy postulated this exact issue concerning the Crime of Aggression by asking 'how this new crime [will] affect the [...] states which have not yet ratified the Rome Statute, including major military powers such as China, Russia, and the United States?'[208] This concern directly compromises the ICC's ability to function as both the prosecutor of crime and, by extension, as a deterrent to future crimes. The principal issue here is the lack of cooperation, in that the ICC boasts no police force or universal membership, and there is reliance on sovereign states.

International relations scholars have often tried to address whether international treaties affect state behaviour. For instance, Gilligan claimed that cooperation can only be enforced by an implicit or explicit credible threat.[209] He further asserts that states would fail to cooperate with treaties if their noncompliance was met with a lack of enforcement mechanisms. Although the ICC can prosecute any individual regardless of their location if said individual is a national of a non-party state or a state which has not ratified the Rome Statute, a UNSC resolution must be drafted.[210] While this may appear acceptable, Article 16 of the Statute permits the UNSC under Chapter VII of the UN Charter to request a deferral of an investigation or prosecution for a year.[211] This automatically reduces the scope of the ICC's powers of deterrence, as it falls victim to the veto powers of permanent members.

ICC Jurisdiction

Articles 11-19 of the Rome Statute deal with the ICC's jurisdiction, admissibility, and trigger mechanism. Understanding these aspects of the court is necessary to gauge the challenges that arise and how this impacts the ability to effectively deter the Crime of Aggression. Following disagreements between permanent members of the UNSC, members of NATO, and other states, Article 5(d) of the statute incorporates the Crime of Aggression. However, the ICC could only exercise jurisdiction over this crime after it was defined and the conditions had been agreed upon in 2010.[212] Although the inclusion of said crime received overwhelming support from the Preparatory Committee, it also faced challenges, the most significant of which was the role played by the UNSC in determining the concept. Indeed, there were debates about

[205] Alexandre Galand, UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits, (5th ed., [ebook] Brill, 2019).
[206] Gegout (n 23).
[207] Coalition for the International Criminal Court, 'The Crime of Aggression', [online].
[208] Sean Murphy, 'Aggression, Legitimacy and the International Criminal Court' (2009) 20(4) European Journal of International Law.
[209] Michael Gilligan, 'Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime' (2006) 60(4) International Organization.
[210] *Ibid.*
[211] Arsanjani (n 35)
[212] Wong (n 28).

whether the definition under general international law sufficed or whether the ICC required a separate definition for practical purposes.[213]

The ICC cannot investigate or prosecute governments or organisations for the Crime of Aggression. It is primarily concerned with individuals – *ratione personae*– for whom there is no immunity. Unlike the three atrocity crimes in the statute, Gomaa asserts that individuals do not commit the Crime of Aggression, 'it can only be committed collectively.'[214] However, this assertion has been refuted by Lichtenstein diplomat Christian Wenaweser: 'only leaders are legally capable of committing the Crime of Aggression.'[215] There is clearly ambiguity as to who the prosecutable agent is / should be for the Crime of Aggression. This confusion may well play into the ICC's inability to generate deterrence, as accountability for this crime remains unclear. Regardless, immense pressure remains placed on the Office of the Prosecutor (OTP) to ensure all perpetrators are brought to justice — something which, as previously discussed, the ICC does not always have the power to do.

There are three different trigger mechanisms with which the ICC can derive jurisdiction[216]: the UNSC can request the OTP to launch an investigation; signatories to the Rome Statute can refer a case to the OTP; and lastly, the OTP may also initiate an investigation *proprio motu* subject to authorisation by the Pre-Trial chamber.[217] The last mechanism faced criticism from certain states, such as the US. However, most states thought empowering the OTP with such independence was necessary. Nonetheless, it should be noted that the ICC cannot investigate or obtain evidence from within a sovereign state without its permission.[218] This hinders the juridical process of the ICC and is a significant obstacle for deterrence, as there is no implicit or explicit credible threat.

Article 17 refers to the four issues of inadmissibility. '(a) the case is being investigated or prosecuted by a state that has jurisdiction over it [...]; (b) the case has been investigated by a state that has jurisdiction over it, and the state has decided not to prosecute the person concerned [...]; (c) the person concerned has already been tried for the conduct in question [...] ; (d) the case is not of sufficient gravity to justify action by the court.'[219] Article 17 does go on to stipulate guidelines on determining the unwillingness of a state to cooperate. However, this caveat remains contentious in that, particularly with major powers, state discretion can submerge the interests of justice.

The 2003 US/UK invasion and occupation of Iraq provides a vivid illustration of the Crime of Aggression, which could not be prosecuted retrospectively, and was ruled inadmissible due to

[213] Gomaa in Politi and Nesi (n 4)
[214] *Ibid.*
[215] Coalition for the International Criminal Court (n 43).
[216] Hans Peter Kaul, 'The International Criminal Court: Trigger Mechanisms for ICC Jurisdiction' (Speech delivered on 26 November 2011, International Criminal Court).
[217] European Parliament, 'The Rome Statute of the International Criminal Court 17 July 1998' (The International Criminal Court, 2011).
[218] Christian De Vos, 'Investigating from Afar: The ICC's Evidence Problem' (2013) 26(4) Leiden Journal of International Law.
[219] The Rome Statute of the International Criminal Court 17 July 1998 [pdf] (The International Criminal Court, 2011).

Article 17 of the Rome Statute. Human rights barrister Geoffrey Robertson postulated that a prosecutable Crime of Aggression might have acted as a deterrent: 'had it been in force in 2003, it probably would have deterred Tony Blair from joining the invasion in Iraq, although George W Bush, with less respect for international law, would doubtless have gone ahead.'[220] The issue here is the invasion of a sovereign nation without specific legal authorisation from the international community, something which directly undermines the fourth section of Article 2 of the UN Charter: 'all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.'[221] Article 51 of the UN Charter conveys a state's right to use force in self-defence. However, Iraq had not conducted attacks on either the UK or the US. While this would indicate the irrelevance of said article, the Bush administration sought to retain it by blaming the Iraqi regime for the terrorist attacks of September 2001.[222] What is also pivotal is that the UK initially lobbied for a delay in the development of the jurisdiction over the Crime of Aggression and refrained for a significant time from ratifying the activation of the amendment in 2018.[223] The reason behind this was most likely the fear of retrospective enforcement. Providing states with the choice to accept and ratify international codes of conduct, such as the Rome Statute or its subsequent amendments, does not bode well for the ICC's powers of deterrence, as states are under no obligation to adhere to principles of morality unless they opt to.

According to the Final Report, the ICC had jurisdiction over the crimes in Iraq, which were egregious enough to warrant an investigation. Furthermore, while the OTP accused the UK investigations of being 'inadequate', following the governmental creation of the Iraq Historic Allegations Team, the OTP could not find substantial evidence to prove that the UK was shielding individuals from prosecution.[224] As codified in Article 17, the admissibility provisions proved futile, as powerful nations could manipulate its criteria. Similarly, while the Rome Statute's principle of non-retroactivity appears astute, there are instances where its application risks overstepping this line: when a state declares acceptance for the ICC's jurisdiction on an ad hoc basis for a situation in which there is no previous source of law.[225] In the case of Iraq, there was an overreliance on procedural justice, which compromised the integrity of the ICC as an organisation, making the road ahead for deterring the Crime of Aggression that much more arduous.

As discussed above, in July 2018, the Assembly of State Parties of the ICC decided to place the Crime of Aggression into its jurisdiction following the Kampala Amendment in 2010. According to Akande and Tzanakopoulos, the main point of contention surrounded whether the ICC would have jurisdiction over the nationals of a state that had not signed or ratified

[220] Owen Bowcott, 'ICC crime of aggression comes into effect without key-signatories' (2018) The Guardian.
[221] Charter of the United Nations; June 26, 1945 [Charter] (Yale Law School Lillian Goldman Law Library, The Avalon Project: Documents in Law, History, and Diplomacy, Yale Law School Lillian Goldman Law Library, 1996) [online].
[222] Ronald Kramer and Raymond Michalowski, 'War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq' (2005) 45(4) The British Journal of Criminology.
[223] *Ibid.*
[224] UK Parliament, 'UK war crimes in Iraq: The ICC Prosecutor's report' (2021) [online].
[225] De Souza Dias (n 24).

Article 8*bis* if these alleged acts were committed in a state that had ratified this amendment.[226] Article 15*bis* of the amendment states that with both state referrals and *proprio motu* investigations, the ICC 'may, in accordance with Article 12, exercise jurisdiction over an alleged Crime of Aggression.'[227] However, this is refuted in a later sentence: 'in respect of a state that is not a party to this statute, the Court shall not exercise its jurisdiction over the Crime of Aggression when committed by that State's nationals or on its territory.'[228] The language contained in Article 15*bis* is particularly categorical in its approach to non-signatories. The shocking revelation is that the ICC can only assert jurisdiction over the Crime of Aggression when the aggressor state has ratified and not opted out of this amendment, which severely compromises the ICC's ability to deter this crime effectively. [229]

The 2018 activation of the Crime of Aggression was referred to as 'historic.'[230] However, countless Crimes of Aggression have been committed before and after this amendment, indicating how the ICC has been unable to deter this crime adequately. While there have been many occurrences of the Crime of Aggression, the 2014 Russian annexation of the Crimean Peninsula and the 2022 Russian invasion of Ukraine best illustrate some of the challenges facing the ICC in effectively deterring this crime. Mankoff asserts that the 2014 occupation 'plunged Europe into one of its gravest crises since the Cold War.'[231] Following the invasion and occupation, Russia increased its military presence and issued nuclear threats to maintain its grasp.[232] The Ukrainian government never ratified the Rome Statute for domestic political reasons.[233] Consequently, the ICC could not proceed with a full investigation. Kertsen claims that if Ukraine had ratified the statute, the ICC would have acted with more immediacy.[234] It is important to note here that under Article 12(3) of the Rome Statute, a non-party state can exercise its prerogative to accept ICC jurisdiction over alleged crimes on an ad hoc basis.[235] Ukraine accepted this during the 2014 Crimean Crisis, and while the OTP concluded that 'there was a reasonable basis for investigation', no formal prosecution took place.[236] Russia was able to escape responsibility for this act of aggression due to the contested nature of Crimea's regional identity and sovereignty, which only complicated the issue. What remains clear is that the lack of implicit or explicit credible threat exhibited by the ICC in 2014 must have been particularly evident, as, despite the 2018 amendment, it could not deter Russia from committing a further Crime of Aggression.

[226] Dapo Akande and Antonios Tzanakopoulos, 'Treaty Law and ICC Jurisdiction over the Crime of Aggression' (2018) 29(3) European Journal of International Law.
[227] *Ibid.*
[228] Resolution RC/Res.6 The Crime of Aggression [pdf] (United Nations Treaty Collection, 2010) [online].
[229] Refer to Appendix A
[230] Coalition for the International Criminal Court (n 43).
[231] Jeffrey Mankoff, 'Russia's Latest Land Grab: How Putin Won Crimea and Lost Ukraine' (2014) 93(3) Foreign Affairs.
[232] Zachary-Keck, 'Russia Accelerates Asia Pivot' (2014) [online] The Diplomat.
[233] Coalition for the International Criminal Court (n 43).
[234] Kertsen (n 13).
[235] Cartsen Stahn, Mohamed Zeidy, and Héctor Olásolo, 'The International Criminal Court's Ad Hoc Jurisdiction Revisited' (2005) 99(2) The American Journal of International Law.
[236] Coalition for the International Criminal Court (n 43).

The February 2022 Russian invasion of Ukraine 'sent shockwaves across the globe.'[237] This ongoing conflict constitutes a large-scale military assault with indiscriminate strikes on residential areas. As of August 2022, over 5000 civilian deaths were recorded in Ukraine.[238] Russia's invasion of Ukraine blatantly violates the UN Charter. This was reinforced by Agnès Callamard, the current International Secretary General: 'Russia is not only breaching the sovereignty of a neighbour and its people, it is also challenging the global security architecture and exploiting its frailty, including a dysfunctional UNSC.'[239] This incident was referred to the ICC for investigation by 39 other states, including the UK.[240] However, as of 2016, Russia is no longer a signatory to the Rome Statute, further complicating the ICC's jurisdiction. In terms of investigation and prosecution, the OTP has opened an investigation into Ukraine; however, perpetrators are only being investigated for war crimes and, more recently, crimes against humanity, not the Crime of Aggression, as neither state has ratified the 2018 Amendment.[241] In light of egregious violations of the Crime of Aggression, the ICC is feeble in its deference to procedure. While this is in keeping with the sanctity of state sovereignty, it compromises morality. The crimes committed in 2022 are arguably more severe than those of 2014, despite the ICC activating further jurisdiction over the Crime of Aggression. The ICC's response has also been inadequate, indicating that it is restricted in its ability to deter effectively, let alone uphold the rule of law.

Conclusion

The ICC, along with the Rome Statute and subsequent amendments, encounters numerous theoretical challenges that hinder its effectiveness in deterring the Crime of Aggression. This article has highlighted the absence of historical precedents specifically tailored to deter this crime, as previous international tribunals such as the ICTY and ICTR focused more on other atrocities or employed retroactive prosecution, which the ICC is precluded from actively pursuing. The cases of the 2003 invasion of Iraq and the recent Russian invasion of Ukraine exemplify the significant compromise to the ICC's multifaceted jurisdiction. Furthermore, concerns about the ICC's legitimacy raised by certain states have limited its preventive power. Regrettably, the ICC often becomes a target of powerful states who obstruct its investigations or manipulate it for diplomatic purposes. Collectively, these factors undermine the ICC's ability to effectively deter the Crime of Aggression.

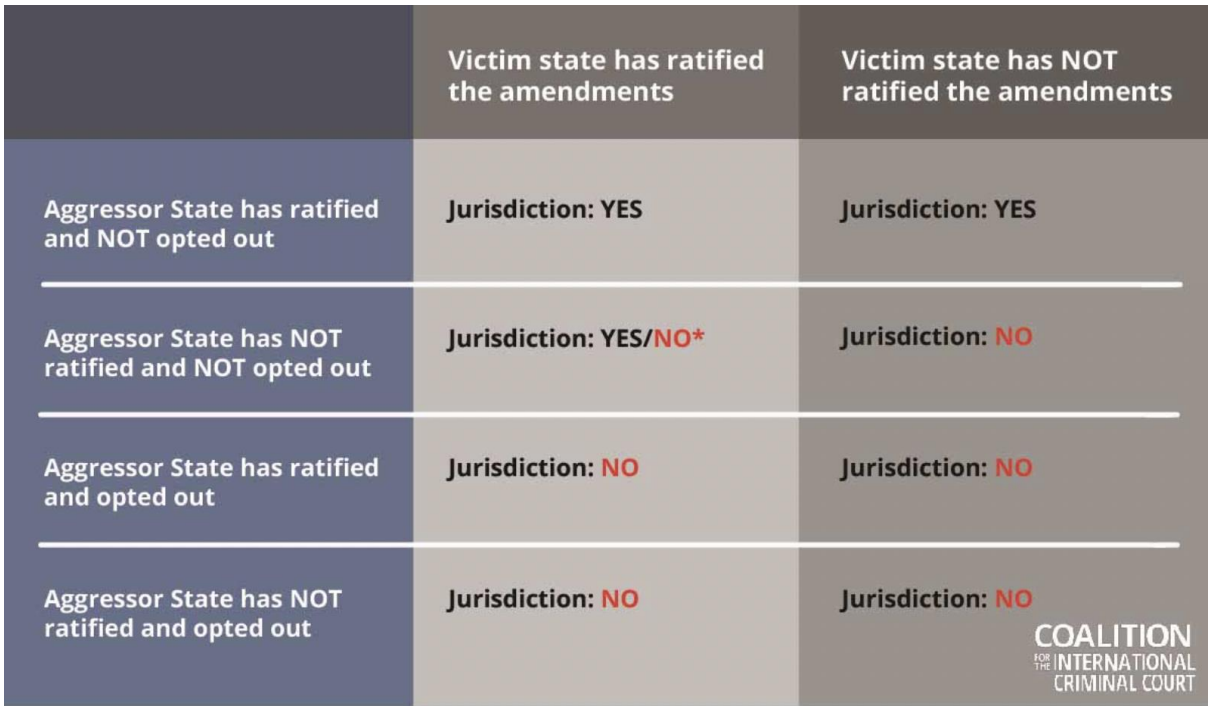
Addressing these issues and bolstering the ICC's authority are crucial steps in enhancing its deterrence capabilities and promoting international justice. By establishing clear historical precedents and addressing jurisdictional challenges, the ICC can strengthen its position and

[237] James Green, Christian Henderson, and Tom Ruys, 'Russia's attack on Ukraine and the jus ad bellum' (2022) 9(1) Journalon the Use of Force and International Law.
[238] Office of the High Commissioner for Human Rights, 'Ukraine: Civilian-Casualty-Update-12-July-2022' (2022) [online].
[239] Amnesty International, 'The ICC at 20: Double standard have no place in international justice' (2022) [online].
[240] Aubrey Allegretti, 'ICC Launches War Crimes Investigation Over Russian Invasion of Ukraine' (2022) [online] The Guardian.
[241] Green, Christian, and Ruys (n 73).

credibility. It is imperative that the international community supports the ICC in its pursuit of justice, ensuring that it remains independent and free from political interference. Only then can the ICC fulfil its mandate and play a more effective role in deterring the Crime of Aggression and advancing global justice

Appendices

Appendix A



Defining Genocide: how the crime without a name became the "*crime of crimes*"

Imogen Hughes

Abstract

This article sets out the nature, history and convoluted structure of the crime of genocide, by providing a comprehensive analysis of how genocide has been defined within international law. The Nuremberg Trials demonstrated the need for a new international crime to comprehend the gravity of the acts perpetrated by the Nazi regime. However, the enactment of the Genocide Convention created tension with crimes against humanity as *ad hoc* tribunal jurisprudence has pushed the boundaries of interpreting genocide as the most serious international crime, generating an impunity gap against crimes against humanity. The narrowness of the Convention has risked demeaning the true horrors of other international crimes, but the recognition of crimes against humanity to be committed during peacetime in the International Criminal Court has filled that lacuna. This article has captured what makes the crime of genocide the 'crime of crimes' by assessing the intricacy of the Convention's stringent criteria and analysing *ad hoc* jurisprudence which has placed a stigma on genocide, positioning it at the apex of the pyramid of international crimes. This thesis has concluded that the force of genocide as the 'crime of crimes' should not be relinquished, this is because the magnitude of this crime is specified within the rigorous criteria of genocidal intent.

Introduction

An assessment of the subject of genocide within international law today should begin by tracking down the evolution of the concept by characterising which atrocious human rights violations were the starting point in defining genocide. Retrospectively speaking, the crimes committed by the Ottoman Empire in Armenia in 1915 are described as 'one of the most outstanding examples of the crime of genocide'.[242] Even though 'the practice of genocide has occurred throughout human history',[243] as an international legal concept the crime of genocide is a young and relatively recent arrival. Winston Churchill expressed this phenomenon in 1941 as "the crime without a name".[244] It was not until World War Two (WWII) that Polish jurist and lawyer Raphael Lemkin in his 1944 work, *Axis Rule in Occupied Europe,*[245] coined the term 'genocide'. In the aftermath of WWII, the United Nations (UN) alongside Lemkin convened in defining the scope and parameters of genocide with the Convention for the Prevention and Punishment of the Crime of Genocide in 1948 (the Genocide Convention).

This article seeks to articulate the meaning of the '*crime of crimes*' terminology and its significance in defining genocide as the most severe international human rights violation. The International Military Tribunal at Nuremberg (IMT) in convicting the major war criminals of crimes committed against the Jewish people, failed to express the true gravity of the crimes

[242] 'Written Statement of the United States of America', *Reservations to the Convention on the Prevention of Genocide (Advisory Opinion)*, Pleadings, Oral Arguments, Documents, 25.
[243] 'Written Statement of the United States of America', *Reservations to the Convention on the Prevention of Genocide (Advisory Opinion)*, Pleadings, Oral Arguments, Documents, 25.
[244] Leo Kuper, *Genocide, Its Political Use in the Twentieth Century* (New Haven, Yale University Press 1981) 12.
[245] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace, 1944.

committed during WWII. This ignited the frustration that crimes labelled 'crimes against humanity' no longer truly conveyed the depravity of the crimes committed by the Nazis. Lemkin was profound in shaping the new international legal order and believed that there needed to be a more narrowly described form of crimes against humanity, reflecting crimes of a more serious nature. Whilst the Genocide Convention was a remarkable development, the requirements to meet the definition as well as the 'crime of crimes' nomenclature has permeated the legal debate as to the hierarchy of international crimes, pushing the courts to interpret genocide as the most serious crime of all.

The Genocide Convention extracted genocide out from the framework of crimes against humanity and elevated it as a distinct crime. Unfortunately, the Convention's conception and ratification created a gap of impunity between crimes regarded as crimes against humanity, until it was finally defined by the Rome Statute of the International Criminal Court (ICC) in 1998. This alleged gap between the two crimes considerably narrowed, eliminating the hierarchy of the crime of genocide.

This article concludes that genocide will always remain the 'crime of crimes'. This is precisely due to the rigours of the definition and its narrow conception such as the extermination of ethnic minorities of the Conventions stringent protection of only 'national, racial, ethical and religious groups'.[246] Since the beginning of international criminal law, society has placed distinctions between crimes in terms of the degree and scale of that type of crime. It is unclear why certain crimes carry more of a stigma than others in terms of seriousness, but in the existence of this hierarchy of crimes, genocide has been said to occupy the 'apex of the pyramid'.[247]

The evolution of genocide

Raphael Lemkin was a moving catalyst in formulating the word genocide which, 'consists of the Greek prefix *genos*, meaning race or tribe, and the Latin suffix *cide*, meaning killing',[248] this was launched in his mature works of *Axis Rule*. Lemkin's definition of genocide began in his report *Les actes constituent un danger general (interetatique) consideres comme delist de droit des gens* in 1933 to which he noted five crimes of international law. Of these crimes mentioned, he believed the crimes of barbarity and vandalism should be codified into international law, where 'Lemkin would fuse these two crimes into his definition of the crime of genocide in his book *Axis Rule*'.[249]

In 1942, Lemkin rearticulated both crimes of barbarity and vandalism, 'suggesting that none of these existing terms conveyed the true nature and gravity of the crime'.[250] 'Lemkin conceived

[246] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force *12 January 1951) 78 UNTS 277, a*rt II.
[247] William A Schabas, *Genocide in International Law: The Crime of Crimes (2nd end, Cambridge University Press 2009)* 11.
[248] United Nations Office on Genocide Prevention and the Responsibility to Protect <https://www.un.org/en/genocideprevention/genocide.shtml> accessed on the 23 November 2021.
[249] Ana Filipa Vrdoljak, 'Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law' (2009) 20 European Journal of International Law 1163, 1177.
[250] ibid, 1184.

of genocide in broader terms than simply killing members of groups',[251] he expressed how the gravity of genocide was contained within the definition, this idea that genocide was not just an act of killing members of a group but rather 'a process of systematic discrimination, exclusion and destruction of a group'.[252] Therefore, by 1944 Lemkin had transformed the "crime without a name" into an articulated definition, by conveying the true gravity of the crime of genocide as the intentional destruction 'of a nation or of an ethnic group'.[253] Lemkin's definition reflected a crime so profound that it required the redefining of a new international legal order. *Axis Rule* 'provided a readily accessible litany of laws and orders signed by senior Nazi officials, which proved invaluable for US and British prosecutors at Nuremberg'.[254] For 'Lemkin's story is one of an idea and a word',[255] his legacy has given Churchill's "crime without a name" – a name.

The Significance of the Nuremberg Trials

'Genocide' entered into the English, French, Russian and German languages in October 1945 in the criminal indictment issued against major Nazi war criminals before the IMT. The indictment incorporated genocide via crimes against humanity by charging the defendants for conducting 'deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others'.[256] This was a promising beginning for Lemkin, as throughout the IMT the word 'genocide' was included in the concluding speeches of the British and French prosecutors. For example, in the closing remarks of the French Prosecutor, Champetier de Ribes, stated: 'This is a crime so monstrous, so undreamt of in history through the Christian era up to the birth of Hilterism, that the term "genocide" had to be coined to define it'.[257] Certainly, the use of 'genocide' throughout the Judgement heralded its acceptance into international law, where genocide had referred to the Nazi atrocities committed against groups, crimes against humanity described the acts committed against individual members.

The Genocide Convention

On 11 December 1946, the General Assembly (GA) adopted Resolution 96(1),[258] which affirmed the status of genocide as a crime under international law. *This set-in motion the Genocide Convention which was adopted in the GA Resolution 260(III) on 9 December 1948 and defines genocide in Article II.*[259] *Two years later, the Convention entered into force on 12*

[251] Lawrence J LeBlanc, *The United States and the Genocide Convention* (Duke University Press 1991) 18.
[252] Vrdoljak (n 8) 1184.
[253] ibid.
[254] Folder 83.8, Box 83, CEIP Archives; and Reminiscences of Robert H. Jackson, Oral History Collection, (Columbia University New York) 1211.
[255] Charles H Anderton and Jurgen Brauer, *Economic Aspects of Genocide, Other Mass Atrocities, and Their Preventions* (Oxford University Press 2016) 42.
[256] Trial of the Major War Criminals before the International Military Tribunal (IMT) at Nuremberg, 14 November 1945 – 1 October 1946, Vol I (1947) 43-44.
[257] *France et al v Goering et al* (1947) 19 IMT 531.
[258] UN General Assembly, *The Crime of Genocide*, UN Doc. A/RES/96(I) (11 December 1946) *188-9*.
[259] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force *12 January 1951) 78 UNTS 277*, art II.

January 1951, categorising genocide as an independent crime.

The development of the law on genocide did not end with the Convention. On 17 July 1998, the Rome Statute of the ICC was established as a permanent international tribunal to prosecute the most heinous crimes of mankind. The definition of genocide in Article II of the Convention is reproduced verbatim in Article 6 of the ICC Statute. By the time of the ratification of the ICC, there was limited jurisprudence confirming the status and definition of genocide. 'No international court existed to prosecute individuals for genocide for the first forty-five years of the Convention's existence'.[260] The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were both landmark *ad hoc* tribunals in examining what the words of Article II conveyed. As well as the Rome Statute, the ICTY and the ICTR both mirrored the definition of the Convention in Article Four and Article Two. These two *ad hoc* courts have 'shouldered an important function regarding the determination of the normative meanings of the expressions in the Genocide Convention'.[261]

A hierarchy of international crimes

From the very inception of the Genocide Convention, *the crime of genocide has 'specifically emerged as a particular species of the broader category of crimes against humanity'.*[262] *The GA 'wished to give special treatment to the crime of genocide because of the particular gravity of that crime, which aims at the systematic extermination of human groups'.*[263] *Although all crimes against humanity "shock the conscience of humankind", genocide has been considered 'the most supreme type of crime against humanity'.*[264] *As William Schabas suggests, the broader concept of crimes against humanity has been viewed as the second tier of the pyramid,*[265] *placing genocide at the apex. It could be said that genocide has evolved outside the framework of crimes against humanity as it is 'undeniably the most horrible and atrocious of crimes under general international law'.*[266] *If this is the case then genocide merits being called the 'crime of crimes', highlighting the particular magnitude of this offence in comparison to crimes against humanity.*

The Convention established no requirement of a nexus with armed conflict, equally, when the ICC Statute was ratified, the requirement for crimes against humanity to be committed during wartime was also abandoned. Schabas has indicated that before the adoption of the ICC there was 'a major *impunity gap'*[267] which pressured the expansion of the genocide definition.

[260] Michael Bazyler, *Holocaust, Genocide, and the Law: A Quest for Justice in Post-Holocaust World* (1st edn Oxford University Press 2016) 40.
[261] Devrim Aydin, 'The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of the International Courts' (2014) 78 Journal of Criminal Law 423, 435.
[262] Payam Akhavan, *Reducing Genocide to Law: Defintion, Meaning, and the Ultimate Crime* (Cambridge University Press 2012) 81.
[263] Ad Hoc Committee on Genocide, Relations Between the Convention on Genocide on the One Hand and the Formulation of the Nuremberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other, UN Doc. E/AC.25/3 (1948), 6 (emphasis added).
[264] William J Fenrick, 'Should Crimes Against Humanity Replace War Crimes?' (1999) 37 Columbia Journal of Transnational Law 767, 775.
[265] Schabas, *Genocide in International Law* (n 6) 12.
[266] *Yearbook of the International Law Commission 1994*, Vol I (2359th meeting) 214, para 21.
[267] Schabas, *Genocide in International Law* (n 6) 647 (emphasis added).

Instead, Article 7 of the ICC[268] has filled that lacuna. This has triggered a debate on whether or not genocide is categorically more serious than crimes against humanity.

The 'crime of crimes' categorisation remits some stigmatisation attaching to this particular crime of genocide. For example, the ICTY in the Appeals Chamber of the case *Prosecutor v Krstic*[269] stated that 'among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium'.[270] Certainly, the Appeals Chamber was trying to explain that this attachment of special condemnation and opprobrium is due to the Holocaust. This reflects the speciality of genocide by stressing the grave nature of the crime, however, some might say that this stigmatisation of genocide in the existence of a hierarchy of crimes is incorrect. The jurisprudence of both the ICTY and ICTR have been equivocal in stating whether or not genocide is within the hierarchy of international crimes. For instance, the Judgement in *Prosecutor v Akayesu*[271] considered genocide to be 'the gravest crime'.[272] Similarly, in *Prosecutor v Blaškić,*[273] the Trial Chamber concluded that the ICTR created a hierarchy of crimes by suggesting that genocide resulted in a higher sentencing, with punishment of life imprisonment.[274] On the other hand, whilst the case of *Prosecutor v Kambanda*[275] recognised the difficulty in establishing a hierarchy of crimes between crimes against humanity and genocide, it observed that war crimes were of a lesser seriousness.[276] Furthermore, the ICTY jurisprudence collectively created a scale of hierarchy which was expressed in *Blaškić*:

1) "The crime of crimes": genocide
2) Crimes of an extreme seriousness: crimes against humanity
3) Crimes of a lesser seriousness: war crimes.[277]

These nomenclatures produced by case-law have categorised themselves into a hierarchy. As a result, genocide has been distinguished as the '*crime of crimes'* despite the rejections of hierarchical labelling as Payam Akhavan has indicated that 'this assessment apparently relates to the additional stigma of this particular crime'.[278]
Alternatively, in the ICTR Appeals case of *Prosecutor v Kayishema and Ruzindana*[279] the Chamber denied existence of a hierarchy stating that, 'genocide is the "crime of crimes" because there is no such hierarchical gradation of crime'.[280] This has been taken further in the Darfur Commission, as '*international offences such as the crimes against humanity and war*

[268] Rome Statute of the International Criminal Court (adopted on 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.
[269] *Prosecutor v Krstić* (Appeals Judgment) IT-98-33-A (19 April 2004).
[270] *Krstić* (n 28) para 36.
[271] *Prosecutor v Jean- Paul Akayesu* (Trial Judgement) ICTR-96-4-T, T Ch I (2 September 1998).
[272] ibid, para 470.
[273] *Prosecutor v Blaškić* (Trial Judgement) IT-95-14 (3 March 2000).
[274] ibid, para 800.
[275] *Prosecutor* v *Kambanda* (Trial Judgement) ICTR-97-23-S (4 September 1998).
[276] ibid, para 14.
[277] *Blaškić* (n 32) para 800.
[278] Akhavan (n 21) 85.
[279] *Prosecutor v Kayishema and Ruzindana* (Judgment (Reasons)) ICTR-95-1-A (1 June 2001).
[280] ibid, para 367.

crimes may be no less serious and heinous than genocide'.[281] Furthermore, the *Akayesu* Chamber observed that each crime has its own interest: '[T]he crime of genocide exists to protect certain groups from extermination or attempted extermination. The concept of crimes against humanity exists to protect civilian populations from persecution.[282] Whilst these statements hold some weight to their arguments, it must not be misunderstood that the concept of genocide still remains the 'crime of crimes'.

To distinguish genocide from other international crimes, the ICTY Appeals Chamber has stated that 'its gravity is reflected in the stringent requirement of special intent',[283] this connotes that genocide is considered to occupy a more specific niche. It requires 'a further dimension of moral turpitude'[284] and merits in-depth discussion as to the mental element of the crime which has created an extremely high threshold.

Genocide versus crimes against humanity

Some contextual elements of genocide are closely related to the crime of persecution. In *United States v Josef Altstoetter,*[285] the Tribunal held that genocide was 'the prime illustration of a crime against humanity'.[286] This is because the Nuremberg Charter defined crimes against humanity as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religion grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal….[287]

At the time of the adoption of the Convention, the crime of genocide shared a lot in common with the crime of persecution as the Nuremberg Charter is a relatively succinct provision. Similarly, both the ICTY and ICTR restrict persecution to 'political, racial and religious grounds',[288] as the Convention states that genocide is to be directed against 'a national, ethnical, racial or religious group'[289]. However, by the time of the implementation of the ICC Statute, crimes against humanity created a wider distinction between the crime of persecution and genocide. This is because persecution under the ICC Statute is directed against 'any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined

[281] 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law in Darfur', UN Doc. S/2005/60 (1 February 2005) para 522 (emphasis in the original).
[282] *Akayesu* (n 30) para 469.
[283] *Krstić* (n 28) para 34.
[284] Akhavan (n 21) 85.
[285] *United States v Josef Altstoetter (Justice Case)* Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10, vol III (1949).
[286] *United States v Josef Altstoetter (Justice Case)* Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10, vol III (1949) 983.
[287] Charter of the International Military Tribunal (8 August 1945) art 6(c).
[288] UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 25 May 1993, art 5(h); *Statute of the International Criminal Tribunal for Rwanda,* 8 November 1994, art 3(h).
[289] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force *12 January 1951) 78 UNTS 277*, art II.

in paragraph 3…'.[290] '[T]he reason for the more elaborate definition was a concern among many delegations at the Rome Conference that persecution might be interpreted to include any kind of discriminatory practices'.[291] Unlike the crime of genocide, persecution now protects political and social groups from annihilation. Furthermore, both crimes require the victim to be targeted or at least in part due to their membership to a group,[292] persecution has been regarded as 'an offence belonging to the same *genus* as genocide'.[293] Although, persecution differs from other crimes against humanity as it requires a discriminatory intent, genocide is fundamentally distinct as persecution does not require 'special intent'. In addition, the *mens rea* of genocide requires that the intended victim be the group 'as such' and not individual members. Thus, persecution falls short of genocidal intent by the intent to destroy a particular group. It could be said that an accused can be convicted of both genocide and persecution in context of the same conduct, however, as discussed above, special intent is what 'makes genocide an exceptionally grave crime and distinguished it from other serious crimes'.[294]

Furthermore, the definition of genocide unlike crimes against humanity does not require the 'proof that the proscribed act formed a part of a widespread or systematic attack on the civilian population, and that the perpetrator knew of this relationship'.[295] Rather, the act of genocide can either take place on a large scale or systematically but also the Trial Judgement in *Prosecutor v Jelišić*[296] theoretically underpinned 'the possibility of a lone individual seeking to destroy a group as such'.[297] For that reason, the perpetrator does not need to know of any relationship between his acts or a widespread or systematic attack. Therefore, the act of genocide can only be committed against individuals based on their national, ethnical, racial or religious identity. These differences highlight the features of genocide that makes it the 'crime of crimes'.

Dolus specialis ('special intent')

The ICC Pre-Trial has explained that the genocide offence comprises of 'an additional subjective element, normally referred to as "*dolus specialis*" or specific intent, according to which any genocidal acts must be carried out with the "intent to destroy in whole or in part" the targeted group'.[298] The words 'with intent to destroy' goes beyond the general intent prerequisite, as genocide is characterised as a crime with 'an extended – with regard to the *actus reus* – mental element or a transcending internal tendency ('*überschießende Innentendenz*').[299]

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[290] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 7(1)(h).
[291] Georg Witschel and Wiebke Rückert, *Article 7(1)(h) - Crime Against Humanity of Persecution* in Roy S Lee (eds) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers New York 2001) 94-95.
[292] See for example, *Prosecutor v Blaškić* (Trial Judgement) IT-95-14 (3 March 2000) para 235: 'the perpetrator of the acts of persecution does not initially target the individual but rather membership in a specific racial, religious or political group'.
[293] *Prosecutor v Kupreškić et al* (Trial Judgement) IT-95-16 (14 January 2000) para 636.
[294] *Prosecutor v Radislav Krstić* (Trial Judgement) IT-98-33-T (2 August 2001) para 553.
[295] *Krstić* (n 28) para 223.
[296] *Prosecutor v Goran Jelišić* (Trial Judgement) IT-95-10-T (14 December 1999).
[297] ibid, para 100.
[298] *Prosecutor v Al Bashir* (Pre-Trial Chamber I) ICC-02/05-01/09-3 (4 March 2009) para 139.
[299] Kai Ambos, 'What does 'intent to destroy' in genocide mean?' (2009) 91 International Review of the Red Cross 833, 835.

Genocide is a crime with a double mental element; a general and ulterior intent with the ultimate aim of the destruction of the group. This ulterior element has been described as a common law concept to distinguish offences of 'general' intent, by adding an additional 'special' intent (*dolus specialis*) which goes beyond any other crime. For this reason, the specific intent is regarded as the essence to the crime of genocide and a 'distinguishing characteristic of this particular crime under international law'[300] making it the '*crime of crimes*'.

Dolus specialis emphasises the significance and magnitude of the crime of genocide in comparison to other crimes under the jurisdiction of Article 5 of the ICC. This is because the International Court of Justice (ICJ) stressed the importance of establishing additional intent because:

> [I]t is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words 'as such' emphasize that intent to destroy the protected group.[301]

Where the offender must ascertain that they meant to cause the act of genocide, the prosecution must go beyond this by establishing 'specific' intent. Therefore, the requirement of 'intent to destroy' manifests genocide into 'an extreme and the most inhumane form of persecution'[302] as the gravity of genocide is contained within the subjective mental element. However, the degree of this special intent is not articulated in international treaty law and thus there needs to be a close analysis of case law of the *ad hoc* international criminal tribunals to comprehend and define what is meant by special intent.

The meaning of 'intent to destroy'

One of the most ground-breaking cases in defining special intent is the *Akayesu* Judgment in the ICTR. The Trial Chamber defined 'intent to destroy' as 'the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged'[303] or has 'the clear intent to cause the offence'[304]. The Judgement stressed how genocidal intent is the essence of an international offence, this is because it is 'characterised by a psychological relationship between the physical result and the mental state of the perpetrator'.[305] Thus, the *Akayesu* case attempted to define special intent by way of distinguishing it from other crimes, this is because the Chamber observed that genocide is committed with special intent as it involves the destruction of the group, whereas in crimes

[300] Report of the International Law Commission on the work of its forty-eighth session, UN Doc. A/51/10 (6 May 1996-26 July 1996) 44.
[301] Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Bosnia and Herzegovina v Serbia and Montenegro)* Judgment (26 February 2007) para 187.
[302] *Kupreškić et al* (n 52) para 636.
[303] *Akayesu* (n 30) para 498.
[304] ibid, para 518.
[305] ibid.

against humanity the group is oppressed.

The *Akayesu* findings created a method for the judicial application of the *dolus specialis* which has also been crystallised by the ICTY. For example, the *Jelišić* Trial Chamber also applied the *Akayesu* definition of special intent, however, Goran Jelišić was acquitted of the charge of genocide. The Prosecutor had failed to prove genocidal intent because it was not 'proved beyond all reasonable doubt that the accused was motivated by the *dolus specialis* of the crime of genocide'.[306] Therefore, 'he killed arbitrarily rather than with the clear intent to destroy a group',[307] however, the Appeals Chamber concluded that the existence of personal motive of economic benefits or political advantage does not exclude the perpetrators specific intent.[308] But they confirmed the irrelevance of 'motive' in the Trial Chamber which criticised their use of the term 'motivated' in relation to intent. Nevertheless, Jelišić pleaded guilty for crimes against humanity and war crimes.

Similarly, the *Krstić* case explored the threshold of special intent of genocide by elaborating on the definition of aiding and abetting genocide. The Trial Chamber held that genocide consists only of acts 'committed with the goal of destroying all of part of a group',[309] where Krstić was convicted based on his intent to kill Bosnian Muslim men of Srebrenica. However, the Appeals Chamber reaffirmed the stringent threshold of *dolus specialis* on the basis of the seriousness of genocide and rejected the knowledge requirement as it was not sufficient enough to infer genocidal intent.[310] The Appeals Chamber substituted his conviction with aiding and abetting genocide which rested on circumstantial evidence that has only proven knowledge of the killings and awareness of the intent of others committing genocide. The *Krstić* case highlights that the ICTY created an extremely high threshold for an individual committing genocide, to some extent, some consider that aiding and abetting genocide is a lesser offence, however, if genocide still merits the 'crime of crimes' classification, then it is difficult to conclude that aiding and abetting is of a lesser offence if the outcome still results in genocide.

On the other hand, the *Sikirica* Trial Chamber considered that the special intent as a 'relatively simple issue of interpretation' as the offence 'expressly identifies and explains the intent that is needed'.[311] Through case-law analysis, it is evident that the original understanding of the *Akayesu* case suggested that 'intent to destroy' meant a special intent which 'expresses the volitional element in its most intensive form and its purpose-based'.[312] This has also been confirmed by ICJ by expressing special intent as an 'extreme form of wilful and deliberate acts designed to destroy a group or part of a group'.[313] The case-law surrounding the meaning, requirement and application of specific intent has been done by interpreting existing norms, of the Convention and the Rome Statute, where through the jurisprudence of *ad hoc* tribunals,

[306] *Jelišić* (n 55) para 108.
[307] ibid.
[308] *Prosecutor v Jelišić* (Appeal Judgement) IT-95-10-A (5 July 2001) para 49.
[309] *Krstić* (n 53) para 571.
[310] *Krstić* (n 28) para 134.
[311] *Prosecutor v Dusko Sikirica* (Trial Judgement on defence motions to acquit) IT-95-8-T (3 September 2001) paras 58 and 59.
[312] Ambos (n 58) 838.
[313] *Bosnia and Herzegovina v Serbia and Montenegro* (n 60) para 188.

international customary law has been able to develop.

Genocide is undoubtedly the pinnacle of evil, this is particularly reflected in the stringent requirement of *dolus specialis,* a feature that makes genocide the '*crime of crimes'*. However, it has been analysed that the gravity of genocide has been challenged by the recent development of crimes against humanity, most notably the crime of persecution and the recognition that crimes against humanity can be committed in peacetime. As a result, it could be said that genocide has been brought down from the apex of the pyramid as the crime has been said to be no less heinous than other crimes of mass atrocity. In addition, the '*crime of crimes*' nomenclature has been regarded as a stigmatisation rather than an important legal significance. This is because the courts have pushed the boundaries in making genocide so exceptional in comparison to other crimes, therefore it is difficult to identify the distinctions between each crime in terms of the seriousness. Nevertheless, the special intent requirement and the narrow definition have created an extremely high threshold for perpetrators to commit genocide which makes genocide the worse crime of all.

Conclusion

This article aimed to break down the definition of genocide by discussing how the "crime without a name" became the "crime of crimes", categorising genocide as the gravest crime in international law. Lemkin was a motivating catalyst in defining genocide, helping the "crime without a name" become the crime of genocide. Post-WWII jurisprudence was influential in construing what the Genocide Convention envisioned, however, post-Nuremberg developments began to place primacy over genocide within international law, thus it acquired so much force that the ICTR described it as the 'crime of crimes'.[314]

This characterisation of genocide as the most extreme human rights violation was manifested in the ICTY and the ICTR. These *ad hoc* tribunals pushed the boundaries of the definition as far as they could to maintain the distinction between genocide and crimes against humanity. In doing so, they suggested that genocide sits at the apex of the pyramid of criminality.[315] However, in looking at the specifics of the Appeals Chambers in both *ad hoc* tribunals, it is somewhat prompted that genocide, crimes against humanity and war crimes are all of the same gravity. This is most prevailing in the Darfur Commission that '[G]enocide is not necessarily the most serious international crime'.[316]

Much of the normative issues surrounding the 'crime of crimes' expression contributes to conveying the terrible seriousness of crimes against humanity, essentially dating back to the allegations made against the Ottoman Empire in 1915. However, it was examined that the adoption of the ICC created a huge development in defining crimes against humanity, especially the nexus with peacetime atrocities which closed the gap of impunity against the crime of genocide. In addition, the crime of persecution was thoroughly discussed as a crime touching

[314] *Kambanda* (n 34) para 16.
[315] *Jelišić* (n 55) para 13
[316] 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur', UN Doc S/2005/60, para 552.

on the definition of genocide, nevertheless, the limiting scope of genocide meant that the crime of persecution is unable to match the Convention's stringent criteria. Thus, genocide is regarded as an extreme form of persecution. However, what makes genocide the 'crime of crimes' is the element of *dolus specialis* and its extremely high threshold. For that reason, abandoning the 'crime of crimes' expression would not change the terrible nature of crimes against humanity, for genocide will always remain the 'crime of crimes' because of the special intent it takes to commit that crime.

There is still divided opinion over the question of whether genocide is more serious than crimes against humanity. However, *ad hoc* tribunal jurisprudence reflects a restrained use of the category of genocide to preserve the narrow definition of the crime. There are undesirable consequences to enlarging or diluting the definition as it could undermine the terrible stigma associated with the act of genocide. Any developments of crimes against humanity have said to dispel this. However, genocide is still 'special' because of the *dolus specialis* that arguably places genocide within a different realm of moral turpitude to other international crimes.