Introduction

International criminal law (ICL) has achieved a degree of permanence and prominence that seemed unforeseeable just decades ago. International criminal tribunals have conducted numerous trials and created an important body of jurisprudence on a range of substantive and procedural issues. Hybrid tribunals, which combine international and domestic features, have contributed significantly to this growth. National jurisdictions have also prosecuted individuals responsible for past atrocities and strengthened international norms.

But despite what Kathryn Sikkink has described as a "justice cascade,"[1] questions about ICL's effectiveness and legitimacy persist. The International Criminal Court (ICC) has neither ushered in an age of global justice nor ended impunity for atrocities. The ICC's jurisdiction remains limited in important respects, and the Court faces criticism over how its cases are selected and its trials are conducted. Meanwhile, domestic prosecutions under the Rome Statute's complementarity framework, which gives states the first responsibility and right to investigate and prosecute international crimes, are still impeded by local resistance.

One of the most important challenges ICL faces is how to resolve the recurring tension between holding perpetrators accountable for grave crimes, on the one hand, and conducting criminal trials that maintain principles of fairness, on the other. That tension is the subject of this book.

The impulse to punish mass atrocities and prevent impunity continues to drive ICL's growth. It underlies the rationale for overriding state sovereignty and subjecting individuals to the jurisdiction of international criminal tribunals as well as for increasing the capacity of national courts to prosecute international crimes. Yet, international tribunals also remain committed to principles of due process and legality in adjudicating charges against those individuals accused of the gravest offenses. Multiple factors help explain this commitment, including the influence of international human rights law, the desire to entrench rule-of-law norms in countries devastated by war and civil strife, and, above all, the goal of subjecting the most egregious forms of human violence to the controlling power of law rather than to other forms of retribution.

The quest to hold perpetrators accountable within the framework of an international criminal proceeding that conforms to prevailing fair trial standards and principles of legality dates to Nuremberg. Widely regarded as the birth of modern international criminal law, Nuremberg famously established that individuals may be prosecuted under international law for crimes committed against others, including against their own citizens. Nuremberg, however, also exposed the friction that can result when pursuing that goal. At Nuremberg, that friction took various forms, including conflicts between legal theories of individual and collective responsibility, controversy over criminal law's retroactive application in the service of broader notions of justice, and the prosecution of senior leaders of the defeated powers by the winning side whose own international law violations went unaddressed. Some of these issues have since been resolved: prosecutors no longer need, for example, to show a nexus to armed conflict to prosecute crimes against humanity to avoid concerns about the legality of the charges, as they had to do at Nuremberg. But tensions between the goals of accountability and fairness still lie at the heart of many important issues in ICL today.

This tension is not unique to ICL. ICL, however, operates on a separate plane from national criminal law. It has overlapping, but ultimately distinct, goals and audiences than national criminal law, and faces unique challenges. International criminal tribunals, for example, lack their own enforcement mechanisms and depend heavily on the cooperation of states where the crimes occurred. They also must grapple with issues that domestic courts ordinarily do not confront, such as the need to protect victims and witnesses in distant conflict zones. Moreover, because ICL addresses the gravest crimes, the pressure to hold individuals responsible is greater than in most domestic prosecutions, which encompass a far wider range of offenses.

The book explains how the tension between accountability and fairness continues to drive many debates in ICL. While the book focuses significantly on procedural safeguards, it also examines other issues that can affect ICL's fairness from the perspective of the accused, such as the use of expansive modes of criminal responsibility and the selection of situations and cases for investigation and prosecution. In the face of continued concerns about ICL's future, the book offers guarded optimism. It describes the significant progress international and hybrid courts have made in protecting the rights of defendants while conducting trials for some of the world's worst atrocities. The book, however, also highlights the continuing obstacles these courts face in achieving this goal.

Chapter 1 describes how the trials conducted at Nuremberg after World War II created the overarching template for modern ICL. Nuremberg's most important achievement was to establish a paradigm that provides legal accountability for atrocities by holding individuals responsible through a criminal trial. Nuremberg also established that the legitimacy of any such trial depends ultimately on its adherence to prevailing fair trial standards and that the enormity of the crimes

increases, rather than diminishes, the importance of those standards. Nuremberg's legal procedures may appear rudimentary by today's metrics, but its articulation of this overarching principle remains critical to its legacy. Additionally, Nuremberg offers a notable contrast to the war crimes trial of Japanese political and military leaders conducted in Tokyo, which was marred by procedural flaws. Nuremberg, however, also illustrates many of the challenges international criminal tribunals face. Those challenges include: navigating between the competing forces of justice and legality; punishing collective criminality without abandoning principles of individual culpability; creating a historical record of mass violence without sacrificing the due process rights of individual defendants; and overcoming the enduring problem of victor's justice.

Chapter 2 examines the revival of ICL in the mid-1990s. It focuses mainly on the creation of the two *ad hoc* international tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), while also briefly noting related developments at hybrid tribunals. It describes how these two *ad hoc* tribunals, and the ICTY in particular, expanded the fair trial protections provided to defendants by building on international human rights law and other post-Nuremberg developments. But it also notes how these tribunals illustrated the continuing tension between ICL's goal of providing accountability for mass atrocities while ensuring the fair treatment of defendants. The chapter first discusses the development of modes of liability designed to hold individuals criminally responsible even where, for example, they did not physically perpetrate the crime or some of the crimes fell outside a common criminal plan but were nevertheless reasonably foreseeable. It then describes other developments affecting the fair trial rights of accused persons, such as the growing reliance by judges on written evidence in place of live testimony, limits on the disclosure of evidence to the defense, restrictions on the pretrial release of defendants despite the presumption of innocence, and a lack of equality of arms between the defense and prosecution (defined generally as an equal ability for each side to present its respective case). Although these developments resulted largely from the limited enforcement powers of the ICTY and ICTR and their dependence on state cooperation, they also stemmed from the tribunals' embrace of goals beyond punishing guilty individuals, including promoting peace and stability in affected countries and securing justice for victims.

Chapter 3 focuses on the ICC, the first permanent international criminal tribunal, established by the Rome Statute of 1998. In contrast to the ICTY and ICTR, which were established by the UN Security Council, the ICC was created by an international treaty. The ICC provides a window into how tensions between accountability and fairness play out before a permanent international criminal court and the challenges of maintaining fair trial standards in this context. The chapter begins by examining modes of liability employed by the ICC and their relationship to fundamental criminal law principles. It then describes how the

ICC has expanded the procedural safeguards available to defendants. Yet, as the chapter explains, various factors can hinder implementation of these protections. The chapter discusses, for example, the conflict between the Court's rules obligating the prosecution to disclose material to defendants and those rules designed to protect the confidentiality of certain information supplied by states or organizations; the Court's reliance on written testimony rather than on oral testimony subject to cross-examination; and the Court's use of case management tools, which can limit a defendant's ability to challenge the evidence against him and to present evidence in his defense. The chapter also explores how the ICC's multiple goals – such as its recognition of the participatory rights of victims – can conflict with the due process rights of accused individuals. It then examines another dimension of fairness: the selection of situations and cases for investigation and prosecution. It suggests how selection decisions that favor powerful countries and interests or that disproportionately target weaker countries, particular regions, or non-state forces generally can undermine the equal application of law.

Chapter 4 examines how fair trial standards can develop within what remains a largely decentralized system of international criminal justice. The chapter describes the different roles that criminal procedure plays within this system. While the multiplicity of tribunals at the national and international level increases the risk of deviation from due process requirements, it also provides opportunities for elaborating upon and entrenching those requirements across different countries and legal systems. The chapter suggests how the ICC could more effectively use the Rome Statute's complementarity framework to advance fair trial safeguards at the national level. It also examines how those safeguards factored into decisions by the ICTY and ICTR (and their successor residual mechanism) on whether to refer cases to national jurisdictions and how those referrals contributed to the inclusion of more due process protections at the national level. The chapter then turns to hybrid tribunals. It explains how hybrid tribunals have developed procedural safeguards and their comparative advantages in embedding those safeguards within domestic legal systems. But it also notes the potential risks posed by hybrid tribunals, which include both shielding powerful officials from criminal responsibility and relaxing fair trial standards in a quest for vengeance.

Chapter 5 explores the question of fairness from the perspective of decisions by international criminal tribunals about which cases to investigate and prosecute. Selection decisions have long been among the thorniest issues in ICL, historically giving rise to claims of victor's justice and reinforcing realist critiques of ICL as a tool wielded by the strongest nations and their allies against weaker countries. Such critiques have become more pronounced as a result of the ICC's disproportionate focus on Africa and the evidence of major power influence over the Court's ability to investigate and punish atrocities. This chapter explains why failing to address concerns about the selection of situations and cases undermines the fairness and legitimacy of international criminal tribunals even where they afford individual

defendants robust due process protections. The chapter examines various proposals to address selection decisions in ICL, focusing particularly on the ICC. It then proposes an alternative approach: placing more emphasis on expressing the principle that no individual is above the law when selecting situations and cases for investigation and prosecution.

Chapter 6 examines the recurring debate over whether terrorism should be treated as an international crime. The proliferation of global terrorism has generated increased pressure to bring terrorism within the orbit of international criminal justice. Elevating terrorism to the status of an international crime would, for example, serve a valuable expressive function, communicating the gravity of this extraordinarily destructive and destabilizing form of violence and the opprobrium it warrants. But prosecuting terrorism as an international crime poses significant challenges. The definition of terrorism still remains insufficiently precise and prone to overbroad interpretations. Further, terrorism prosecutions often involve the type of evidentiary issues that could jeopardize due process safeguards in international criminal prosecutions, given those prosecutions' dependence on state cooperation. Additionally, international terrorism prosecutions would likely result in the continued selection of situations and cases that embed major power influence and shield government forces even when they commit the same crimes as non-state actors. The chapter concludes that these concerns outweigh the potential benefits of subjecting terrorism to international criminal prosecution in light of ICL's overarching goals of accountability and fairness.

NOTE

1. Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W.W. Norton, 2011).

1

Creating the Template: Nuremberg and the Post-World War II International Prosecutions

Today, the trial of major Nazi war criminals at Nuremberg is regarded as the foundation of modern international criminal law (ICL) and the birth of a movement that has expanded the principles and institutions of international justice. Yet, it bears remembering that the trial, which began on November 20, 1945, and concluded on October 1, 1946, almost never occurred.

The leaders of the major Allied powers did not initially support war crimes trials for senior Nazi officials. At the Tehran Conference in 1943, Soviet leader Josef Stalin advocated shooting between 50,000 and 100,000 Germans. British Prime Minister Winston Churchill opposed the Soviet plan for mass executions, but agreed that Nazi leaders should be shot, arguing that circumstances called for a political rather than judicial approach and that a trial would give the Nazis a public platform to propagate their hateful ideology.[1]

In the United States, Treasury Secretary Henry Morgenthau Jr. was the most prominent and vocal advocate for a punitive peace. Morgenthau not only backed summary executions of German leaders, but also sought Germany's overall economic destruction to ensure it would never again threaten world peace. Both President Franklin D. Roosevelt and General Dwight D. Eisenhower, at different junctures, gravitated towards Morgenthau's view, as did a clear majority of Americans, according to polls taken at the time.[2]

US Secretary of War Henry L. Stimson initially provided a dissenting voice in demanding criminal trials for individual Nazi leaders. Stimson feared that summary executions would tarnish the legitimacy of the war effort and fuel resentment within Germany, thus breeding a desire for future war rather than preventing it.[3] Trials, on the other hand, would bring long-term benefits by eradicating the Nazi system and preventing its recurrence, as long as they were conducted in "a dignified manner consistent with the advance of civilization."[4] "[P]unishment," Stimson said, "is for the purpose of prevention and not for vengeance."[5] Stimson maintained that a comprehensive war crimes trial would best further the goals of future peace and security.[6]

States had punished war crimes for centuries. But in the past, the victorious state had typically punished individuals from the vanquished state for war crimes

committed against its own soldiers. Proposals for Nuremberg instead sought an international trial for crimes against the international legal order.

The trials envisaged after World War I offered scant encouragement to Stimson and others who sought to prosecute Nazi atrocities. At the conclusion of World War I, the Treaty of Versailles provided for the creation of an *ad hoc* international trial of the German Kaiser for initiating the war, which it described as "a supreme offense against international morality and the sanctity of treaties," and for the prosecution of German military personnel for war crimes against the Allied military.[7] But no tribunal was ever convened to try Kaiser Wilhelm II, who died in exile in the Netherlands where he had been granted political asylum. The Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties, established by the Allied Powers at the Paris Peace Conference in 1919, initially identified a list of German military personnel who might be prosecuted as criminals. Combined pressure by Germany, which declined to extradite any German citizens to Allied governments, and diminished interest among the Allies themselves caused that list to be whittled down. Eventually, the Allied powers agreed that only forty-five individuals should be prosecuted for war crimes committed during World War I, and that Germany should conduct those prosecutions. Only twelve individuals were brought to trial before the German Supreme Court at Leipzig in 1921, and the six defendants who were convicted received only minor sentences.[8]

Stimson's proposal for addressing Nazi atrocities after World War II received a boost when Morgenthau's plan of pastoralizing Germany was leaked to the press and eventually gained the upper hand.[9] Roosevelt, who had always been concerned that devastating Germany might create resistance, started to gravitate towards a framework for trials outlined by Murray Bernays, a colonel in the War Department, that followed Stimson's approach. In May 1945, President Harry Truman appointed Supreme Court Justice Robert H. Jackson as chief counsel for addressing Nazi crimes and authorized him to enter into negotiations for an international trial of the major Nazi war criminals with representatives of the United Kingdom, Soviet Union, and France. Those negotiations resulted in the London Charter of August 8, 1945, providing the basis for international criminal trials of Nazi officials and establishing rules for those trials.

The Nuremberg Trials attempted to achieve several broader goals beyond deciding a particular defendant's guilt or innocence and imposing punishment. The trials, which included the trial of both major Nazi military and civilian leaders before the International Military Tribunal (IMT) at Nuremberg and the twelve further trials of high-ranking German officials conducted by the US military under Control Council Law No. 10 (Subsequent Proceedings), sought to create the basis for postwar international peace and security by punishing the crime of aggression. As Jackson explained in his opening statement before the IMT, "This trial is part of the great effort to make the peace more secure."[10] The focus on crimes against

the peace (or the crime of aggression) in the London Charter and at trial illustrates the aspiration for Nuremberg to become "the Trial to End All Wars."[11] The IMT deemed war "essentially an evil thing" and aggression the "supreme international crime."[12]

Nuremberg's architects chose criminal trials to achieve this goal not only because of their deterrent effect. They also believed that a judicial process would allow Germans to accept the criminality of their leaders, create a record of Nazi atrocities that would forever discredit the Nazi regime, and facilitate Germany's postwar transition.[13] Trials would demonstrate both the world's abhorrence for the Third Reich and the moral superiority of the Allied powers. The Nuremberg Trials thus pioneered what scholars have described as a model of closure: using criminal proceedings to provide a definitive account of and accounting for mass atrocity that evokes, in participants and observers, a sense of social solidarity premised on the "common values" of what Emile Durkheim called the "collective conscience."[14]

Criminal trials, in this regard, appeared superior to other forms of accountability. Yet, while Morgenthau opposed trials, at least for the Nazi leadership, he was closer to the spirit of ICL today in one respect. Morgenthau's focus on Nazi atrocities against Jews and other groups, rather than on sovereigntist concerns about Germany's launching of aggressive war, anticipated ICL's subsequent focus on crimes against humanity and genocide. On the other hand, Morgenthau wanted an extralegal form of justice, swift and merciless, which is antithetical to the basic premise of a judicialized process underpinning modern ICL.[15]

Nuremberg's singular achievement was to seek justice through a paradigm that defines crimes under international law and holds individuals responsible through the mechanism of a criminal proceeding. That paradigm represents the triumph of what Judith Shklar has termed legalism: "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules."[16]

The Nuremberg Trials, however, were not merely deciding individual cases nor using those cases Solely to build a historical record of Nazi barbarity. In seeking to punish those responsible for Nazi atrocities and to prevent their recurrence, the United States and other Allied Powers were deliberately setting an example. They intended to show that principles of criminal justice could – and should – be applied to the gravest of crimes. Nuremberg thus resisted the proposition that some crimes were so extraordinary that, as Hannah Arendt later put it, they "explode[d] the limits of the law" and defied the structure of a judicial proceeding.[17] But adopting the form of a judicial proceeding meant that Nuremberg's success would be measured not only by whether, but also by *how* justice was imposed. Stimson and others did not believe that Nazi leaders deserved rights. They thus did not share the view associated with contemporary human rights discourse, which asserts the universal rights of all defendants regardless of the enormity of the alleged crimes or the form of proceeding in which they are tried. But Stimson and others did believe that the success of all

criminal trials depends ultimately on the perception that the defendants are treated fairly and afforded due process. Jackson famously conveyed this sentiment in his opening statement, emphasizing, "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow."[18]

Despite its aspiration to adhere to principles of legality and due process, the IMT faced significant obstacles that it did not – and could not – always overcome. Central charges of the indictment were vulnerable on the ground that they constituted impermissible *ex post facto* punishment – a violation of the principle of legality known as *nullum crimen sine lege* (no crime without law). That principle requires that the law be defined clearly in advance of a crime's commission. The related principle *nulla poena sine lege* (no penalty without law) similarly requires that the punishment be defined in advance. The indictment at Nuremberg consisted of four counts: conspiracy (Count 1); crimes against peace (Count 2); war crimes (Count 3); and crimes against humanity (Count 4).[19] The main charge (Count 2) alleged that the Nazi defendants had committed a crime against the peace by participating in "the planning, preparation, initiation, and waging of wars of aggression."[20] Prosecutors relied for this charge on the Kellogg-Briand Peace Pact of 1928, a treaty signed by Germany and sixty-three other countries that renounced aggressive war. The treaty, however, did not define aggressive war. Nor did the treaty provide for criminal sanctions or assign criminal responsibility to any national leader who violated it.

In their challenge to the indictment, the Nazi defendants argued that because crimes against peace had never been codified, their trial was "repugnant to a principle of jurisprudence sacred to the civilized world."[21] In rejecting the defendants' argument, the IMT determined that the *nullum crimen sin lege* principle "is not a limitation of sovereignty, but is in general a principle of justice."[22] Thus, rather than strict legality, the tribunal adopted a more flexible standard that considered whether the Nazis knew the conduct was wrong when they carried out a policy of invasion and aggression. As US Nuremberg prosecutor Telford Taylor framed the question: "It has never been a defense that a robber is surprised by the resistance of his victim and has to commit murder in order to get money."[23] The IMT also determined that the defendants could be held criminally responsible even though the Kellogg-Briand Pact spoke only to state responsibility, since "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[24]

The fourth count was similarly vulnerable to attack. The indictment charged defendants with crimes against humanity, defined in the charter as "murder, extermination, enslavement, deportation, and other inhumane acts against any civilian population," whether or not in violation of the domestic law of the country where perpetrated.[25] From today's perspective, this charge best captures the egregious

criminality of the Nazi regime – the mass murder of millions of Jews and other innocent civilians that constitutes the Holocaust. But at the time, the legal prohibition was less clear. Crimes against humanity, which had been suggested to Jackson by a prominent scholar, Hersch Lauterpacht, invoked familiar norms about the treatment of civilians, set forth in international treaties such as the Hague Conventions of 1899 and 1907. The term had also been used in the context of atrocities committed against Armenians in World War I. But no one had been held criminally responsible for this offense, and the offense was not specifically codified in any treaty.[26] The United States and Japan, moreover, had objected vociferously after World War I to the proposition that crimes against humanity existed under international law.[27] While the law of war provided some support for prosecuting crimes committed in occupied territory, international law generally did not regulate how a country treated individuals within its own borders. Prosecutors attempted to address the vulnerability of charging crimes against humanity by requiring a nexus to crimes against the peace or war crimes, thus requiring a connection to the war itself. Prewar atrocities thus had to be linked to preparations to wage aggressive war. The IMT's judgment reflected the uncertain status of crimes against humanity: it tended to find that defendants accused of war crimes and crimes against humanity were guilty of both, thus avoiding the need to distinguish the two offenses. In the two cases where the IMT found the defendants guilty solely of crimes against humanity (those of Nazi publisher and propagandist Julius Streicher and Nazi youth leader and local administrator Baldur Benedikt von Schirach), the tribunal did not elaborate on the nexus between crimes against humanity and war crimes (Streicher) or between crimes against humanity and aggression (von Schirach).[28]

The IMT did not address whether conviction for crimes against humanity constituted *ex post facto* punishment in its decision. Austrian jurist and legal philosopher Hans Kelsen provided one of the strongest defenses of the charge, appealing to notions of fundamental fairness and higher principles of justice. Even if positive law did not expressly outlaw their conduct, Kelsen argued, the defendants "were certainly aware of [its] immoral character," thus satisfying the principle of justice that requires fairness to the accused.[29] And when two postulates of justice are in conflict with each other – here, the principle of *nullum crimen* and the defendants' moral responsibility for aggressive war and atrocities – the higher principle prevails.[30] The alternative – not holding Nazi officials individually responsible for what were universally regarded as grave offenses – was considered unacceptable, as Taylor has explained.[31] But the Subsequent Proceedings convened by the US military in the American Zone from 1946 to 1949, after the main trials before the IMT had concluded, continued to endorse the principle of strict legality, with the exception of the trial of Nazi judges and prosecutors, known as the *Justice Case*.[32] There, the prosecution prevailed by establishing that the defendants knew or should have known that they could be brought to justice for acts so offensive to "the moral sense of mankind."[33]