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978-1-107-02354-3 - The Rise and Fall of War Crimes Trials: From Charles I to Bush II

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Excerpt

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# 1

## Introduction

### Overview

The law has contemplated punishment for violent acts toward other humans as long as there has been law. Individual accountability for aggression and other acts of rights deprivation is the bedrock of municipal criminal law and forms the foundation of a large portion of the civil codes of virtually every legal system. In contrast, states and those who act on behalf of states, until relatively recently, have mainly operated with impunity toward individuals and have operated in a vacuum of accountability for transgressions toward individuals. Although the rise of the liberal state brought with it an improvement in the protection of human rights as states evolved to become more cognizant of the claims of the individual (Ratner and Abrams 2001,

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Excerpt

[More information](#)

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pp. 3–4), a legal mediation of the treatment of individuals by states developed in the shadow of privilege of near absolute internal sovereignty. Accordingly, the initial development of accountability for improper actions by the state arose in the dual-tract context of the laws and customs of war and in the context of interactions with noncitizens (McCormack 1997; Smith 2008). Individual criminal accountability for those who commit egregious acts on behalf of states flourished in the context of a post-belligerence or transitional justice frame.

Often, contestation over appropriate prosecutions of state actors has been couched in terms of whether the proposed prosecutions were practical (e.g., Aukerman 2002, p. 39). Others have insisted that there is a general imperative seated in international law that requires prosecution for gross human rights violations by state actors (e.g., Orentlicher 1991). Generally, analysis has converged on the notion that prosecutions are one of the best mechanisms, even perhaps the best mechanism, for the provision of post-transition justice (Penrose 1999). Other avenues for the delivery of postconflict justice, such as truth commissions, are thought of as morally inferior and sub-optimal with outcomes that sacrifice justice for political expediency (Dwyer 1999; Minow 1999; Neier 1998). For much of the scholarly community, accountability and punishment for criminal actions undertaken on behalf of the state are the driving imperatives that demand prosecutions (Crocker 1999). Others enter the debate as champions for situating

## Introduction

the specific mechanism for transitional justice in terms of the goal-specific structures, for instance democratic consolidation, and in terms of culturally specific processes, shaped by the locale of the conflict (Aukerman 2002). Much of the literature considers the overall evolution of discrete aspects of the jurisprudence of war crimes trials, from questions about universal jurisdiction (Morris 2001, p. 43; Smith and Smith 2009, pp. 32–5) to considerations of the relative value of international versus domestic venues (Kritz 1996) and the appropriate scope of sentencing (Nino 1991). Missing from the literature is a thorough explication of the political origins of these types of trials and the manner in which the construction of each tribunal has shaped the path of development of future tribunals. The purpose of this volume is to demonstrate the evolutionary path and jurisprudential trajectory of the development of war crimes tribunals.

The first efforts to prosecute political leadership for actions taken on behalf of the state during times of conflict were revolutionary attempts to hold those who enforced the law accountable to it. As the trials developed over time with each successive conflict and each postconflict consideration of what to do about the criminals of war, the search for justice and accountability was constrained by political expediency and the tangible needs of the victors who sought to mete out justice. Although the approbation of the actions classified as war crimes amounts to a public airing of the norms and expectations of the larger community, these public displays of the mechanics of justice are undertaken

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Excerpt

[More information](#)

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without fear of prosecution for those involved in the creation or perpetuation of the postconflict tribunals. Perhaps even more important, these trials are constructed for the purposes of political consolidation rather than the dispensation of justice. Although the evolution of war crimes trials has taken a path that approached justice as the goal of the proceedings only to ultimately revert to political consolidation and expediency as the purpose of the prosecutions, there remains a value to the proceedings even if not all war criminals are held accountable for their crimes and the powerful states are completely insulated from prosecution. The prosecution of individuals for criminal conduct and acts of state during times of war or conflict has evolved over time into a mediated resolution of the tension between the demands of justice and the necessity of consolidation of power. Despite the best efforts of some of the architects of postconflict prosecutions, ultimately the search for justice through war crimes trials has been co-opted by political concerns and the trials have reverted to show trials that rival the initial forays into political prosecutions.

The initial foray into the prosecution of civilian and military leaders in a nominal court of law began inauspiciously with Charles I of England, who was executed after a show trial orchestrated by Oliver Cromwell. After the Civil War in the United States, Captain Henry Wirz, a commandant of a Confederate prison, was executed after a public show trial. However, when the Nuremberg Trials were conducted after World War II, the process of a demonstrably fair prosecution

## Introduction

through a legitimate legal forum triumphed over the early models of mere summary prosecution by the victors. In the decades since the trials at Nuremberg, the prosecution of the perpetrators of human rights violations on an ad hoc basis has come to be expected by the international community after the resolution of any conflict that gives rise to the types of bad acts that have been variously called war crimes, crimes against humanity, or gross violations of human rights. These ad hoc tribunals have established a jurisprudence of prosecution that has evolved with each successive set of trials or tribunals. In contrast to the more recent permanent court, the International Criminal Court (ICC), the ad hoc prosecutions took the form of trials or tribunals, with varying procedural rules and jurisdiction over various crimes. The nominal purpose of the tribunals invariably is the establishment or re-implementation of justice.

The ad hoc trials have been designed, at least nominally, to redress human rights violations as an integral part of the restoration of justice after the cessation of conflict. The prosecutions have been conducted either domestically or through an international structure. Conventionally, these tribunals prosecute individuals who, on behalf of a governmental entity during conflict, have acted contrary to the emerging norms of appropriate conduct during conflict. Typically, some wrongful use of force against civilians by the agents of government is a necessary element to the crimes that are the focus of prosecution. Moreover, the wrongful acts by these agents of government are categorically of a type that

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Excerpt

[More information](#)

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is claimed to be universally abhorrent. The categories of acts that fall into this range of universally unacceptable have been variously catalogued from the indictment of Charles I through each successive war crimes trials subset including those crimes identified in the ICC statute and the indictment of Saddam Hussein. The ICC was created in part to bring efficiency and predictability to these types of prosecutions. Specifically, the institutionalized court might have reduced the selective justice and idiosyncratic operation of the ad hoc tribunals. The ICC also presented the possibility that universal jurisdiction would continue to evolve as an accepted international norm. That is, with the ICC came the hope that certain especially heinous acts would be considered so terrible that a global jurisdiction would provide the foundation to proceed against the perpetrators regardless of the geographic limits of the crimes.

The question addressed here through an examination of the development of war crimes trials is whether human rights tribunals, either ad hoc or standing, are products of the high call to justice or instead are tools utilized in the normal dimensions of political processes and political consolidation. Whether human rights tribunals in general are juridical rather than political has yet to be established. It is not surprising that there has been an absence of a systematic analysis of the concept of war crimes trials. These trials are constructed after some outrageous level of violence has occurred and only after at least some of the perpetrators of that violence have been defeated. Perhaps obviously, those

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[More information](#)

## Introduction

who stand before any specific tribunal as the accused typically complain that the prosecution is politically motivated and fundamentally unfair. Perhaps because the motives of any of the defendants in the role of systemic critic of the prosecution and the court are tainted by self-interest, little attention has been given to the question of whether the nature of these tribunals is fundamentally juridical or political.

Whether the purpose of the trials is justice or the appeasement of various political factions and political consolidation can be examined through an analysis of the degree to which justice was served through the conduct of the trials. In order to examine the relative degree of commitment to justice among the various trials, some definition of justice must be operationalized. Although *justice* has come to be thought of as a more admirable concept than *politics*, the foundations of a jurisprudence that precedes the functional construction and implementation of the law are soundly rooted in political discourse. For the purposes of assessing the development and conduct of war crimes trials, a straightforward notion of justice as a product of substantive due process and procedural due process, which aspires to achieve the dual goals of deterrence and retribution, is parsimonious and clear. If the substantive due process elements of the trial fall short, then the defendant cannot be treated fairly regarding the content of the charges. If the procedural due process elements of the trial are insufficient, then the evidence against the defendant is never adequately tested and a robust defense

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[More information](#)

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is not possible. Deterrence as a goal is critical because both the specific defendants and others similarly situated in the future must be discouraged from engaging in comparable acts in the future. Retribution as a goal is the notion that the specific victims and society collectively are entitled to be put back in *status quo ante*, or the condition they were in before the criminal act occurred.

Whether the trials are driven by the demands and constraints of political consolidation can only be determined after some operationalization of political consolidation. That is, *political consolidation* here means the effort at maintaining and solidifying the newly secured or defended control over the institutions of government. The shifts in political power that precede the initiation of human rights tribunals vary in their degree of societal upheaval and in the degree to which the victorious party is able to assert political control. That is, after the conflict subsides, the victorious – those who come to be in charge – have control over the institutions of the governments at issue to varying degrees.

Some shifts in power are complete and those in power have little to be concerned with regarding their treatment of the perpetrators of the violations, as the accused no longer have any meaningful political power. This situation arises in the event of a total military victory. The defeated have no recourse if their treatment by the victorious rises to little more than summary justice. Other shifts are complete but the control over the institutions of government remains unstable. The maintenance of power is at least partially

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dependent on the continued suppression of those elites no longer in power, but where unfair treatment of the former leaders could be risky for the new rulers. This occurs when the vanquished elites maintain some ability to resurrect a popular political base and possibly challenge the newly installed regime. Some shifts in power are incomplete and those with new power depend on those with old power for some critical aspect of system maintenance and control. This situation is typical when those who have lost power still maintain or can exert some control over a necessary element of governance, such as the financial infrastructure or portions of the military. Some power shifts result in an indeterminate resolution. For those instances in which no clear winner of the conflict emerges, something akin to an uneasy balance of power among competing factions continues after the conflict seems to have concluded. Here, balance arises when the end of the conflict is brokered rather than achieved by one party through political or military means.

Given the variety of ways in which conflicts can end and the variety of ways power can be obtained and maintained, the degree of justice achieved in human rights tribunals may be a function of the political expediency of those who come to power instead of the implementation of an abstraction of a universally recognized concept.

The evolution of war crimes trials has developed in both a transnational environment and a domestic environment. Of course, conflict has taken place in both transnational and domestic venues, so naturally the resolution of conflict

## The Rise and Fall of War Crimes Trials

and postconflict political developments should be expected in both. The trials have evolved in the context of a search for transnational justice and domestic justice, and each type of trial or series of prosecutions has affected the subsequent efforts regardless of whether those efforts were transnational or domestic. Each given instance of postconflict prosecution might be considered so specifically tied to the discrete facts of the conflict as to render it a singular occurrence that could not be credibly compared to other similar processes. However, the historical path of development of these postconflict processes reveals that these cases share a great deal in common and each has guided the development of the subsequent trials. Moreover, the transnational prosecutions have so informed the development of the more recent municipal prosecutions that to consider one without the other would overlook a critical dimension of the pedigree of the municipal trials. Additionally, because many prosecutions that appear in a transnational context involve only municipal crimes, there is little indication that the international community makes any meaningful distinction between the two types of trials. There likewise is little indication that such a distinction would give additional traction to any systematic analysis of war crimes trials.

For each case examined here, the political context of the end of the conflict is analyzed before considerations of the issue of justice are addressed. The variables that act as indicators of the extent to which each case was concerned with justice include the degree to which substantive due