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# Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law

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# GEORGETOWN LAW

## Faculty Working Papers



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### Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law

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**Fairness to Rightness:**  
**Jurisdiction, Legality, and the Legitimacy of International Criminal Law**

David Luban

**1. What is international criminal law?**

As the name suggests, “international criminal law” (ICL for short) refers to applications of criminal law across borders. ICL encompasses three overlapping bodies of law:

(1) *Domestic criminal law applied transnationally*. The oldest and least controversial is the application of a state’s domestic criminal law to conduct outside the state’s borders. Criminal law represents governments’ efforts to protect important societal interests, and obviously assaults on those interests can come from outside the state as well as inside. A hacker in Russia steals identities in Argentina; drug smugglers in Malaysia conspire to sell heroin in California; a sniper in Serbia assassinates a pedestrian in Bosnia. There is nothing conceptually problematic about Argentina, Bosnia, or the United States recognizing these as domestic-law crimes and punishing the perpetrators if the states can catch them. Difficulties arise only because conduct outside one state’s territory almost always occurs within the territory of another state with its own sovereign interests. That raises questions of which state interests justify transgressing borders to legislate conduct in another state’s territory, and how states should resolve conflicts over criminal jurisdiction. These are deep-cutting questions, because seemingly-arcane issues of jurisdiction mirror philosophical issues about state sovereignty and its limits.

Traditional legal theory offers well-defined answers to the first question. The theory begins with the recognition that a state consists of a territory, the people who live in it, and a government. These are, of course, merely the material constituents of the state – its Aristotelian “material cause” – and a complete theory of the state would also need to specify the structural relationships among these constituents and the aims of state organization: the state’s formal and

final causes. But the traditional legal theory derives state interests from the constituent elements alone, generating four jurisdictional principles:

- (1) The *territorial principle*, which gives states jurisdiction over crimes committed in their territories, as well as crimes committed elsewhere with effects in their territories.
- (2) The *nationality principle*, which gives states jurisdiction over crimes committed by their own nationals.
- (3) The *passive personality principle*, which gives states jurisdiction over crimes committed against their nationals.
- (4) The *protective principle*, which gives states jurisdiction over crimes committed against vital governmental interests – crimes like espionage, for example, or counterfeiting the state’s currency, or smuggling immigrants or contraband across its borders.

These familiar principles are staples of every international law textbook. That does not mean they lack challenges or perplexities; some states push the principles farther than others are willing to accept. The fact remains, however, that all states accept the core of the four principles.

Most states also accept – in theory, at least – so-called *universal criminal jurisdiction* (UCJ), which allows any state to prosecute certain crimes committed anywhere in the world. Grotius asserted that every state has jurisdiction over “gross violations of the law of nature and of nations, done to other states and subjects.”<sup>1</sup> However, for many years piracy was the only recognized UCJ crime, not because of its moral awfulness but because it is committed outside the territorial jurisdiction of all states. More recently, legislators as well as theorists have returned to Grotius’s “moralized” rationale, and proposed UCJ over the narrow set of crimes that are subject to international tribunals: genocide, crimes against humanity, war crimes, and torture. But this

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<sup>1</sup> Hugo Grotius, *The Rights of War and Peace, Including the Law of Nature and of Nations [De Jure Belli ac Pacis]*, A.C. Campbell trans. (Washington and London: M. Walter Dunne, 1901)(Elibron Classics reprint), II.20.XL, p. 247.

But this proposal has met with mixed responses among states as well as theorists, and in recent years has encountered significant political opposition. The opposition arises from the fear that UCJ would lead to politicized prosecutions. During a short and ill-fated experiment with universal jurisdiction, Belgium launched investigations, many based on complaints by advocacy groups, of numerous world leaders – until threats by the United States forced Belgium to repeal its UCJ statute.<sup>2</sup> Critics charged that Belgium’s courts had become the tool of political interests. But supporters of UCJ can respond (rightly, in my view) that the real politicized abuses in such cases are the crimes politicians commit under color of their office, nonchalantly assuming that their power should grant them impunity.

The theoretical question arises of what state interests UCJ serves. Universal jurisdiction does not assume any tangible connection between the crime and the state. It seems, therefore, that UCJ can be justified only if states have distinctively moral interests in repressing crimes (or at least certain crimes) wherever they occur. That assumption is hard to reconcile with liberal or minimalist accounts of the legitimacy of state power: liberals generally suppose that states have no self-standing moral interests, and minimalists argue that legitimate state power includes only the smallest set of powers necessary to protect the security and well-being of the state’s citizens. In my view, the real basis for UCJ lies in the idea that perpetrators of infamies offend not against state interests but human interests – the perpetrators are indeed “enemies of all mankind” – and that states prosecuting infamies under UCJ act merely as surrogates. This assumption that major

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<sup>2</sup> Belgian procedure permits crime victims to initiate criminal prosecutions; and none of the high-profile prosecutions originated with state prosecutors. For the most thorough English-language study of UCJ, see Luc Reydam, *Universal Jurisdiction* (Oxford: Oxford University Press, 2003). Reydam is highly critical of ambitious use of UCJ. On the political crisis created by Belgium’s prosecutions, see Glenn Frankel, “Belgian War Crimes Law Undone by Its Global Reach; Cases Against Political Figures Sparked Crises,” *Washington Post*, Sept. 30, 2003. The legitimacy under international law of universal jurisdiction was debated in the *Arrest Warrant Case* (Democratic Republic of Congo v. Belgium), International Court of Justice, General List No. 121, Feb. 14, 2002. The case concerned Belgian efforts to arrest Congo’s foreign minister for international crimes. Although the ICJ decided the case in Congo’s favor without reaching the question of whether international law permits UCJ, several judges wrote separate opinions on that question, of which the opinions of Judges Guillaume and Bula-Bula against UCJ, and Judges van den Wyngaert, Buergenthal, Higgins, and Kooijmans (the latter three in a joint opinion), favoring UCJ, are particularly interesting. Judge Bula-Bula emphasizes the neo-colonialist implications of Belgium prosecuting an official of its former colony; and, in this connection, it is significant that other famous UCJ cases involved Spanish efforts to prosecute officials of Argentina, Mexico, and Chile.

international crimes are, quite literally, crimes against humanity (regardless of their legal label), is debatable.<sup>3</sup> But the assumption undergirds not only UCJ, but also international tribunals to try these crimes. Without it we shall have a hard time justifying any distinctively international criminal law.

(2) *Treaty-based or “hybrid” transnational criminal law.* Beginning in the early twentieth century, states began to recognize that crimes committed by multinational criminal gangs can be repressed only through international cooperation. The result has been multilateral treaties on subjects ranging from counterfeiting and drug trafficking to war crimes and apartheid. The treaties share a common structure: they require parties to enact domestic criminal laws against the conduct; they require parties with custody of an accused offender either to extradite the suspect to a state with jurisdiction over the crime or to prosecute the crime themselves; and they require parties to establish a kind of UCJ that will enable them to prosecute the crime if extradition fails. Treaty-based international crimes are a hybrid of domestic criminal law applied transnationally and what I shall later call “pure” international criminal law. On the domestic-law side, the point of the treaty is to get states to use their municipal legal systems to repress crimes like aerial hijacking or narco-trafficking. On the international side, however, these treaties create a distinctive kind of domestic criminal law: a body of criminal laws governing deeds of international rather than merely domestic concern – laws, moreover, that would not exist without international efforts to establish them.

(3) *“Pure” ICL.* Finally, there is a distinctive body of law that originated in the post-World War II international tribunals, designed to punish a handful of maximally evil crimes: crimes against humanity, genocide, serious war crimes, and aggressive war. Most people who speak of ICL have these crimes and these tribunals in mind. There is no accepted name for this category of crimes. One might call them “the great crimes,” because they represent the very

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<sup>3</sup> I defend the claim in David Luban, “A Theory of Crimes Against Humanity,” *Yale Journal of International Law* 29 (2004): 124-61.

worst atrocities that people commit against each other. Typically, they are mass atrocities; indeed some scholars (not including me) argue they must meet some threshold level of awfulness, involving hundreds or thousands of victims, before they become the legitimate business of the international community rather than domestic criminal justice systems. One might also call them “tribunal crimes,” because they are the subject-matter of the Nuremberg and Tokyo tribunals, the ICTY and ICTR, the Special Courts of Sierra Leone, Cambodia, and East Timor, and the ICC. But “tribunal crimes” is not entirely accurate: states can enact domestic laws to punish them – Canada, for example, has a statute on crimes against humanity, and many states have anti-genocide statutes. Iraq executed Saddam Hussein for crimes against humanity under Iraq’s own criminal code. Furthermore, as we have seen, proponents of U CJ believe that the great crimes can be tried by any state that gains custody of the perpetrator. I shall usually refer to them as “pure international crimes” – pure, in that their criminal character originated in international rather than domestic law, and international rather than domestic legal institutions.

These three bodies of ICL overlap, and not only because treaty-based international crimes and pure international crimes can be prosecuted within domestic legal systems. They also overlap because, as pure international criminal law developed, it has added some treaty-based crimes to its list of offenses. Notwithstanding the overlap among these three bodies of ICL, the remainder of this paper focuses on pure international crimes, because these raise distinctive problems and, now that the ICC is up and running, they are especially compelling.

## **2. The roots of pure ICL**

Although there were intimations of ICL prior to World War II, ICL in its modern form originated at Nuremberg, and was fortified by the U.N. resolution recognizing genocide as a crime. The Nuremberg Charter defined three categories of crimes: *crimes against peace* (the planning or launching of aggressive war), *war crimes*, and *crimes against humanity* (gross violence and persecution against civilian populations, including within one’s own state). The Nuremberg framers, particularly chief U.S. prosecutor Robert Jackson, focused principally on the crime of aggressive war, which, self-evidently, can be launched only by a group. Furthermore, at

Furthermore, at Nuremberg the definitions of crimes against peace and crimes against humanity both emphasized the organized, group-based nature of their perpetration. This emphasis on group perpetrators persists to the present day. Under the Rome Statute of the ICC, war crimes must either be widespread or else the result of a plan or policy; and crimes against humanity require a “widespread or systematic attack against a civilian population,” where “attack against a civilian population” is defined as an attack resulting from or furthering a state or organizational policy.

The crime of genocide has a different emphasis. To be sure, genocide appears in Nuremberg law as the crime against humanity of extermination; but in current law the two crimes are defined differently, and therein hangs a tale. The word “genocide” was coined by the remarkable Polish-Jewish lawyer Raphael Lemkin, in his 1944 book *Axis Rule in Europe*. Lemkin’s word did not catch on immediately. It appears in the earliest draft of the Nuremberg Charter, but disappears (I don’t know why) from subsequent drafts. After the war, Lemkin launched a tireless one-man lobbying campaign to recognize the uniqueness of the crime of genocide. It was all the more remarkable because Lemkin was a refugee with no family, no job, no money, and no connections – the “totally unofficial man,” in the words of an admiring 1957 newspaper editorial.<sup>4</sup> Miraculously, his campaign succeeded a few years later, when the United Nations opened the Convention Against Genocide for state adoption. (After the vote, reporters found the exhausted Lemkin alone in a side room, weeping.) Parting company with the framers of the Nuremberg Charter, Lemkin focused not on the group character of the perpetrators but the group character of the victims. Lemkin believed that groups as such possess value over and above the value of all the individuals in them.<sup>5</sup> Thus, to qualify as genocide, an attack must be

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<sup>4</sup> Quoted in Samantha Power, *“A Problem from Hell”: America and the Age of Genocide* (New York: Basic Books, 2002), p. 76. Power’s narrative of Lemkin’s career is riveting.

<sup>5</sup> Raphael Lemkin, *Axis Rule in Occupied Europe* (New York: Carnegie Foundation, 1944), p. 91. For criticism of this idea, see Chandran Kukathas, “Genocide and Group Rights” (unpublished).



directed against national, ethnic, religious, or racial groups “as such,” and intended to destroy the group in whole or in part.

The curious result of Jackson’s and Lemkin’s emphasis on group perpetrators and group victims was that at its origin, modern ICL had little to do with individual human rights. Jackson was principally interested in criminalizing aggressive war; crimes against humanity focus on “civilian populations,” not individual rights; and Lemkin cared about national minorities as groups, rather than as collections of individuals.

Only after the human rights revolution that began with the 1948 Universal Declaration of Human Rights have we come to think of ICL as the use of criminal law to enforce basic human rights. This is a retrospective reinterpretation of the original impetus for ICL, and both Jackson and Lemkin would have thought it a misinterpretation. Misinterpretation or not, however, it has become the dominant conception of ICL, and today we take it for granted that ICL aims to mobilize international institutions against gross human rights violations, just as domestic criminal law mobilizes governmental institutions against domestic rights violations.

### **3. The aims of international criminal trials**

From its inception at Nuremberg, there has always been something extraordinary about pure ICL and the tribunals that adjudicate it. Dealing as it does with acts of extraordinary violence, systematically perpetrated, and typically on a large scale, pure ICL comes into play only in times of cataclysm: wars and civil wars, bloody ethnic or religious struggles, political upheavals, revolutions or other changes of basic political systems. Instead of being a normal part of the daily functioning of government, international criminal trials occur after governments have fallen or radically altered.

The trials, then, form part of *transitional justice* -- the legal regimes that arise when one form of government replaces another.<sup>6</sup> Where ordinary criminal law is a product of continuity,

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<sup>6</sup> The important observation that ICL emerges from the confluence of domestic criminal law, human rights law, and transitional justice comes from Allison Marston Danner and Jenny S. Martinez, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,” *California Law Review* 93 (2005): 78-82.

pure ICL is a product of discontinuity, of upheaval and political rupture. Inevitably, then, the trials take on political overtones; and sometimes the requirements of politics and those of criminal justice are in tension with each other. Politics is broad, partial, and forward-looking; criminal justice is supposed to be narrow and impartial.

The foundational question about criminal law is what justifies punishment, which is, after all, a form of state violence. Standard justifications (retribution, general and special deterrence, incapacitation, rehabilitation) all raise familiar and difficult justificatory problems, which are no less acute in ICL than they are in domestic legal systems. To be sure, they may take on different configurations in ICL than those familiar from domestic criminal justice. For example, special deterrence will seldom be necessary, because the defendant in the dock of an international tribunal is unlikely ever again to be in the circumstances in which he committed his crime. For related reasons, there is scant need to incapacitate or rehabilitate many low-level perpetrators, who (under the familiar dynamics of the “banality of evil”) may be ordinary, law-abiding citizens, good men and good neighbors, in peacetime. On the other hand, incapacitating toxic political leaders – a Goering, a Milosevic, a Charles Taylor – can be absolutely crucial.

But, in addition to the familiar quartet of retribution-deterrence-incapacitation-rehabilitation, ICL recognizes other purposes, and these raise problems of their own. The curious feature about ICL is that in it the emphasis shifts from punishments to trials. Thus it is often said that the goal of ICL lies in promoting social reconciliation, giving victims a voice, or making a historical record of mass atrocities to help secure the past against deniers and revisionists. The legitimacy of these goals can be questioned, because they seem extrinsic to purely legal values. But what is often overlooked is that, legitimate or not, they are goals of trials, not punishments. Indeed, the punishment of the guilty seems almost an afterthought (not to them, of course). Perhaps that is because, as one often says, no punishment can fit crimes of such enormity; or because compared with their trial, their punishment lacks didactic and dramatic force. Whatever the reason, it is remarkable that the center of gravity so often lies in the proceedings rather than in their aftermath. That is not an objection to the trials, if they are conducted fairly. But the use

of the trial as political theater puts pressure on its fairness; furthermore, international trials have at best a spotty track-record of promoting social reconciliation, giving victims a voice, and making a record.<sup>7</sup> Under some circumstances, truth and reconciliation commissions may do a better job, without the need for punishment; if so, the question of what justifies punishments in international criminal trials becomes even more compelling.

In my view, the most promising justification for international tribunals is their role in *norm projection*: trials are expressive acts broadcasting the news that mass atrocities are, in fact, heinous crimes and not merely politics by other means. In recent years, philosophers have studied expressive theories of punishment; the norm-projection rationale adds an expressive theory of trials.<sup>8</sup> As the Allies recognized at Nuremberg, the alternatives to trying murderous generals and politicians are summary punishment or impunity, each of which, in its own way, is a backhanded admission that *raison d'état* and *Kriegsraison* are a legitimate part of public morality. Only trials can communicate the inherent criminality of political violence against the innocent. The decision not to stage criminal trials is no less an expressive act than the creation of tribunals; and the expressive contents associated with impunity or summary punishment are

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<sup>7</sup> Martti Koskenniemi advances these criticisms with great force in "Between Impunity and Show Trials," *Max Planck Yearbook of International Law* 6 (2002): 1-35. One problem is that the forensic setting can backfire, and license all-out assaults on witnesses and history. In Canada's *Zundel* and *Finta* trials, Douglas Christie, a well-prepared, strategically adept defense lawyer badgered, humiliated, and confused Holocaust survivor witnesses, accused expert-witness historians of relying on hearsay (as if historians ever rely on anything else!), boldly denied that the Nazis had ever gassed Jews, and, in *Finta*'s case, won an acquittal for crimes against humanity. See the disturbing accounts of the *Zundel* case in Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001), and *Finta* in Stephen Landsman, *Crimes of the Holocaust: The Law Confronts Hard Cases* (Philadelphia: University of Pennsylvania Press, 2005).

<sup>8</sup> I am sympathetic with the view of expressivism in Elizabeth S. Anderson and Richard H. Pildes, "Expressive Theories of Law: A General Restatement," *University of Pennsylvania Law Review* 148 (2000): 1503-75, and the expressive accounts of punishment in R. A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986), pp. 235-62, and Jean Hampton's contributions to her and Jeffrie G. Murphy's *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988). Most recently Robert Sloane has argued that the expressive function of punishment is the one most suitable for international criminal law. Robert D. Sloane, "The Expressive Capacity of International Punishment," *Stanford International Law Journal* 43: 39-94 (2007).

unacceptable: both are assertions that political crime lies outside the law. The point of trials backed by punishment is to assert the realm of law against the claims of politics.<sup>9</sup>

Although the center of gravity in international tribunals lies in the trial, not the punishment, punishment following conviction remains an essential part of any criminal process that aims to project a no-impunity norm. Truth and reconciliation commissions have important virtues, but they have a hard time escaping the unwelcome expressive contents that go with impunity: these crimes, they seem to say, are not for the law to handle. Sometimes, no doubt, the short-term need for political reconciliation in a war-shattered society will outweigh the longer-term importance of asserting the realm of law. But all forms of impunity, including politically indispensable impunity, carry the cost of perpetuating a world in which political violence is presumed to transcend law.

Of the traditional aims of punishment, norm projection most closely resembles retribution, at least when retribution is understood, as Jean Hampton proposes, as an *expressive defeat* that reasserts moral truth against the wrongdoer's devaluation of the victim.<sup>10</sup> But ICL uses the ceremonial of the trial, rather than the infliction of punishment, as its primary vehicle for expressing moral truth; and the moral truth it expresses is not the moral equality of perpetrator and victim, as Hampton suggests is the aim of retributive punishment. Rather, ICL's moral truth is the criminality of political violence against the innocent, even when your side hates the innocent as an enemy. Carl Schmitt famously defined "the concept of the political" as the friend/enemy relation, with the strong implication that political violence against the enemy defines the human condition and lies beyond good and evil. The moral truth that international tribunals express is, quite simply, the negation of this familiar political amoralism. International criminal law stands for the proposition that crime is crime regardless of its political trappings.

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<sup>9</sup> In Duff's words, "to remain silent in the face of crime would be to betray the values which the law expresses, and to which we are committed." *Ibid.*, p. 236.

<sup>10</sup> Hampton, "The Retributive Idea," in *Forgiveness and Mercy*, pp. 124-38.

#### 4. National sovereignty and the legitimacy of international tribunals

The major obstacle to establishing ICL lies in the international character of its tribunals, which subjects acts of sovereign states to criminal scrutiny by the “international community,” something of a gaseous invertebrate under the classical Westphalian theory of equal sovereign states.

As I suggested in the preceding section, characterizing sovereign acts as crimes is a momentous, even utopian, decision. As Paul Kahn has argued, in the Western political imagination, states are gods, and this is no less true of contemporary secular states.<sup>11</sup> Like gods, states do not admit their own mortality, and they demand devotion and obedience. Every state, liberal constitutional states no less than absolute monarchies, claims the ultimate authority over its citizens: to make them die and kill on the sovereign’s behalf. That a state has no military draft at the moment is irrelevant: all states claim the authority to conscript, and all states cloak the profoundly illiberal project of sacrificing lives for the supposed salvation of others in the language of religion. The American soldier killed in the line of duty in Iraq has made “the ultimate sacrifice” for his country, politicians’ language nearly identical to Islamists’ talk of “martyrdom.”

Viewed from outside a religion, human sacrifice looks like murder or suicide. Viewed from within, it is a non-criminal and in fact supremely meaningful form of violence. Kierkegaard described Abraham’s sacrifice of Isaac as a “teleological suspension of the ethical,” meaning not that it was a justified killing but that the language of justification simply does not apply to it. The kinds of mass violence that ICL addresses take place within what participants regard as struggles to the death between groups, in which killing and humiliating the enemy likewise seems like a supremely meaningful form of violence. When ICL redescribes it as crime – mere crime, nothing more – the effect is not much different than redescribing the sacrifice of

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<sup>11</sup> Paul W. Kahn, *Putting Liberalism in Its Place* (Princeton, NJ: Princeton University Press, 2005), pp. 228-41.

Isaac as an attempted murder. In one sense, the description is straightforward and uncontroversial. But it is only straightforward once we stand outside the religion of state, race, ethnicity, and nation, and dismiss them as gods that failed. Within the religion, crime-talk is blasphemy.

For that reason, establishing a pure international criminal law of universal application is a momentous and radical project, equivalent in its way to the early secularists' deflationary view of state authority as manifestation of human rather than divine will. We are not there yet. Not even the so-called "likeminded" states who promote the ICL project are heretical enough to reject the religion of sovereignty. For states to call other states "gods that failed" is a Damoclean sword, for they themselves are nothing more than gods that have not yet failed.

In legal terms, the gulf between the transcendent claims of sovereignty and its deflation in ICL raises the jurisdictional question of what right international tribunals have to try nationals of states that do not wish them tried. For each of the principal tribunals, the jurisdictional question received an answer that was only partly satisfactory on classical Westphalian terms:

(1) At Nuremberg, the four major powers conducted the trial, but none of the traditional principles of transnational criminal jurisdiction except universality can explain why Great Britain (for example) could try Germans for the persecution of Jews in Germany or the murder of Gypsies in Poland. Allied lawyers argued that Germany's unconditional surrender and the collapse of the Nazi regime made them Germany's new government, but under pre-existing treaty law an occupying power must maintain the laws of the occupied country – a constraint that obviously reflects classical ideas about the sacredness of state sovereignty.<sup>12</sup> The Nuremberg Tribunal, criminalizing conduct even if it was legal under Nazi law, violated this sovereignty-based principle of treaty law.

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<sup>12</sup> For discussion of the jurisdiction problem at Nuremberg, see Robert K. Woetzel, *The Nuremberg Trials in International Law* (New York: Praeger, 1960), pp. 54-95; see especially page 82. The treaty law is Article 43 of the 1907 Hague Convention.

(2) The United Nations Security Council established both the Yugoslav and Rwanda tribunals under its peacekeeping powers, but the Security Council's powers are themselves limited by states jealous of their sovereignty. The UNSC can act only to "maintain or restore international peace and security" (the condition given in Article 39 of the U.N. Charter); and the argument that post-conflict trials would help maintain or restore international peace and security was speculative and perhaps even farfetched. The more hostile critics thought – not without reason – that the true aim of the Tribunals was to deflect attention from the politically embarrassing fact that neither the Security Council nor any of the major powers did much to stop the atrocities while they were happening.

(3) The ICC operates on a theory of delegated jurisdiction – that is, states-parties transfer to the ICC their own territorial and nationality jurisdiction over pure international crimes. But it is far from obvious that criminal jurisdiction is something a state *can* legitimately delegate to whomever it chooses. If it can delegate criminal jurisdiction to the ICC, then why not to the Kansas City dog-catcher, the World Chess Federation, or the Rolling Stones?

Even with the added premise that sovereignty never includes the right to commit the great crimes, we need an additional step to reach the proposition that outsiders can try and punish them. As we saw in the earlier discussion of UCJ, that step will require us to recognize a kind of universal moral interest in condemning the great crimes. This moral interest has precious little institutional embodiment, however. Obviously, there is no political community called "humanity" that authorizes the tribunals; nor are they products of anything like a world government.

## **5. Legitimacy through fairness**

My own view is that the legitimacy of international tribunals comes not from the shaky political authority that creates them, but from the manifested fairness of their procedures and punishments. Tribunals bootstrap themselves into legitimacy by the quality of justice they deliver; their rightness depends on their fairness. During the first Nuremberg trials, prosecutors fretted that acquittals would delegitimize the Tribunal; in hindsight, it quickly became apparent

that the three acquittals were the best thing that could have happened, because they proved that Nuremberg was no show trial.

In the same way, it is essential that the ICTY, ICTR, and ICC deliver champagne-quality due process and fair, humane punishments – which, in most respects, they do.<sup>13</sup> Lacking world government to authorize international tribunals like the ICC, their authority must be largely self-generated by strict adherence to natural justice. Only in that way can they project a normative vision that might compete with the Westphalian orthodoxy.

The term “natural justice” is perhaps a misnomer, because the basic procedural rights recognized world-wide today are products of centuries of tinkering, not pure reason alone. As embodied in international treaties, they include the right to a speedy, public trial before an impartial tribunal that bases its decision solely on the evidence, under rules designed to reach accurate verdicts; the right to offer a defense; the right to be informed of the charges, in a language that the accused understands, through a written indictment that specifies the charges and the conduct charged; the right of the accused to confront the witnesses against him; the right of the accused to have compulsory process for obtaining witnesses in his favor; the right to counsel and the privilege against self-incrimination; and the ban on double jeopardy (*ne bis in idem*).<sup>14</sup> Natural justice also includes the right to appeal; and it includes familiar duties of prosecutors: to pursue cases only when there is probable cause, to disclose exculpatory evidence to the accused, and more generally, to seek justice rather than victory. Finally, it includes humane conditions of confinement and reasonable punishments.

One important fact about these requirements is that only tribunals that have some kind of internationally recognized state authorization – paradigmatically, authorization by a multilateral group such as the U.N. – are likely to be able to satisfy them. Evidence must be gathered from

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<sup>13</sup> The only real criticism of the ICC so far is that its statute does not establish an office of defense counsel along with the highly professionalized prosecutor’s office.



foreign war zones by trustworthy and impartial investigators, evidentiary chains of custody must be maintained, defense counsel and judges recruited and paid, defense witnesses subpoenaed across borders, appellate panels created and staffed, rules written, safe, humane prisons found, and long-term confinements monitored. Realistically, only states can carry out these tasks. Thus, even though I believe the legitimacy of international tribunals arises from their fairness rather than their political pedigree (their state authorization), in actual fact state authorization will be contingently indispensable to achieve procedural fairness. That, ultimately, is why it will not do to grant criminal jurisdiction to the Rolling Stones or the World Chess Federation. Once we look carefully at what it actually takes to achieve fair procedures and punishments, the natural-justice account turns out not to be vulnerable to imaginary counter-examples in which vigilantes abduct defendants, try them “fairly,” and punish them. No such vigilantes could hope to meet the stringent requirements of natural justice.

Not every civilized legal system satisfies all the requirements of natural justice. (In my view, the United States, with its savagely harsh prison sentences and brutal supermaxes, violates the last two conditions.) It may not be essential that international tribunals be tops along every dimension of natural justice; but, because tribunals must earn their legitimacy rather than inheriting it, they cannot be far from the top on any of them.

## **6. The Principle of Legality**

In criminal law, the most fundamental requirement of natural justice is the Principle of Legality. Traditionally, the principle received expression in the Roman maxims *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no punishment without law). The first means that conduct may be criminalized only if publicly-accessible law spells out all the

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<sup>14</sup> All these rights can be found in Articles 14 and 15 of the International Covenant on Civil and Political Rights, as well as the Rome Statute of the ICC.

elements of the crime; the second means that the law must, in addition, sentence only according to a legally-specified scheme of punishments. Combining these, the Principle of Legality asserts that conduct may be criminalized and punished only if the crimes and punishments are explicitly established by publicly-accessible law. The Principle seems close to the core of the rule of law, in two distinct ways: first, by tying crime and punishment to law rather than the ruler's arbitrary will; and second, by insisting that law must be publicly accessible, therefore integrated into the daily life of the people it governs.

The Principle of Legality generates corollaries, as important as the principle itself: the prohibition on vaguely-defined crimes, requirements of fair notice and nonretroactivity, and the principle of lenity, which asserts that if a criminal statute is ambiguous, the version most favorable to the defendant is the correct version. Each of these helps ensure that people are not punished for conduct that they had no definitive way to know had been criminalized. In the remainder of this paper, I examine, and attempt to resolve, some significant tensions between pure international criminal law and the Principle of Legality.

The most obvious such tension, which figured prominently at Nuremberg, is simply that the tribunal applied novel law retroactively. Although war crimes are a traditional category of criminal law, crimes against peace and crimes against humanity were novel. The problem of retroactivity dogged the ad hoc tribunals as well, because they were established after the crimes. True, their statutes were modeled on pre-existing ICL, so the substantive criminal law was not retroactive.<sup>15</sup> But the ICTY broke legal ground on important issues, most dramatically in its holding that the war crimes law governing international armed conflict applied in the Bosnian civil war as well.<sup>16</sup>

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<sup>15</sup> The substantive criminal law of the ICTY statute combines the war crimes provisions of the Hague and Geneva Conventions, the Genocide Convention, and the definition of crimes against humanity drawn from Allied Control Council Law No. 10, which slightly modified the Nuremberg Charter and was used in the second round of Nuremberg trials. The ICTR statute also uses familiar definitions of crimes drawn from pre-existing law.

<sup>16</sup> *Prosecutor v. Dusko Tadic*, ICTY Appellate Chamber Judgement of 15 July 1999, paras. 68-171, available at <http://www.un.org/icty/tadic/appeal/judgement/index.htm>.

Larry May, in his recent book *Crimes Against Humanity*, argues that the Principle of Legality requires defendants to receive fair notice of all elements of the crime, including the jurisdictional element. In May's words, "defendants should have been able to see, at the time they acted, that what they were doing was a violation of international law." The ICTY violates the fair notice principle because the tribunal post-dated the crimes. May objects to the "plight" – his word – "of some of the Bosnian Serb 'small fry' now in jail at The Hague who had no hint that their acts, as unspeakable as they may be, were even remotely likely to land them in jail and awaiting trial before an international tribunal."<sup>17</sup>

Finally, as Allison Danner and Jenny Martinez have argued, the contemporary connection between ICL and international human rights law creates a standing tension between ICL and the Principle of Legality.<sup>18</sup> Human rights law adopts the standpoint of protecting victims, and therefore requires laws to be read broadly in cases of ambiguity.<sup>19</sup> But criminal law adopts the standpoint of protecting defendants, and the principle of lenity requires ambiguous statutes to be read narrowly.

To illustrate the conflict: common Article 3 of the Geneva Conventions offers a list of basic human rights that must be guaranteed to all captives in armed conflicts not of an international character, for example protection against "outrages upon personal dignity," including humiliating or degrading treatment. Insofar as Article 3 is a human rights instrument, the vague notion of "outrages upon personal dignity" must be read expansively. But insofar as Article 3 is also a criminal prohibition – as it was, for example, in U.S. law, where until 2006 all violations of Article 3 were war crimes – it must be read as narrowly as possible. The Principle

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<sup>17</sup> Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005), p. 109.

<sup>18</sup> Danner and Martinez, "Guilty Associations," pp. 89-90.

<sup>19</sup> Two textbook statements of this principle appear in *Soering v. United Kingdom*, [1989] ECHR 14 (7 July 1989), para. 87, reprinted in 28 I.L.M. 1066, 1091-92 (1989); *Prosecutor v. Dusko Tadic*, ICTY Appellate Chamber Judgement of 15 July 1999, para. 96, available at <http://www.un.org/icty/tadic/appeal/judgement/index.htm>.

of Legality gave a pretext to U.S. President George W. Bush for retroactively decriminalizing humiliation tactics after the Supreme Court declared that Article 3 applies to Al Qaeda captives.<sup>20</sup>

The result seems deeply embarrassing for ICL. If these examples truly demonstrate that international tribunals violate the Principle of Legality, and the Principle is truly central to natural justice, and – finally – natural justice is necessary to bootstrap ICL into legitimacy, the result seems to be that ICL has no legitimacy.

In response, I will argue that the Principle of Legality has less importance in ICL than in domestic criminal law systems, and therefore that legality-based objections to the ICL enterprise are not fatal. Even if the Principle of Legality lies at the core of domestic rule of law, its role in ICL is far more peripheral. To see why, we must begin by asking a fundamental question: what justifies the Principle of Legality?

There are two main arguments for the Principle, one based in the action-guiding character of law and the other in the need to curb abuses of state power. The first is that to punish people without fair notice of the elements of crimes and the scheme of punishments violates their reasonable expectations that their behavior is legally innocent. This familiar argument is inherent in Lon Fuller's notion that law is meant to be action-guiding. Inadequately specified law cannot guide actions, and it is unfair to punish failures to be guided by laws incapable of guiding. The second is that, historically, rulers have used vague, discretionary, underspecified criminal law to target and repress opponents – perhaps the most notorious example being the provision of the Nazi criminal code prohibiting any conduct that affronts “healthy folk-sentiment.”<sup>21</sup> Call these the *fair notice argument* and *government abuse argument*, respectively.

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<sup>20</sup> I refer to Bush's legality-based argument as a “pretext” because he also stated that his objective in changing the law was to permit his program of harsh interrogation to continue. The Principle of Legality does not require decriminalizing outrages on personal dignity; it requires only that standards be specified more concretely.

<sup>21</sup> Gesetz zur Änderung des Strafgesetzbuchs vom 28. Juni 1935, 1 Reichsgesetzblatt 839. See Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, trans. Deborah Lucas Schneider (Cambridge, MA: Harvard University Press, 1991), p. 74.

## **7. The government abuse argument**

I begin with the government abuse argument, which insists on the Principle of Legality as a safeguard against arbitrary punishment by governments under cover of vague, underspecified law. The response in the case of pure ICL is straightforward: there is simply much less danger of government abuse in ICL than in domestic legal systems, because ICL arises from weak, decentralized institutions rather than strong, concentrated ones. Skeptics point to the free-floating, cosmopolitan character of the tribunals in order to attack their legitimacy. But exactly the same facts demonstrate that the worry about abuses of the legal process by holders of state power is not a powerful one. The Principle of Legality still matters in tribunal prosecutions, but not as a safeguard against despotism.

Arguably, the government abuse argument has more force applied to domestic prosecutions of international crimes under universal jurisdiction. Even here, however, the danger seems slight. UCJ prosecutions depend on the infrequent, difficult, and almost random processes of gaining custody over perpetrators, and it is unlikely that significant state interests can be advanced by abusively prosecuting nationals of other states for pure international crimes. It is possible, of course. For that reason, the legitimacy of UCJ prosecutions will depend on common-sense safeguards against abuse: procedural fairness, of course, but also prosecutorial independence from the political branches of the government, and absence of prior political strife between the state conducting the trials and the defendants. Without these safeguards, the Principle of Legality will indeed kick in as an essential protection against government abuse. But, when a state with no political axe to grind against the defendant and whose jurists aren't under the thumb of politicians prosecutes great crimes under a UCJ statute, the Principle of Legality loses its central place in the pantheon of legal values.

## **8. The fair notice argument**

Even if the lack of world government weakens the government-abuse rationale for the Principle of Legality, the fair-notice rationale remains central to the idea that law exists to guide human action. Isn't it a mere travesty to try people under retroactive law, before tribunals that

didn't exist when they committed their crimes, or under vague legal standards that expand to disfavor the defendants?

My basic response to the fair-notice argument is that when the deed is morally outrageous – *malum in se*, as criminal lawyers say – then no reasonable expectations of the defendants are violated when they are tried for it. The Nazi leadership, with the blood of 50 million people on their hands, fully expected summary execution if they were defeated. Their own ideology rejected the *Rechtsstaat* (and with it the Principle of Legality) in favor of the law of tooth and claw. If anything, the Nuremberg trial treated them better, not worse, than they had reason to expect. That is why Jackson described the Nuremberg defendants as “hard pressed but...not ill used,” because they are “given a chance to plead for their lives in the name of the law. Realistically, the Charter of this Tribunal, which gives them a hearing, is also the source of their only hope.”<sup>22</sup> Though there is no getting around the fact that the Nuremberg Tribunal applied law retroactively, it did not treat the defendants worse than they had reason to expect, which is the moral basis for the ban on retroactivity. Thus, even if pure international criminal law was born in sin at Nuremberg, the sin was a venial one. What mattered was that the defendants got a fair trial; that, plus the fact that the law of the Nuremberg Charter criminalized only actions that are morally outrageous, confers a legitimacy on the trial that outweighs its formal violation of the Principle of Legality.

By the time of the Balkan Wars, the Nuremberg principles and the Geneva Conventions had been part of international law for forty years. Were Yugoslav soldiers and militiamen “on notice” of this law? To answer this question, it is important to recognize that fair notice in criminal law always involves the legal fiction that publishing the law in some officially sanctioned manner places people on notice of it. This is a fiction, of course, because most people most of the time have no idea when or where to look for changes in the criminal law. Fair notice,

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<sup>22</sup> 2 *Trial of the Major War Criminals before the International Military Tribunal* 101-02 (1946). Here I am summarizing my argument from David Luban, “The Legacies of Nuremberg,” in *Legal Modernism* (Ann Arbor, MI: University of Michigan Press, 1994), pp. 355-56.

Fair notice, in other words, inevitably means *constructive* notice, even in domestic legal systems. In this constructive sense, the Yugoslav perpetrators were on notice that Nuremberg law, Geneva and Hague law, and the Genocide Convention applied to them. Ignorance of the law is no excuse.

Sometimes, however, ignorance of law *is* an excuse. In domestic legal systems, when law imposes unusual, surprising, or counterintuitive requirements, fairness demands that accused persons actually (not just constructively) know that the law prohibits their conduct. Thus, for purely regulatory, *mala prohibita*, offenses prosecutors will have to prove not only that the accused knew what he was doing, but also that he knew that what he was doing is illegal. For such offenses, knowledge of the legal as well as behavioral element of the offense is required for guilt, on pain of violating the requirement of fair notice.<sup>23</sup>

May seems to have some argument like this in mind when he argues that it is unfair to “Bosnian small fry” to try them before an international tribunal unless they knew at the time of their crime that it fell within the jurisdiction of pure ICL. However, the argument fails, because the war crimes and crimes against humanity charged against prison guards who tortured and raped camp inmates are hardly the kind of regulatory, *mala prohibita* defenses that demand actual, rather than constructive, notice of their legal prohibition. The more egregiously awful the conduct is intrinsically, the more it signals its own probable legal prohibition, and the less reasonable the defendant’s expectation of innocence or impunity – doubly so because murder, rape, torture, and beatings are central domestic-law crimes in every legal system in the world. The Bosnian guards who gang-raped and tortured their captives may have expected to get away with it – but that is different from a reasonable expectation of impunity.

I want to turn, finally, to the worry raised by Danner and Martinez that the human-rights rationale behind ICL runs afoul of the principle of lenity, and therefore of the Principle of

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<sup>23</sup> In U.S. doctrine see, e.g., *Lambert v. California*, 355 U.S. 225 (1957) and *Liparota v. United States*, 471 U.S. 419 (1985). For more detailed discussion of these ideas about mens rea, see David Luban, “The Publicity of Law and the Regulatory State,” *Journal of Political Philosophy* 10 (2002): 296-316.

Legality. This, it seems to me, is a deeper and more significant worry than concerns about retroactivity, because it concerns a fundamental clash between the world-views of human rights and criminal law. Here too, however, I shall argue that the Principle of Legality represents the less important principle.

Recall that the principle of lenity says that if a criminal statute is ambiguous, it must be read in the way most favorable to the accused. Why is that? The reason, according to the fair notice argument, is that the defendant needs to be told unambiguously whether his conduct is criminal under the statute. Let's use the term "gray zone" to describe the zone of ambiguity in the statute – the conduct that is forbidden under one reading but not under the other. Then it appears that the accused doesn't have adequate notice about whether gray-zone conduct is permitted or forbidden.

It follows that the only way he can be certain his conduct is legal is to steer clear of the gray zone. Even if gray-zone conduct is legal, he engages in it at his peril. That seems to violate one of the basic tenets of liberal legality, namely that the law permits anything that it doesn't expressly forbid.<sup>24</sup> We are entitled to walk to the very boundary of the law, so long as we don't step over it.

Yet this doctrine carries undeniable costs. It encourages envelope-pushing, loopholing, and pettifoggery. Perhaps that is an acceptable cost when the issue is tax "avoidance"; and perhaps it is downright desirable when the issue is political speech that angers the government. But when the legal issue concerns basic human rights and their violation, envelope-pushing is the last thing we should want. The outrageous memos written by U.S. government lawyers to loophole the law against torture offer a vivid illustration of what happens when ruthless men and women, bent on evading human rights protections, probe and twist the law for ambiguities.<sup>25</sup> In

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<sup>24</sup> Contrast this with Aristotle's deeply illiberal view that the law forbids whatever it does not expressly permit. N.E. 5.11, 1138a5-7.

<sup>25</sup> David Luban, "The Torture Lawyers of Washington," in *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007), pp. 162-205; Jeremy Waldron, "Torture and the Common Law: Jurisprudence for the White House," *Columbia Law Review* 105 (2005): 1681-1750, especially pp. 1701-03. Envelope-pushing has



cases like these, it should count as a plus, not a minus, if ambiguity or vagueness in the law discourages actors from the gray zone. The human-rights-law mode of reading pure ICL statutes – filling gaps and resolving ambiguities in favor of victims of human rights violations – simply has far more to recommend it than the principle of lenity. These statutes, after all, deal with the great crimes, and the gray zone at their margins is bad enough that we should welcome any inhibition the criminal law creates on people choosing to inhabit them.

There is one important exception to this conclusion, and that is the case of certain war crimes. Under the ICC's statute, it is a war crime to take actions that cause disproportionate civilian deaths or environmental damage (Article 8(2)(b)(iv)). But no formula exists for calculating proportionality. Soldiers in combat always try to inflict the maximum lawful amount of force when they have to – that is both how they safeguard themselves and how they accomplish their missions. To tell them that not only must they obey the law of war, they must also steer clear of the gray zone seems unfair and wildly unrealistic. These are, after all, men and women fighting for their lives in conditions close to hell. Other laws of war are also fuzzy or contestable: for example, opinions differ over whether targeted killings of enemy militants violate the prohibition on intentionally targeting civilians (Article 8(2)(b)(i)). In these examples, the special conditions of war suggest that the principle of lenity should govern criminal prosecutions, because it is unreasonable to expect actors not only to abide by the law but also to steer clear of the gray zone. I hasten to add, however, that this will not be true of all war crimes. In some cases the argument that soldiers should be deterred from the gray zone applies full force – for example, in the prohibitions on cruel and degrading treatment of captives.

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has been an official policy of the Bush Administration; in the unapologetic words of the head of the National Security Agency, “We’re going to live on the edge....My spikes will have chalk on them....We’re pretty aggressive within the law. As a professional, I’m troubled if I’m not using the full authority allowed by law.” Dana Priest, “Covert CIA Program Withstands New Furor; Anti-Terror Effort Continues to Grow,” *Washington Post*, Dec. 30, 2005, p. A1. He was talking about electronic surveillance, not torture, but many Americans were deeply troubled even by the surveillance issue.

On the more general point that mistake-of-law defenses should not be available to sharpies who use them as an excuse for exploring the gray zone, see Dan M. Kahan, “Ignorance of the Law *Is* an Excuse – But Only for the Virtuous,” *Michigan Law Review* 96 (1997): 127-54. Kahan argues that existing criminal law recognizes this point.

## 9. Conclusion: legitimacy from the bottom up

The institutions of ICL are fragile, weak, and – to be perfectly honest – far less important than the attention they receive warrants. Realistically, the current ICC may turn out to be a short-lived preliminary sketch like the League of Nations. Nevertheless, opponents of the ICC, particularly in the United States, view it in exaggerated, paranoid terms; supporters, churning out reams of commentary on legal minutiae before the first case has been tried, can fairly be accused of living in a fantasy-world of their own, where the court has already been fully normalized into a global rule of law.<sup>26</sup>

The reason for the attention, the fantasies, and the conspiracy-theories woven around the ICL enterprise is not hard to see: as I have argued, even if the institutions are weak, their project is a fundamental challenge to statism and nationalism, which (unlike ICL) are fighting faiths. That the project gets any backing at all from states is remarkable; it testifies to a world-wide cosmopolitan yearning coming from below – and not only on the part of liberal elites, as conservative opponents of ICL invariably believe. It is the yearning to escape the eternal cycle of crimes that the fighting faiths commit in the name of states, nationalities, and religions. Against the bloodshed of mass political violence, the ICL project has little to offer except the dramatic force of legal trials that attach labels like “war crimes,” “genocide,” and “crimes against humanity.” Lacking the authority of world government, these norms build their legitimacy from the bottom up, by the fairness of their proceedings and the moral power they project. The success of the project is improbable; its failure, if it happens, is the failure of law itself.<sup>27</sup>

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<sup>26</sup> For relevant examples of criticisms of the ICC, see, e.g., John R. Bolton, “The Risks and Weaknesses of the International Criminal Court from America’s Perspective,” *Law and Contemporary Problems* 64 (2001): 167-80; Jack L. Goldsmith, “The Self-Defeating International Criminal Court,” *University of Chicago Law Review* 70 (2003): 89-104; Jack L. Goldsmith and Stephen D. Krasner, “The Limits of Idealism,” *Daedalus* 132 (2003), 47.

<sup>27</sup> I would like to thank Anthony Duff, Paul Kahn, Jenny Martinez, Steve Ratner, and John Tasioulas for comments on an earlier version of this paper, as well as participants in the workshop from which this volume arose.