Fair Trials and International Courts: A Critical Evaluation of the Nuremberg Legacy

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The novelties of the contemporary international order require a rethinking of the normative foundations of criminal justice. Although one can understand the relevance of basic principles such as the rule of law and, in particular, the value of a fair trial in the domestic context, when one looks at criminal courts operating beyond the bounds of the traditional nation-state—specifically to the courts founded in the wake of the International Military Tribunal at Nuremberg—the justification for recourse to these principles is far more elusive. In this paper I will argue that several traditional arguments for basic normative principles of criminal justice, in particular the right to a fair trial, are problematic in the international context and thus these principles require a different sort of justification than one would find domestically.

The Nuremberg Legacy

There is no doubt that, with the benefit of over six decades of hindsight, we can say that the International Military Tribunal at Nuremberg (IMT) was an event of world-historical importance. It was the first successful international criminal court, and has since played a pivotal role in the development of international criminal law and international institutions. In many ways, therefore, it represents a paradigm shift in international law. It had a seminal influence on the two ensuing ad hoc international tribunals (for the former Yugoslavia and Rwanda), the various “mixed tribunals” (for Sierra Leone, East Timor, and Cambodia), as well as the new International Criminal Court (ICC). No scholars of international criminal law could claim serious understanding of their disciplines if they did not study the IMT seriously and in depth. Over the last six decades, the word “Nuremberg” has become

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synonymous with humankind’s highest ideals and aspirations—a measuring stick against which all subsequent humanitarian ventures have been measured.

The IMT has held such influence and garnered such praise for a number of reasons. The arguments presented before the court by Hartley Shawcross and Justice Robert Jackson and others possess a gravity that denotes their genuine historical import and the final opinions of the court show a thoughtfulness that is surprising given the strong public sentiments and political pressures that were brought to bear on the tribunal. Passions were put aside during the proceedings and for the most part reason was allowed to prevail. Nonetheless, despite the numerous significant features of the IMT, the vast majority of scholars of international criminal justice point to one feature of the IMT as essential to its enduring influence: the IMT is deservedly famous because it was, for all intents and purposes, a fair trial.1

In fact, the influence of this aspect of the IMT in international criminal justice has been so pervasive that the contemporary conception of international trials has become synonymous with the idea of a fair trial. It is assumed that any other sort of criminal tribunal, such as a “show trial,” is, by that fact alone, an illegitimate enterprise. An unfair international trial, one that does not give defendants the vast majority of rights that they would be afforded in a domestic court in a country such as the U.S. is, ipso facto, not a real trial. Virtually all recountings of the Nuremberg tribunal take great pains to point out that the trial was fair and present this as prima facie evidence that the trial was a good thing and a valuable contribution to human civilization. This concern for the fairness of international courts as the central condition of legitimacy is the most significant influence of the Nuremberg Tribunal, even if this point is largely taken for granted by many scholars of international criminal justice.2

However, in this paper I want to take a somewhat skeptical approach to evaluating the idea of a fair international criminal trial. My concern is not primarily with what rules would constitute a fair trial in the international context (although this, too, is a problematic issue), but rather with a concern that is somewhat deeper. Although I instinctively believe that international criminal tribunals should be fair, when I ask why they should be fair, answers are not as easily forthcoming. International criminal justice is clearly a unique domain, functioning in very special political and moral circumstances. An international criminal trial functions in a context that impacts on the traditional reasons that are usually given for providing accused criminals with the requisite procedural safeguards. This novel context, I will argue, substantially undermines the traditional arguments that are given for making criminal trials fair, and forces us to revise the available rationales for a fair trial.

There is a historical correlate to this normative problem: the diplomatic prelude to the Nuremberg trial itself. Historians point out that at the end of World War II, the creation of an international tribunal that would adhere to western, liberal principles regarding fair trials in order to deal with the surviving Nazi leadership was far
from a foregone conclusion. Alongside the proposal for an international court like the IMT were two other popular suggestions. The first was the proposal of U.K. Prime Minister Winston Churchill along with U.S. Treasury Secretary Henry Morgenthau and Secretary of State Cordell Hull, that the main leadership of Nazi Germany be subject to “drumhead trials” and then, having established the identity of the defendants, they would be immediately executed. The other suggestion was that of Joseph Stalin, that the court conduct a “show trial,” that is, a theatrical presentation for the world offering the defendants few if any rights with a predetermined conclusion: guilt and a swift execution. Such trials were common in Stalinist Russia and did not carry the stigma that they do in Western democracies. Both Stalin’s and Churchill’s proposals had solid backing from political elites in all of the allied governments. As there was no real precedent for the something like the IMT, there was no reason to assume that the creation of such a novel institution was a foregone conclusion.

Moreover, it was not clear that a fair trial was the most popular of the three proposals that were put forward at the time. Polls conducted at the end of the war, in the U.S. at least, suggested that fair trials were not desired by the vast number of citizens for their soon-to-be vanquished enemies. A Gallup poll in 1942 found that only 1% of Americans favored a trial for Adolf Hitler, with a full 39% supporting execution (and 3% supporting slow torture). In a 1944 poll, 88% of Americans supported punishing the Japanese military leadership, but only 4% wanted to “treat them justly.” Such sentiments are not unique to another, less civilized time. Today, anecdotal evidence suggests that many find the idea of a fair trial for some of human civilization’s worst offenders to be a frivolous waste of time or even a morally repugnant project. Few objected when, in October 2002, White House Spokesman Ari Fleischer called for the summary execution of Saddam Hussein. Such individuals are viewed as beyond the pale of law and justice, much less deserving of the protections that are given the ordinary citizens; at least according to public opinion.

All of this raises the question: why should we provide such unique and uniquely horrible offenders (in such strange circumstances) with the trappings of a fair criminal trial, with all its costly procedural safeguards and the ever-present possibility of failure? Once we examine the reasons that are traditionally given for making criminal trials fair, I will argue, several of the conventional arguments do not stand up to scrutiny. Rather, only one persuasive reason can be offered for conducting fair trials in the international context: the concern that an unfair trial sanctioned by the international community would send an unacceptable message to countries that do not presently observe the standards of due process provided in liberal democracies.

International criminal trials that are unfair will allow oppressive states to justify conducting similar trials against offenders in their own nations, an obviously unacceptable conclusion and will likewise prevent any liberal democratic state from effectively criticizing such regimes. Thus, the rationale for a fair international
trial is exogenous to the actual trial itself: international trials need not be fair because the defendant deserves such a trial, but rather they warrant a fair trial because of what such trials do for others. In the vast majority of cases, international criminals do not require fair trials, but domestic criminals do and this alone justifies making their trials fair.

I should note that this discussion of international criminal trials will be limited to trials for large-scale crimes committed by powerful offenders such as military commanders, leading policymakers, and top political leaders: figures such as Herman Goering, Charles Taylor, and Saddam Hussein. While such leaders are not always the target of international criminal trials, they are the cases that raise the most vexing problems, and are the intended targets of most international courts, even if this has not always been the case in practice. The statute of the ICC, for example, restricts the court’s provenance to “the most serious crimes of concern to the international community as a whole” and will prosecute suspects only when their domestic criminal courts are unable or unwilling to do so. However, if the mechanisms of international criminal justice continue to expand and prove themselves, there is good reason to believe that lesser offenders may be brought before such tribunals and the internationalized criminal justice system will expand to resemble a more conventional system. Nonetheless, at this point, the international courts are limited to the types of criminals that were originally brought before the Nuremberg tribunal: powerful people who are egregious violators of some of the most important international legal norms.

### The Novelties of the International Context

An international criminal court is superficially similar to a domestic one. It uses judges and lawyers to conduct a trial, applies an explicit legal code, and renders a verdict along with an appropriate punishment when necessary. However, there are some important political and normative differences between the two. Politically speaking, international justice is different in the sense that international trials are run by the “international community,” a collection of sovereign states with nearly absolute control over what happens within their borders. This means that international courts cannot count on the backing of a government, a police force, or an executive, but must instead rely on the cooperation of national political leaders to conduct their affairs. Normatively speaking, they claim to represent the moral judgments of international society and of humanity in general, and not the judgment of a particular community or a particular state.

Additionally, the criminals who are prosecuted by the ICC and other international tribunals are not ordinary criminals prosecuted for ordinary sorts of crimes. As was mentioned, they are often high political officials who have been charged with carrying out large-scale atrocities: war crimes, genocide, crimes against
humanity, and military aggression, among others, and who are not suitable candidates for conventional, domestic criminal justice in their home states. They are often individuals who are held in great esteem by at least some of their fellow countrymen and greatly detested by others. Together, I will argue that these circumstances together amount to a profound set of differences from domestic justice and pose serious challenges for international justice, challenges that are significantly different from its domestic counterpart. Because of these novelties of international justice, I will argue, many of the traditional reasons given for making criminal trials procedurally fair do not hold up.

Due Process: A Moral Argument

Clearly, criminal trials serve a number of different social and moral functions. Only when we have articulated the different purposes that a criminal trial is meant to play, as well as the significance of a fair trial for fulfilling these different purposes, can we properly evaluate their relation to international criminal justice. In the following sections I will examine some of the different roles played by criminal trials and their relevance for international criminal justice. I will focus on three commonly cited functions of a criminal trial (the attribution of blame, telling stories, and restoring the community) and one that is unique to the international context (serving as a role model). Only the last one, I will argue, works as an appropriate rationale for fair trials in the international context.

The Attribution of Blame

The simplest and most straightforward reason as to why a trial should be fair is epistemological: fair trials help us to discover the truth. As Antony Duff argues, at least at first glance, truth-finding is “the main, or even sole, aim of the criminal trial.” Whether it is through an adversarial process or an inquisitorial one, the most obvious rationale for fair trials is that (so the theory goes) they are the most sound method for finding facts about who did what to whom and when. A fair trial makes it more likely that the guilty will be punished and the innocent exonerated, obviously an important part of any well-ordered criminal justice system. It stands as a protection against the forces that would seek to punish an innocent person in lieu of giving the guilty parties their just deserts and allows for the appropriate fixation of blame. If trials are not fair, and the accused individuals are not given adequate chance to defend themselves, there can be no guarantee that those being punished truly deserve it and that society has been adequately protected from lawbreakers. This is to say that a trial is meant to uncover the truth about a particular individual’s alleged
misdeeds in a case, and unbiased procedures are an essential element to getting to there.

The vast majority of arguments for criminal punishment depend on the claim that only the truly guilty ought to be punished. Establishing the guilt or innocence of a particular defendant is a precondition, at least theoretically, of any other social benefits that a criminal trial might provide. Both general and special deterrence depend on the fact that the correct individual is punished for his or her crime, for how can one anticipate society’s response to an infraction if it is not clear that the correct individual will be punished? Similarly, the offender can be reformed or incapacitated only if the correct person is arrested and placed under the power of the state—reforming the innocent is incoherent. Finally, the justified desire for retribution cannot be met by punishing just anybody, those who are truly responsible for the wrongdoing must face justice for retribution to be given. For almost all penal theorists, a necessary condition for punishment to be effective is that punishment is aimed only at the guilty party—and establishing guilt is the role of a criminal trial.

Although one can question whether or not the “truly guilty” need be punished for a crime to have such effects (as opposed to “telishment”—that is, punishing an innocent person who is widely perceived to be guilty but may be innocent12), we can see that in general punishing the guilty party is essential to the functioning of a criminal justice system, and fair trials are the best way to achieve this.

The Attribution of Blame in an International Context

As with everything else, this dimension of criminal justice becomes significantly more complicated when we move into the international arena. This is the case for numerous reasons. First and foremost, in many international criminal cases there is never any serious doubt that the accused is guilty of some of the worst crimes imaginable. Although a small number of people were acquitted at Nuremberg, a number of the individuals charged before the IMT were so obviously guilty that the trial’s finding of fact seemed from this perspective almost trite and the conclusions foregone. Similarly, the crimes of Saddam Hussein and Slobodan Milosevic (along with the at-large criminal Ratko Mladic) are acknowledged and publicly documented. In international cases, guilt is rarely, if ever, seriously questioned by any but the most partisan observers (who would probably not be convinced by the results of such a criminal trial, no matter how fair its procedures), and the acquittal of a figure like Hussein would be outrageous.

One could argue in response to this claim that if legal or criminal guilt is about the application of laws to facts and the ascertaining of individual responsibility, then it follows that the point of the trial should be to determine whether or not the individual in the dock has violated a law. This can only be determined through a fair trial. It may be an unquestioned fact that
genocide has been committed in a particular instance, but the trial must determine whether or not the accused individual has violated a criminal law and therefore deserves punishment. This, so the argument goes, is the correct epistemological rationale for fair trials—they determine precisely law that the defendant violated—if she violated any at all. Thus, arguing that the defendant is “obviously guilty” conflates moral guilt, a less clear and probably less serious form of guilt, with criminal guilt.13

However, this whittling down of the concept of criminal guilt to the narrowest form of legal liability—breaking a rule—overlooks a number of crucial features of international criminals and international crimes. For domestic activity, it may make sense to frame criminal responsibility so narrowly: individual criminals, save in extreme cases, act in isolation or in concert with a small group of like-minded conspirators. However, international actors of a stature that would fall under the purview of the ICC or the Nuremberg tribunal are powerful players who either know what is happening under their watch or should have known. If criminal activity such as genocide rises to the level of an international crime, which almost always garners a great deal of public attention, it is virtually inconceivable that a powerful policymaker would not be aware of it. This, coupled with the heavy pre-trial screening procedures for most international tribunals (which constitute a “trial before the trial” in many senses), means that it is highly unlikely that those accused of international crimes in international cases do not deserve punishment.

Moreover, the crimes that occurred during World War II, Rwanda, or in the former Yugoslavia were widespread and diffuse. There is not a single isolated incident with a single actus reus that can establish the commission of the offense. Rather, they were crimes of vast scale, stretching over years and filtered through dozens if not hundreds (or thousands) of subordinates. International crimes like “genocide” and “crimes against humanity” are by definition large-scale atrocities that could not be committed by an individual alone. They represent the sum total of vast numbers of assaults, murders, and other equally wrongful acts. By establishing who did what to whom, criminal prosecution is well suited to serve the need to punish conventional acts performed by individuals, but with such large-scale crimes, the dynamics of proof are different. The discrete acts that constitute “genocide,” which can involve millions of people, are far beyond the capacity of a conventional criminal trial with its heavy emphasis on rules of evidence and the requirement that facts be established beyond a reasonable doubt. With wide-scale atrocities, liability is widespread and shared and thus difficult to establish through courtroom procedures.14 This means that a narrowly construed notion of legal liability and the procedures designed to establish it are inadequate for these uniquely horrible acts and actors.

Of course, there may be some legitimate debate as to whether or not individual defendants are responsible for one or more particular crimes listed in their indictment. Thus, the defendants at Nuremberg may not have been responsible for everything of which they were accused. However,
this point overlooks the vastness of their criminal activity. Whether or not the Nazi government was responsible for the massacre of Polish nationals at the Katyn Forest (four decades after the IMT the Russian government admitted to carrying out the massacre\textsuperscript{15}), there is little doubt that they were responsible for a wide range of some of the worst crimes imaginable, many of which did not make it into the indictment. The German leaders may have been innocent of the Katyn Forest killings, but that offense is miniscule when contrasted to the long list of other massacres for which they bear an unambiguous and uncontested responsibility and for which they were justly punished.\textsuperscript{16} The responsibility of international criminals for some of the worst atrocities known to humanity is invariably unquestioned by objective observers, whether or not they bear liability for each single act of which they are accused is beside the point. The minutiae of criminal responsibility—the facts established in a criminal trial—are overshadowed by the overwhelming evidence of deep and widespread criminal wrongdoing done by international offenders.

Similar arguments were put forward by members of the allied forces when the IMT was initially proposed. In terms of formal international law, the Soviets pointed out that the Allies had already declared the Axis leaders “criminal” and deserving of punishment in the Moscow Declaration, and thus a criminal trial was redundant.\textsuperscript{17} In response to Justice Jackson’s proposal for the IMT, British Foreign Minister (and later, Prime Minister) Anthony Eden scoffed, “The guilt of such individuals is so black that they fall outside and go beyond any judicial process.”\textsuperscript{18} In this instance, a slavish obedience to a legal process threatened both military achievements and delicate political realities. Instead of already establishing a well-known fact, that the Nazi leadership including those in the dock at Nuremberg, were responsible for waging aggressive war in Europe, such critics feared that the trial would give the Nazi leadership a forum in which they could justify their acts and command world attention. The important thing to remember is that the debate among the allies was not whether the Nuremberg defendants would be harshly treated. All sides agreed with this. The only point of contention was whether or not this treatment (execution) should be attached to, and dependent upon the outcome of, a procedurally fair trial. The IMT threatened to be an expensive, politically costly exercise in establishing truths that were already accepted by everybody.

When we step outside of the post-World War II context and look at later tribunals, the same argument applies. The suspected war criminals who go before international criminal courts are unlikely to be unknown individuals who are prosecuted for arbitrary reasons or mere targets of a capricious prosecutor. The modern international courts have established safeguards to exclude all but the worst and most obviously culpable defendants. The ICC has set up several different pre-trial stages in order to prevent such an occurrence that effectively serve to establish de facto (if not de jure) guilt in many of the cases that would go before this court. According to the ICC’s charter, prior to the indictment of an individual, there are several steps that
must be taken: first, the prosecutor must examine the initial evidence to determine that there is a “reasonable basis to proceed.” Further, if the prosecutor determines that the evidence meets this test, then the Pre-Trial Chamber must evaluate this evidence and determine that, “There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.” Only then may a prosecutor issue an indictment. Thus, the fact that an independent judge oversees the selection of persons for indictment helps to make the prosecution of manifestly innocent individuals an unlikely event. In fact, given the structures of the ICC (such as its complementary jurisdiction and the U.N. Security Council’s ability to delay prosecutions), it is far more likely that guilty parties will be unmolested than that innocent people will be unjustly prosecuted.

Along with the legal safeguards, there is also a practical limitation on the ICC prosecutor that undermines the need for a full-blown trial to establish the guilt of international criminals. It is an unfortunate fact that there is no shortage of atrocities in the world and the ICC prosecutor is likely to be inundated with requests to investigate certain crimes. While it is true that, according to the ICC’s charter, the prosecutors have a good deal of discretion in terms of deciding which of these complaints to pursue and which to disregard, it is likely that they will restrict themselves to the most egregious cases. This means that they are less likely to engage in frivolous prosecutions aimed at minor figures whose criminal liability is subject to serious doubt. The first criminals indicted by the ICC, Joseph Kony and other leaders of the Lord’s Resistance Army, have committed crimes that have been well-documented for nearly two decades, as have later indictments for officials in Sudan and the Democratic Republic of Congo. Similarly, the prosecutor is unlikely to initiate investigations of individuals where criminal responsibility is unclear and establishing culpability is difficult.

Another major reason why the epistemological rationale for a fair international criminal trial is not compelling is that many of the secondary benefits that are supposed to result from punishing criminals do not apply to the international arena. Even if we assume that the prosecution of criminals provides social benefits in the domestic context, most of these are likely not to be forthcoming from an international criminal trial. Although I have made this argument more extensively elsewhere, suffice it to say that there is no reason to think that international criminal courts can either deter would-be international criminals or provide their victims with the requisite satisfaction. The individuals who are willing to commit atrocities such as torture or genocide for political ends are not the sort of individuals who are likely to be deterred by the threat of penal sanctions, particularly the relatively mild sanctions of incarceration threatened by international courts. Such individuals are by nature political gamblers who operate in a violent world in which the cost of failure is often a horrible, violent death. Likewise, the nature of international criminal trials is such that they will probably not be conducted regularly enough to generate the certainty of punishment that deterrence research has shown is necessary to alter the
behavior of would-be offenders. Finally, the nature of international crimes—that they are committed by large numbers of individuals, with only the elite facing prosecution before an international court—entails that the victims and their survivors will not be compensated in the way that they would in more conventional criminal trials. It may be satisfying for victims to see a head of state punished, but one’s own actual victimizer, the man who actually pulled the trigger or raped the prisoner, is usually too small an actor to face indictment by an international court, and often is allowed to continue on with his life. International prosecutions are too rare and too specialized to provide many of these traditional goods of criminal justice, regardless of whether or not the individuals indicted are actually guilty of the crimes of which they are accused.

Assuming then that the primary rationale for making trials fair, the appropriate attribution of blame, does not stand up to scrutiny when placed in the international context, what does? I will now turn to secondary justifications for a fair trial, justifications that are rooted in other roles that are played by criminal trials beyond that of merely establishing guilt. If these roles can be shown to matter in the international context, and they can be shown to depend on assuring that a trial is fair, then we can say that international trials ought to be fair. Here I will look at three purposes that are often given for trials: the story-telling function, the restorative function, and (for lack of a better term) the “role model” function. I will argue that only the third of these serves as a proper justification for making international criminal trials fair.

Telling Stories

A second argument for a fair trial is also epistemological, but in a historiographic sense rather than in the more limited sense of determining individual culpability. Courtrooms serve not only as a means to establish the facts of a particular situation, but, particularly in international courts, to give a broader understanding of what happened, to report “the truth” in a sense beyond mere individual liability. That is, when appropriately conducted, criminal trials may formulate a story that gives the general public an interpretation of what happened, a way to make sense of a complex conflict and to place it in its proper moral context. As Washington Post columnist Charles Krauthammer described the trial of Saddam Hussein, “War crimes trials are, above all and always, for educational purposes. This one was for the world to see and experience and recoil from the catalogue of Hussein’s crimes, and to demonstrate the justice of a war that stripped this man and his gang of their monstrous and murderous power.”

A trial can present and evaluate evidence that places the acts of a few individuals in a broader historical context, situating those acts alongside those of other political actors and pointing out the broader consequences of their acts for humanity. Audiences can then take this
narrative as a reliable account of what happened when they reflect on these events in the future. Researchers and students can rely on evidence presented for future research and, when done right, the narrative can shape public consciousness for generations to come.

This feature of criminal trials can provide a number of benefits for society. Not only can such a narrative serve to make sense of horrible events for posterity, but it can also help to undermine revisionists who wish to deny inconvenient historical facts for their own purposes. Hitler was able to seize power, in part, by exploiting the belief that Germany had been unfairly victimized at the Treaty of Versailles and that the previous world war would have been won had there not been a domestic (Jewish) conspiracy to betray the Kaiser and end the war. 28 Arguably, none of this would have happened had there been an objective recounting of the events that led up to the war, preferably by some neutral tribunal such as a criminal court that fairly and objectively evaluated the evidence. Had the trial for Kaiser Wilhelm proposed at the end of World War I been allowed to proceed, the evidence brought forward could have blunted some of Hitler’s historical revisionism. 29 Similarly, those who wish to deny the Holocaust must continually confront the evidence set out at Nuremberg, evidence that shows unequivocally that the millions of Jews, Poles, and others were slaughtered under orders from the German political leadership. While obtuse revisionist historians are always capable of crawling out from under a rock, their accounts are less likely to be credible when confronted with voluminous court records.

This historiographic role for criminal trials can consequently serve as a justification for a fair trial. In this context, a fair trial is useful because, presumably, its procedures will lead to a better sort of story, or at least a more convincing one. The general public is more apt to believe a narrative of events if those who are cast as the “villains” are given a chance to give their side of the story. A narrative presented by only one side, without any criticism or rebuttal from the other, is apt to be looked upon skeptically by those who seek to learn the lessons of history. An unfair trial would only verify Goering’s insistence (inscribed in a copy of his indictment) that, “The victor will always be the judge and the vanquished the accused.” If both sides may contribute to the historiographic process through the procedures of a fair trial, the narrative that is unfolded is likely to be given a greater deal of credibility by an otherwise skeptical public.

However, there is a danger in relying on criminal trials—especially trials burdened with a requirement of fairness—to provide a proper historical narrative. The truth that criminal trials are designed to establish is much more limited than this. A court is not charged with constructing an entire narrative consisting of all of the facts surrounding a particular situation, but rather the particular facts that relate to the guilt or innocence of a defendant. As Arendt put it in relation to Nuremberg:

_The purpose of the trial is to render justice, and nothing else; even the noblest ulterior purposes— the “making of a record of the Hitler regime…” can only detract from the law’s_
main business: to weigh the charges brought against the accused, to render judgment and to mete out due punishment.\textsuperscript{30}

The job of the prosecutor is to show that the evidence proves beyond a reasonable doubt that the defendant committed the proscribed acts. The job of the defense counsel is to present evidence that exonerates her client or to use whatever legal tactics are available to her to cast doubt upon evidence, regardless of its probative value or its utility to historians. Even in an inquisitorial system (with less emphasis on the roles of attorneys and more on the efforts of the investigating judge), the court is ultimately responsible for establishing the innocence or guilt of specific individuals for specific acts, not telling a convincing narrative about a complex moral and political event.

The more that extraneous factors are included in the trial, regardless of their historical significance, the less likely it is that the trial will be fair, and the more likely it is that broader, political decisions will impact on the trajectory of the trial and sway the views of the judges. Shorn of a defense that openly attacks the credibility of evidence, an unfair trial could serve a much better historiographically or pedagogically effective than a show trial. Historical-pedagogical purposes detract from a trial’s fairness.

Although Koskenniemi has perhaps drawn too stark a divide between these two possibilities (there are many finer gradients between fair trials and show trials), his overall point is nonetheless correct. A fair trial, where defendants may reframe issues and cast doubt upon the reliability of witnesses, is apt to be less historiographically or pedagogically effective than a show trial. Historical-pedagogical purposes detract from a trial’s fairness.

The trial of Saddam Hussein before the U.S.-backed Iraqi Special Tribunal provides a poignant example of the problems with using trials to tell stories about complex, ongoing political conflicts.\textsuperscript{32} While there were a great many misdeeds that occurred over his 24-year rule and could be placed at Hussein’s feet, he was convicted and executed for only one (relatively) small offense: the killing of 148 men and boys in the Shiite town of Dujail in 1982. This conviction left out massive criminal activity such as his role in instigating the Iran-Iraq war, which killed nearly one million people, his attempted genocide of the Kurdish population of Northern Iraq, and the massive repression of his own people, including the torture and mass murder of political dissidents. Whether or not Hussein’s trial was fair (the Iraqi Special Tribunal had many critics), it certainly failed to tell any convincing story about life under Hussein and the atrocities committed by his government. Most of these stories were well-known and little
new information was added by the Hussein trial or execution.

Of course, this objection could also apply to conventional, domestic trials. As many critics have pointed out, domestic trials are often partial affairs, providing a limited sense of what happened and boiling complex interactions down to their barest factual essentials necessary to establish the charges. Crime victims often report being unsatisfied with the operation of American criminal courts, being far removed from their proceedings. However, there are some key differences between domestic and international criminal trials. For one, the stories that must be told in the international context are much more complex than in the domestic sphere. An individual crime in a domestic context usually does not involve large-scale political conflict or historical animosities that may go back centuries. The fact that an individual killed his victim in a particular place in a particular way may overlook complex questions about the relationship between the defendant and his victim that are certainly germane to having a complete grasp of what happened. However, there is absolutely no comparison between discrete acts of domestic crime and the conflicts that the ICC has been charged with prosecuting or that the IMT handled prior to this. The truth generated by criminal trials is always a limited truth (which is not to say that it is false), and when the truths that are to be told are about events of world historical significance and great misery, such impoverished truths are inadequate, regardless of their benefits for the immediate victims.

There are a number of ways in which one may construct a convincing narrative for a complex political and social event that do not rely upon the cumbersome and divisive procedures of a criminal trial, but nonetheless carry the gravity of an official finding. Truth commissions, such as South Africa’s lauded Truth and Reconciliation Commission (TRC), jetisoned the criminal dimension of transitional justice in favor of developing a more complete story about what happened under that country’s vicious apartheid regime. Toward this end, the TRC was authorized to grant immunity for certain crimes (even for the most serious criminal offenses) in exchange for truthful testimony from witnesses and perpetrators about what happened. Even with such powers, the TRC had trouble getting testimony from important apartheid officials who resented its accusatory nature and many have objected to the TRC process.33 Despite its challenges, however, the TRC makes evident that non-criminal institutions may help to develop a historical narrative without the baggage that comes from conducting a criminal trial.

Restoring the Community

The communitarian argument in favor of making trials fair is that such a trial will help conflicted communities restore a sense of “wholeness” after a violent conflict, truly facilitating the process of transitional justice.34 Observing a despised criminal punished can help those who
were victims of his misdeeds find some sense of peace and to move on with their lives. Regardless of their personal losses, an important tormentor has been made to answer for his crimes and has been removed from human society—and in cases like the IMT, removed permanently. There is no doubt that seeing evil-doers punished provides us with a sense of satisfaction and seeing widely despised figures like Saddam Hussein and Slobodan Milosevic in the dock would probably provide not only their victims (Kurds, Bosnian Muslims, and so forth) with satisfaction, but would no doubt also help the international community restore its moral balance. As Ruti Teitel describes this, “Punishment is largely defended on the grounds that it advances the society’s political identity in the transition to a democratic rule of law abiding state.”

Many were shocked at the end of World War II by revelations regarding the Holocaust, and the trial and punishment of the most powerful architects of that atrocity surely helped the world (and the German people) move on from these awful deeds.

This may be an argument for domestic criminal trials for prominent regime members after the fall of a despotic regime, but it does not necessarily apply to international criminal courts. A key feature of international tribunals is that they do not function within the confines of one group, but rather work “above” any particular community, serving as an outside body casting judgment upon evildoers’ actions. The international court does not represent a society articulating its own moral code or its own political identity; instead, the global community, international society (if there indeed is such a thing), not the defendant’s own community, is casting its judgments upon an individual or group. Domestic trials provide a community with a chance to work out its social issues in the confines of one of its own institutions. International trials do not.

Because international courts do not represent a society passing judgment on some of its own members, but rather represent the opinion of the human community, the possibility of such courts assisting in transitional justice is sharply limited. It is not “we” who are passing judgment on “one of our own,” but “them” (the rest of the world) passing judgment on “one of us.” As Koskenniemi puts it, “When trials are conducted by a foreign prosecutor, and before foreign judges, no moral community is being affirmed beyond the elusive and self-congratulatory ‘international community.’” Such accusatorial and judgmental contexts tend to make groups defensive about what occurred. For decades, many Germans charged the IMT judgments with hypocrisy, and many Serbs in the former Yugoslavia have denounced the International Criminal Tribunal for the Former Yugoslavia as an anti-Serb inquisition. Regardless of whether or not such claims are justified, they point to a broader problem with criminalizing the behavior of individuals in international conflicts. Those groups whose members are accused of crimes are unlikely to accept the findings, regardless of whether the trial is fair—the problem is not with the quality of the trial as much as the context in which these trials take place. This is especially true when
issues of ethnic nationalism or national pride are involved, as they are in many cases that go before international tribunals.

In fact, there is good reason to believe that international criminal prosecutions could make the process of transitional justice much more difficult than it would otherwise be. Criminal prosecutions, as a matter of necessity, apply only to one individual or group of individuals for a specific set of crimes — putting “Germany” on trial for the Holocaust may be an appealing historical exercise for many, but it is difficult to see how this program could be made coherent. Nonetheless, the actions of the leaders of the government are inevitably bound up with the self-identification of the people that they ostensibly represent. This means that such trials are inevitably accusatorial in nature, and, unlike domestic criminal trials, they must inevitably fix blame on a particular group (through their representative leaders). It was not merely Herman Goering, et al., on trial in Nuremberg, but it was Germany itself that was in some sense pronounced guilty by world opinion. Accusations directed toward a group’s self-identity almost inevitably provoke a defensive “circling of the wagons”—a group refusing to accept responsibility from outside. Accepting responsibility for historical misdeeds is often a slow process, conducted through reflection, and is usually not facilitated by accusations from “outside.” Thus, an international criminal court (as opposed to a domestic one), by placing criminal responsibility on a group, through the individual prosecution of their individual members, may make groups less inclined to accept their collective responsibility for mass atrocities, defeating the desire for transitional justice.

So far, we have seen that most of the traditional arguments for fair trials are less than persuasive when applied to the international context. Either they do not take the novelties of the international situation adequately into account or they overestimate the influence that a criminal trial may have on society at large. However, there is one argument, I think, that does serve to justify such protections for accused international criminals. The most persuasive argument in favor of making international trials fair is the belief that fair trials can serve as a “role models” for countries that do not already observe the rule of law. By international courts publicly displaying the proper ways to prosecute suspected criminals, states that are unfamiliar with the delicacies of fair criminal trials can observe appropriate procedures first-hand. Although specific procedural rules may vary from state to state, through international trials, the international community expresses its esteem for principles that are not generally respected in many of the non-democratic nations of the world. International criminal proceedings provide democratic states with a means to explain, endorse, and (for lack of a better word) advertise a desirable set of procedural norms for the rest of the world to see.
Underlying the role model argument for fair international trials is a philosophical observation about the nature of the rule of law. “Legalism”—“the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of dues and rights determined by rules”—does not easily allow for exceptions based on novel circumstances regardless of how significant or relevant they may seem. Unlike other political values, legalism and the rule of law force political debate into strict confines: the format of rules and rule-following. The rule of law works through generalized rules and principles, not on a case-by-case basis. Such constraints cannot admit any exception without a previous rule establishing such an exemption. The more that legalist ideologies infiltrate and control the discourse of international criminal justice, the less likely it is that pragmatic arguments against fair international trials, regardless of how sound such arguments are, can be heeded. This transformation of political debate away from pragmatism and towards legalism is, perhaps, the most significant contribution of the Nuremberg Tribunal, and the IMT’s emphasis on fair procedures is the centerpiece of this shift.

One can also put this point negatively: If international trials were not fair, there is little reason to believe that authoritarian states would feel any pressure to liberalize their own criminal procedures. An unfair international trial, conducted with the blessings of the democratic, human-rights-respecting states, would sharply undermine these states’ efforts to reform non-democratic states. Non-democratic states could simply point to the unfair international criminal trials and the endorsement of such trials by the democratic governments of the world to deflect any criticism of their own practices. Regardless of whether procedural protections for international criminals are necessary for normative reasons, the visible hypocrisy of states that endorse unfair trials can have a disastrous effect on those who seek reforms elsewhere. Even if a fair trial is not required to determine the guilt of the accused, and even if such a trial does not serve any historiographic purpose, international criminal trials should be fair because the consequences of making them unfair could be disastrous. We give international defendants protections for reasons that are exogenous to the trial itself. Due process should not be given to international defendants because they themselves necessarily require such protections, but rather because others deserve it and may not get such protections in their home countries if they are denied at the international level.

Unlike the previous arguments, this rationale for fair trials turns many of the unique features of international trials into important advantages. The public attention that the trials garner, the unique nature of the defendants, and the other features of the international criminal courts enhance the important lessons that international trials can provide. Although international trials may not be necessary, strictly speaking, they establish a principle that is cherished in our domestic context, namely, that all deserve a fair trial and a chance to rebut the evidence against them, regardless of its strength. When domestic criminal justice systems must
confront cases analogous to the international ones (overwhelming evidence of guilt, politically charged context, and so forth) they should not be allowed to subordinate the principles of due process in the name of expediency by referring to the international criminal justice system. Hence, if the international community supports these values when the crimes are much worse and the evidence much more damning by promoting fair international criminal trials, then it sends a powerful message to the governments of the world.

This argument is different from the claim that liberal democracies would lose some of their moral integrity were they to support unfair international tribunals, which in turn would affect domestic principles of justice. While there may be some truth to this, history has shown a surprising flexibility among democratic states in dealing with non-democratic or unfair institutions operating in the international sphere. Liberal democracies have historically befriended autocratic states and participated in international institutions that would be unacceptable in a domestic context. For example, the key decision-making power of the U.N. is invested in its Security Council, a body representing only a small slice of the international community (and has members that are decidedly undemocratic). The U.S. has had and continues to have friendly relations with states that violate the rights of their citizens (China, Pinochet’s Chile, and Hussein’s Iraq until 1990) without suffering any debilitating effects on America’s domestic democratic practice. While Justice Jackson’s claim that sponsoring an unfair trial is a form of self-destruction (a “poisoned chalice” lifted to our own lips) may be provocative rhetoric, in practice the democratic states have maintained a great deal of domestic integrity while adopting different standards abroad.

**Conclusion**

Perhaps the most significant consequence of Nuremberg, one that remained largely dormant for the half-century succeeding the IMT, was the transposition of one discourse, the discourse of crime and criminal justice, into the political discourse of strategy and power. Acts that were considered a normal part of the Machiavellian calculus of political life were labeled “criminal” by the IMT and condemned by international society. Along with this condemnation came the apparatus and ideologies of domestic criminal justice, the institutions and procedures of the criminal trial. Justice Jackson’s contribution to this is not only the creation of the tribunal, but the honest attempt to pattern the international courts on the domestic ones, including the importation of the principle that defendants deserve a fair trial, regardless of the quality of evidence against them. This is a transformation of world-historical significance, forever changing how legal scholars and the public look at the moral element of international affairs.

Although this development is welcome in many ways, and one hopes that it will continue, there remain a number of crucial differences between the two spheres of social life.
that these discourses were meant to confront. These differences must give us pause. We should not immediately assume that the same rules apply to the international context and that the same principles of criminal justice work in their new home in the same fashion that they did previously. This novel international context presents many new challenges for scholars of criminal law and criminal justice. It is only when these challenges are met that one can significantly appreciate the contribution that Justice Jackson and the IMT have made to international society.

Notes

1 This, of course, does not mean that the trial was perfectly fair (whatever that means). There were a number of important objections to the Nuremberg Tribunal—the application of ex post facto law and the denial of the *tu quoque* defense are among the two most significant. Nonetheless, relative to the other proposals put forward for treating the Nazi leadership and other post-war reckonings, Nuremberg was remarkably fair. (For a criticism of Nuremberg’s procedures see Max Rheinstein, “Review of The Nuremberg Trial and Aggressive War,” *The University of Chicago Law Review* 14 (1947): 319–21.


6 According to a November 2001 Gallup Poll, 35% of Americans supported the summary execution of Osama Bin Laden, while 62% supported some form of trial. Notably however, 80% believed that there was “no doubt” that he was guilty of orchestrating the attacks on the World Trade Center and the Pentagon. Available at: http://www.gallup.com/poll/5092/Majority-Says-Military-Action-Success-Until-bin-Laden-Captured.aspx (accessed April 15, 2008).

7 To cite the press conference of October 1, 2002, “Again, the President has not made any decisions about military action or what military option he might pursue. And so I think it’s impossible to speculate. I can only say that the cost of a one-way ticket is substantially less than that. The cost of one bullet, if the Iraqi people take it on themselves, is substantially less than that.” Available at: http://www.whitehouse.gov/infocus/iraq/excerpts_oct1.html (accessed November 24, 2005).

8 One common criticism of the Yugoslavia Tribunal has been that it has targeted underlings rather than prosecuting the most significant offenders, as is its mandate. See Hitomi Takemura, “Big Fish and Small Fish Debate—An Examination of the Prosecutorial Discretion,” *International Criminal Law Review* 7 (2007): 677–85. Nuremberg prosecutors, on the other hand, chose to target members of Hitler’s inner circle as well as important representatives in the various parts of the Nazi regime such as the Reichsbank (Hjalmar Schacht and Walter Funk), organized labor (Robert Ley), and industry (Gustav Krupp). Although these are not “political leaders” in the conventional sense, they are far from the conventional criminals prosecuted in domestic courts.

10 Rome Statute of the International Criminal Court, Article 17(1)(a).


13 I am indebted to an anonymous reviewer from Criminal Justice Ethics for making this criticism.

14 Conspiracy laws such as the RICO statutes in U.S. law could be used to prosecute widespread international crimes. However, as many critics have pointed out, such laws are (to use Justice Robert Jackson’s terms) “the darling of the prosecutor’s toolbox” whose fairness has been widely questioned. See Aaron Fichtelberg, “Conspiracy and International Justice,” Criminal Law Forum 17 (2005): 149–76. I am grateful to John Kleinig for raising this issue.


17 Telford Taylor, The Anatomy of the Nuremberg Trials (New York: Little, Brown, and Company, 1992), 27–29. Specifically, the Moscow Declaration stated that, “The above declaration is without prejudice to the case of the major criminals whose offenses have no particular location and who will be punished by a joint decision of the Governments of the Allies.” The declaration did not specify that the “criminals” deserved a trial, only punishment.

18 Bass, Stay the Hand of Vengeance, 13.

19 Rome Statute of the International Criminal Court, Article 53(1).


21 Articles 17 and 16 of the Rome Statute, respectively.

22 For a complete listing of ICC indictments, see http://www.icc-cpi.int/cases.html.

23 It should be noted that, as of this writing, there have been no completed ICC proceedings. However, the ICTY has only acquitted 10 defendants out of a total of 161 indicted individuals. Moreover, it should be noted that very few (if any) of these were innocent of grievous wrongdoing, but instead were acquitted on largely technical grounds. For a brief, but enlightening analysis of ICTY acquittals, see: http://www.icty.org/sid/9984.

24 As Duff and his co-authors point out, consequentialist theories of punishment “would sanction, or at least regard as a morally open option, the punishment of those known to be innocent if this would serve the further aims of the system.” (Duff et al., “Introduction: Towards a Normative Theory of the Criminal Trial,” 21).


27 Charles Krauthammer, “Man for a Glass Booth,” Washington Post, December 9, 2005, A31. However, Krauthammer himself acknowledges that, “Hussein deserves to be shot like a dog.”


29 For a discussion of the effort to prosecute the Kaiser, see Bass, Stay the Hand of Vengeance, 58–105.

31 Koskenniemi, “Between Impunity and Show Trials,” 35.

32 It should be noted that the Iraqi Special Tribunal was a hybrid tribunal, mixing some aspects of domestic Iraqi law and international law. Regardless of its legal status, however, it was seen by most observers as a creation of the U.S.-backed Coalition Provisional Authority, and to this extent was international. Thus, despite this important qualification, it can help us to see some of the weakness of using a judicial forum to punish a unique class of evildoers.


36 One example of this would be the “mixed” or “hybrid” tribunals such as the Special Court for Sierra Leone (which is currently prosecuting Liberian President Charles Taylor) or the Extraordinary Chambers of the Courts of Cambodia. These courts use domestic law but have international judges to ensure impartiality.

37 Koskenniemi, “Between Impunity and Show Trials,” 11.

38 For an example of such an effort, see Daniel Goldhagen, Hitler’s Willing Executioners (New York: Vintage, 1997).


40 For example, Kant expressed this view when he distinguished between “decrees” and “laws.” The former are “directed to decisions in particular cases and are given as subject to being changed,” while the latter are general and universal. Immanuel Kant, The Metaphysics of Morals, trans. Mary Gregor (Cambridge, UK: Cambridge University Press, 1996), 93.