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Introduction

In the last two decades there has been a meteoric rise of international criminal tribunals and courts. It should come as no surprise that in the last decade there has also been a strengthening chorus of critics of these institutions. Indeed, today it is hard to find strong defenders of international criminal tribunals and courts. This book attempts such a defense – and against a wide array of critics of international criminal law. Our defense will be a nuanced one, accepting many criticisms but arguing that a core of the idea of international criminal tribunals can be defended as providing the fairest way to deal with mass atrocity crimes in a global arena. Indeed, fairness and moral legitimacy will be at the heart of our defense. In the end we will show that the range of criticisms, often powerfully expressed, do not defeat the idea, or perhaps the promise, of a system of international criminal courts and tribunals.

The questions of the legitimacy and fairness of international criminal tribunals are some of the most important, but they are not the only challenges raised recently. In addition, there are questions about economic feasibility and ideological bias. Some of the strongest critical voices have arisen from those who are concerned about the justification of punishment internationally, given the lack of evidence for either a deterrent effect or a retributive reaction when the crimes have been committed by political and military leaders who claim to be acting in the interest of their people. And even those who defend criminal punishment generally on expressivist grounds have nonetheless found fault with international criminal punishment for failing in this way.

The world's relatively new experiment with holding international criminal trials in the aftermath of mass atrocity is by no means perfect. As this book proceeds we will do our fair share of criticizing the existing practices at the various international criminal courts and discuss particular, and sometimes grievous, instances of failure. But we will argue that it is also not nearly as

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flawed as the critics have claimed, and we will propose various changes to those practices that will make these courts more defensible. Again, we want to stress that we believe that international criminal tribunals, in some amended form from the way they now exist, can be normatively defended, and defended strongly.

By normative defense we mean a broad array of ways of discussing what institutions should be through the application of various norms (legal, moral, social, economic, etc.) to international tribunals. We will, of course, defend these norms along the way, but in general the norms we will employ are well-established norms of various communities. We will also bring some empirical considerations to bear on the various disputes about international criminal courts. But the empirical considerations we will consider will only be those that have a direct bearing on the normative critique and defense of international criminal tribunals. And while we will also spend time describing the actual practices of these courts and tribunals, again we will do so only as it has bearing on the normative debates. We will not, accordingly, advance conclusions about the actual practices of international courts. Instead, our conclusions will be normative.

These normative conclusions do not rely on one vision of the goals of and justifications for the international criminal courts and tribunals. In each chapter, we address multiple criticisms of the courts. Our defense attempts to respond to each criticism without presenting a specific construction of how we should all see international criminal law and how it can be defended. Rather, our defense embraces the variety of justifications for and benefits of international criminal courts and tribunals. Our objective is to show how the system of international criminal justice can be defended against criticisms from victims and their families, defendants, states, other international institutions, and scholars.

The critics of international criminal tribunals have worked with a wide variety of fields, methods, and approaches. In responding to the critics of international criminal tribunals we will attempt to engage with the critics in their own terms. But we will not dispute largely empirical matters, since our focus is on a normative defense. What this means is that we will sometimes offer suggested changes to the way that international criminal tribunals currently proceed, so as to improve their alignment with the overarching goals of those institutions.

In Chapter 1, we argue that international criminal tribunals can legitimately exercise jurisdiction over international criminals via several different routes, including consent, a recognition of an international legal system, or the demands of justice and equity. In Chapter 2, we address sovereignty concerns and argue that the protection of the complementarity

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principle prevents the International Criminal Court (ICC) and the international criminal tribunals from usurping the sovereignty of states. We argue in Chapter 3 that all three main theories of punishment, namely, retributivism, deterrence, and expressivism, have a role to play in justifying international criminal justice through international courts. In Chapter 4 we give an account of individual and group responsibility, a "group-based model," that we argue can provide a basis for responding to many criticisms of the international criminal courts and tribunals in their apportionment of legal responsibility. In Chapter 5 we consider the economic criticisms of an international criminal legal system and argue that the motivations of domestic criminals, which can be used to predict behavior and ensure compliance, do not easily translate to international criminals, and that moral considerations do influence states. We argue in Chapter 6 that despite the fact that most international criminal prosecutions have been focused on African leaders, there are signs that this situation is changing, and we also argue that there are not structural political biases within the international criminal legal system. In Chapter 7, we argue that the current barriers to fact-finding in the international criminal courts and tribunals are not determined by their construction, but rather can be mitigated or addressed with the outlay of sufficient resources. Finally, in Chapter 8, we argue that prosecutorial discretion helps ensure fairness, rather than contributing to unfairness in the international criminal justice system.

The ICC and other international tribunals begin operations with a democratic deficit. Unlike domestic prosecutors and criminal courts, international tribunals are not part of a government that has checks and balances, or that regularly must face voters or legislative investigative committees. Because of this democratic deficit, international tribunals and their prosecutors must make sure that they do not appear to be abusing the often-considerable power that they wield. While this is true, it is also true that international tribunals have achieved some small degree of success in bringing a few of the worst international criminals to justice. And the outlook for the future is that there will be other political and military leaders who will face prosecutions for atrocities, either in international tribunals or in domestic courts that are enforcing international criminal law. While there are problems, there is no strong reason to lose faith in the tremendous promise of international criminal tribunals to confront mass atrocities.

We completed the research and writing for this book in May 2016. As we were revising the copyedited manuscript, Burundi and South Africa announced their intentions to leave the ICC.

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1

Legitimacy

International tribunals are free-standing courts that prosecute international crimes. The best known international tribunal was the International Military Tribunal (IMT) that sat in Nuremberg and prosecuted some of the political and military leaders of Nazi Germany. In more recent times, there have been ad hoc tribunals established to deal with international crimes committed in the 1990s in Rwanda and the former Yugoslavia, along with more recent atrocities prosecuted in tribunals in Sierra Leone, Kosovo, Timor Leste, and Cambodia, to name only the most prominent. The International Criminal Court (ICC), a permanent court seated in The Hague, was established by treaty to prosecute individuals who have been charged with international crimes committed since July 2002, and whose domestic courts cannot or will not prosecute. A defense of international tribunals, understood in the narrow sense of the ICC and ad hoc tribunals, is similar to but not quite the same as a defense of international criminal courts, or of international criminal law more generally.

In Section I of this chapter, we begin by discussing arguably the first recorded international tribunal, the one organized by Athena to determine the guilt or innocence of Orestes in Aeschylus's play *Eumenides*. In Section II we will characterize some problems of legitimacy of the Nuremberg tribunal. We then discuss two problems of legitimacy for current international criminal tribunals. In Section III we discuss the problem of the lack of a legislature to establish the laws on the basis of which the tribunals prosecute. In Section IV we consider the problem that international tribunals may not be created by those who have the legitimacy to do so. In Section V we argue that despite these two problems, international criminal tribunals can achieve legitimacy by a kind of bootstrapping procedure that, while not without problems, is sufficient for establishing legitimacy.

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I THE TRIBUNAL OF ATHENA

In Aeschylus' play *Eumenides*, Orestes, the son of the king Agamemnon, is being pursued by the Furies, who demand revenge as a matter of straight justice[1] for those who have killed by their own hands. Orestes is confronted by the Furies for having killed his mother, Clytemnestra. To evade the death sentence that the Furies seek, Orestes appeals to the goddess Athena. When Athena arrives on the scene, she announces, "From far away I heard a cry summoning me."[2] Indeed, Athena calls both Orestes and the Furies by the term "stranger," apparently indicating that she and they are from different regions of the world. Athena makes it clear that she has intervened because she believes that Orestes is being held responsible for his mother's death and is in jeopardy of "being injured."[3]

Athena describes the ensuing trial as "the first trial for bloodshed."[4] And insofar as the trial is not under the jurisdiction of a municipal judge, but a judge who claims a wider – perhaps even universal – jurisdiction, the case can also be seen as one of the first "international" criminal trials. The court, which is constituted just for this case, is best seen as something very close to an international criminal tribunal administered under universal jurisdiction. We will see as this section of the chapter proceeds that this trial also illustrates the main legitimacy problems that we will address more directly in subsequent sections of this chapter.

The trial of Orestes before the tribunal of Athena is of course a mythical trial, but we can see here on display the rudiments of the rule of law. Of prime consideration is the refusal of Athena to judge merely on the basis of oaths sworn by acquaintances of the parties, as had been the practice in Greece prior to the rise of the Areopagus – the first properly criminal trial court. Instead, Athena insists that the jury that she has picked from "the best of all citizens" will administer a system of justice that "is neither anarchic nor despotic."[5] The jury is "untouched by thought of gain, reverend, [or] quick to anger" and is thus a "sentinel" to protect the innocent.[6] The jury is to judge on the basis of the evidence, not prejudices, and only on the basis of that evidence that is

[1] Aeschylus, *Eumenides*, in *Aeschylus' Oresteia*, 310, edited and translated by Alan H. Sommerstein (Cambridge, MA: Harvard University Press/Loeb Classical Library, 2008), p. 395.
[2] *Eumenides* 400, p. 405.
[3] *Eumenides* 410, p. 407.
[4] *Eumenides* 680, p. 441.
[5] *Eumenides* 485, p. 417.
[6] *Eumenides* 695, p. 443.

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strictly relevant. Here, we can see most of the important characteristics of the rule of law.

But the trial of Orestes also manifests some of the legitimacy worries of all tribunals that are not based on the criminal statutes of a municipality. First, Athena arrives to constitute the tribunal seemingly from above as a deus ex machina. In fact, the story of Athena's birth is indicative of how she is regarded – namely, as someone who was born fully formed from the head of Zeus – as someone who did not begin life as a baby. In this context of being a judge at her own tribunal Athena did not go through the normal tribulations of developing by starts and stops, learning from experience along the way. Athena's tribunal arises, as tribunals often do, from a very specific need, and at a time seemingly standing with no history. Most importantly, tribunals like that of Athena are not constituted by those who represent a particular population (i.e., not by a community of the victors, victims, or alleged perpetrators), although it is true that both Orestes and the Furies eventually agree to allow Athena to be the judge of their case.

Second, Athena's tribunal stands completely outside the charges and countercharges of the people who have been affected, namely, the victims. Here there is some evidence for thinking that the Furies hold masks with the likeness of Clytemnestra on them to try to include the victim in the trial. But it is clear that Athena pushes the proceedings forward by focusing on the question of Orestes' guilt. Athena is chiefly concerned with Orestes' possible defenses and excuses and in thus countering the revenge that the Furies claim to demand in Clytemnestra's name. However, it must be noted that Apollo, the god who commanded Orestes to kill his mother in the first place and is seen by the Furies as an accomplice, refers the case to Athena. Apollo sees Athena as a newer deity like himself and may see her as less amenable to the claims of the primitive Furies.[7]

Third, Athena claims to be the convener of this tribunal because there is no one else who stands willing to do so except those, the Furies, who seem likely to administer vigilante justice at best. But Athena's tribunal looks like a plausible dispute resolution mechanism only because the existing alternatives seem worse, not because of the intrinsic value of Athena's tribunal. The justification for Athena's tribunal is thus a kind of lesser evil justification, not the kind of justification that would afford this tribunal proper legitimacy in the normatively rich sense of this term. In the sections of the chapter that follow, we will attempt to provide a stronger grounding for the legitimacy of international criminal tribunals, but in the end, at least for some tribunals, it may be that the best we can hope for will be lesser evil justifications.

7 *Eumenides* 222, p. 385.

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Fourth, the procedures of the tribunal are not ones that have been developed over many years and have stood the test of time but are merely imposed by someone who turns out to be relatively unbiased and reasonable. Yet to judge the legitimacy of the tribunal's procedures merely in terms of the reasonableness of the judge is not to proceed in the way defenders of the rule of law would advocate. Indeed, since procedural fairness is often said to be the hallmark of legitimacy in courts, the fact that Athena's tribunal achieves procedural fairness, if it does, merely as an incidental effect of who the judge is, leaves many readers justly concerned.

Ultimately, Athena's tribunal succeeds because of the reasonableness and fairness of the judge along with the force of divine sanctions that a god such as Athena can command, especially since she is backed by her fellow gods on Mount Olympus. But succeeding in reaching a fair result and achieving legitimacy are two different things. Indeed, a tribunal could achieve fair results and yet be so flawed procedurally that the putatively fair results themselves would be tarnished. And the sanctions meted out by divine authority hardly answer those who would criticize Athena's tribunal as seemingly foisted upon the mere mortals who were forced to stand before it.

II THE TRIBUNAL AT NUREMBERG

The first, and most important, tribunal in modern times was the International Military Tribunal established by the Allied Powers in Nuremberg for the purpose of trying Nazi leaders at the end of World War II. This tribunal shared with Athena's tribunal a number of characteristic features of tribunals, but also displayed several new problems, especially concerning legitimacy. Chief among the problems were that the tribunal appeared to be little more than victors' justice, where the victorious leaders at a war's end establish a tribunal to prosecute the vanquished leaders. Such tribunals are sometimes seen as little better than other measures used to divide up the spoils of war, especially since the Nuremberg tribunal did not deal with such crimes as mass looting or systematic rape of the women of the conquered peoples.

At the outset of the trial, the U.S. Supreme Court justice Robert Jackson, on special assignment for the U.S. president Franklin Roosevelt as one of the main Nuremberg prosecutors, offered the best justification he could muster for a trial that did not prosecute any of the obvious crimes committed by the victorious parties:

> The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to

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> condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.[8]

Notice that Justice Jackson, speaking for the prosecution team at Nuremberg, offers as his first justification that the Nuremberg tribunal has "stayed the hand of vengeance," just as Athena stayed the hand of the revenge-seeking Furies.

Unlike the tribunal of Athena, those leaders who established the Nuremberg tribunal aimed to stay the hand of those powers that were "flushed with victory." Athena stays the hand of the powerful Furies, who are also "flushed" but not from victory. Instead, the Furies are accustomed to getting their way and are flushed with success at having done so in all previous situations. In both cases, there is a sense of entitlement of the power-wielding to take revenge that is then redirected by the creation of tribunals. The endless cycle of revenge killing is so poisonous to harmony in society that even seemingly unauthorized and illegitimate tribunals are seen as better than what is the alternative.

Like Athena's tribunal, there is also a recognition at Nuremberg that the judges and prosecutors are in uncharted waters:

> This Tribunal, while it is novel and experimental, is not the product of abstract speculations nor is it created to vindicate legalistic theories. This inquest represents the practical effort of four of the most mighty of nations, with the support of 17 more, to utilize international law to meet the greatest menace of our times – aggressive war. The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched. It is a cause of that magnitude that the United Nations will lay before Your Honors.[9]

In a sense, the Nuremberg tribunal is also like Athena's tribunal in that rulers, not small fry, are those who stand in the dock. And the justification of the "experimental" nature of the tribunal is that the great powers of the world eventually come to support it, seemingly similarly to the way in which Athena's

[8] Justice Jackson's opening statement is published in volume II of *Trial of the Major War Criminals before the International Military Tribunal* (Nuremberg: IMT, 1947), pp. 98–155.
[9] Ibid.

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tribunal eventually gained support from other gods of Mount Olympus, and even grudging support from the Furies themselves.

One of the chief differences between Athena's tribunal and the Nuremberg tribunal is that there was only very selective prosecution in the case of the Nuremberg tribunal. The only possible similarity is that Athena did not prosecute Clytemnestra for killing her husband, Agamemnon, but it also appears that the Furies did not haunt Clytemnestra. Nonetheless, the Nuremberg prosecutors chose from among contemporary crimes only those committed by Nazi German officials, completely disregarding nearly identical crimes committed by Allied officials – we are thinking of the use of firebombing of civilian centers by both sides during the war. In Athena's case, she is acting on the basis of divine or natural law, and in the Nuremberg case the tribunal is acting on the basis of natural or international law.

Nuremberg creates a significant problem for those who wish to defend international criminal tribunals in terms of the rule of law. While the procedures employed were highly laudable in many respects, the defendants were tried according to a statute that had been drafted just months before the trial commenced. This has been a persistent source of strong criticism in the sixty-plus years since the tribunal sat and convicted most of those who were prosecuted at Nuremberg. And this continues to be a major source of worry about most tribunals, at least in part, especially for those created on an ad hoc basis, although we later also discuss some of the problems of the permanent ICC as well. Yet, like Athena's tribunal, there is a strong sense today that Nuremberg succeeded because of the reasonableness of its procedures and the rulings by its judges. As we will explore later, the question is whether a kind of bootstrapped legitimacy is enough to offset the inherent shortcomings in international tribunals.

III PROBLEMS FROM A LACK OF A LEGISLATURE

Tribunals are generally free-standing in the sense that they are not part of a legal system that has a legislature passing laws that are then interpreted and applied by the tribunal in its prosecutions. There are at least two major problems that result from the lack of a legislature that we will address in this section. First, there is a significant worry, as mentioned in connection to the Nuremberg tribunal, about retroactive prosecutions. Since the laws with which the prosecution proceeds are typically only established at the instigation of the tribunal, those laws are created only after the alleged criminal acts have occurred. In the case of the ICC, however, alleged criminal acts can only be prosecuted if they occurred after the court came into existence, but there

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remain critics who allege selective prosecution even for cases that fall squarely under the ICC's jurisdiction.[10] Second, the lack of a legislature connected to the tribunal means that the authority of the tribunal is independent of a legal system – free-floating, as it were – and often seemingly has little accountability. Again, the ICC is a partial exception here since it is permanent, although to many it seems nonetheless to be free-floating since it lacks a connection to a legislature.[11]

Retroactive application of law is not always problematic, as Lon Fuller argues in *The Morality of Law*.[12] Fuller points out that certain social goods can only be accomplished by the application of retroactive statutes, such as would be true in the case of a statute that required a seal on a valid marriage certificate, but where the seal had been destroyed or mislaid. Here a retroactive statute validating marriages even without a seal seems to be needed for the common good. Yet, retroactivity is especially pernicious in criminal law. In criminal tribunals, and criminal courts more generally, the defendant is at risk of significant loss of liberty and even loss of life, as was seen at Nuremberg, where more than twenty defendants were hanged as a result of their convictions.

In the debates about the legitimacy of Nuremberg, many legal philosophers at the time, including Fuller, H. L. A. Hart, and Gustav Radbruch, argued that the retroactivity of the Nuremberg statute did not delegitimize that tribunal.[13] And one of the most striking arguments, similar to Justice Jackson's, was that enforcing a retroactive statute was better than not prosecuting the Nazi leaders at all – a lesser evil defense.

In a different vein, one could argue that the lack of a statute at the time the Nazi crimes were allegedly committed is really beside the point. The question is whether or not there were sources of law, knowable at the time, that proscribed the conduct for which the defendants were being prosecuted. And here the record is not terribly clear. Scholars often point to the Kellogg-Briand Pact that Germany ratified, which made aggression by one state against another state illegal as a matter of international law. And other scholars have

[10] See Matthew Happold, "The International Criminal Court and the Lord's Resistance Army," *Melbourne Journal of International Law*, vol. 8 (May 2007).

[11] See Antonio Cassese, "The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice," *Leiden Journal of International Law*, vol. 25, no. 2 (2012), pp. 491–501.

[12] Lon L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1963).

[13] See H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review*, vol. 71, no. 4, 1958; Lon. L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review*, vol. 71, no. 4, 1958; see also Gustav Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht [Statutory Lawlessness and Supra-Statutory Law]," 1 *Suddeutsche Juristen-Zeitung* [SJZ] 105 (1946, pp. 105–108) (Ger.), translated in 26 *Oxford J. Legal Stud.* 1, 7 (translated by Bonnie Litschewski Paulson & Stanley L. Paulson., 2006).

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