No Peace Without Justice, No Justice Without Law: A Review Essay

MARK R. SHULMAN*

JONATHAN HAFETZ, PUNISHING ATROCITIES THROUGH A FAIR TRIAL: INTERNATIONAL CRIMINAL LAW FROM NUREMBERG TO THE AGE OF GLOBAL TERRORISM (CAMBRIDGE UNIVERSITY PRESS, 2018)

According to the last living Nuremberg Prosecutor, the extraordinary Benjamin B. Ferencz, "There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance."[1] In reviewing an important new book, this essay examines the work of the International Military Tribunal convened in 1945 and at courts since to deliver justice that would indeed ensure peace. In part because of Mr. Ferencz's tireless advocacy, the decades since Nuremberg have witnessed significant progress in the development of courts capable of delivering the kind of justice upon which peace can fairly rest.

In November 2006, I happened to be in Kuwait on business. On the afternoon of the fifth, I was scheduled to address members of the Kuwait Lawyers Association. Prior to my going out to the auditorium, the bar's Board of Directors greeted me in the executive suite. There we engaged in conversation, mostly comparing the different roles that bar associations play in developing the rule of law in our respective countries—the United States, a settled superpower, and Kuwait, a young country that had been invaded and partially destroyed by neighboring Iraq a few years before. While we spoke, I could see a television showing a court hearing—the trial of the recently deposed Iraqi leader, Saddam Hussein. As I don't speak

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* Member of the Board of Directors, *Columbia Journal of Transnational Law*.

1. BENJAMIN B. FERENCZ, 1 AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARDS WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS 30 (1980). This essay is dedicated to Mr. Ferencz for his remarkable lifetime of contributions to the promotion of international justice.

Arabic, I couldn't understand what was being said. Even while conversing with me, however, the distinguished members of the Kuwaiti bar were also carefully monitoring events on the screen. Then the Chief Judge of the Iraqi Special Tribunal wound up to pronounce a verdict upon Saddam for his role in the 1982 massacre of nearly 150 Shiite Iraqi citizens at Dujail.[2] Conversation in the Board Room hushed. The KLA directors all turned to watch the Chief Judge deliver his pronouncement: guilty. Inexplicably, the silence in our room did not seem like the kind of solemn respect for the pronouncement of guilt in a capital case. Rather, the lawyers around me betrayed their complex emotions with chuckles and some eye rolling. As an outsider, I was unsure what to make of their responses to this deadly verdict. I could tell that it was neither jubilation nor cold-hearted vengeance. Only later did I conclude that they were expressing a combination of relief and contempt.

The trial of Saddam Hussein encompasses many of the complexities inherent in trials of those accused of widespread atrocities. Iraq's former president faced an *ad hoc* court, created by the new government specifically to try him and members of his Baathist regime. He was charged with having ordered violent acts during wartime in reprisal for an attempt on his own life. The would-be assassins reportedly had been sponsored by and acting at the behest of Iran, Iraq's archenemy. No doubt vicious and contrary to international humanitarian law, the reprisals were ordered and carried out by a government at war, by a state of which Saddam was the absolute leader and the ultimate source of law. Saddam was clearly responsible for the atrocious and indiscriminate attacks on the

2. *See The Trial of Saddam Hussein*, C-SPAN, https://www.c-span.org/video/?196977-1/trial-saddam-hussein# [https://perma.cc/B2WA-2C98]; The Association of the Bar of the City of New York, Council on International Affairs Task Force on Issues Related to the Trial of Saddam Hussein, Recommendations Related to the Trial of Saddam Hussein (2004) https://www.nycbar.org/pdf/report/City%20Bar%20Report%20re%20Hussein%20Draft%20of%20April%202%202004.pdf [https://perma.cc/8BJZ-K4DM] *reprinted in* Mark R. Shulman, *Recommendations Related to the Trial of Saddam Hussein, in* 1 THE IMPERIAL PRESIDENCY AND THE CHALLENGES OF 9/11: LAWYERS REACT TO THE GLOBAL WAR ON TERRORISM 173 (James R. Silkenat & Mark R. Shulman, eds 2007). During the 1980–88 Iran-Iraq War, Iran supported some Shiite groups in Iraq to destabilize the Baathist Regime led by Saddam Hussein. In July 1982, members of one such group, the banned Dawa Party, assaulted Saddam's motorcade as he was departing Dujail. Over the next couple of years, the Baathist regime engaged in brutal reprisals against those suspected of being members of Dawa, exiling hundreds, detaining and torturing some, and ultimately killing nearly 150. After the 2003 U.S.-led invasion of Iraq, the United States helped the new Iraqi government set up the Iraqi Special Tribunal, which put Saddam Hussein on trial for these and other charges. He was hanged to death in December 2006.

citizens of Dujail, but his prosecution by a new *ad hoc* court raised troubling questions of fairness. How was it illegal for the absolute leader of a country at war to order use of force to quell violence behind the lines that menaced the command and control functions of the government? And why did a "Special Tribunal" have capacity to judge him a quarter century later and only after a regime change forced by a foreign power that itself lacked important legal authority?

At that moment in November 2006, I was not sure what to make of the bar leaders' responses. Some time later I concluded that they were feeling, "Yes, of course he's guilty, but this kangaroo court doesn't have the proper authority to make the finding." To this day, I wonder if I read the room correctly. No one knew better than Kuwaitis the scope and depravity of Saddam's actions. In August of 1990, he had overseen the invasion of their country, followed by a devastating campaign of murder, plunder, and wanton destruction. And yet, these men were jurists, engaged in building a principled rule-of-law system. I assumed that they were perplexed by the challenge they faced. On one hand, they were engaged in rebuilding a peaceful society following national trauma, extending from the 1990–91 invasion and continuing for the fifteen years of pseudo-war on the border. On the other hand, they could clearly see that the Iraqi Special Tribunal lacked the legitimacy of an ordinary court, having been established by the puppet government created by the superpower that had invaded without clear legal justification. In other words, they were watching sham justice being applied when even the most legitimate justice could not have condemned Saddam in terms that adequately reflected the enormity of his crimes. Or at least, that's how I read the faces of the directors in that boardroom on that momentous day. The Kuwaitis were not the only ones who struggled to reconcile the complexities of peace and justice that week. The U.S. elections that followed two days later brought sweeping victories for the opposition party and triggered the resignation of the Secretary of Defense, Donald Rumsfeld, who was widely viewed as bearing principal responsibility for the misguided war and botched transition to peace.

My experience in that elegantly appointed room encapsulates many of the tensions underlying the application of international criminal law. What kind of justice did Saddam deserve? What kind of justice could a special tribunal in U.S.-controlled Iraq deliver to its deposed leader? Can an individual be held accountable for acts he did not physically commit? What constitutes a fair trial for mass atrocities? Since at least the end of the Second World War, legal theorists, advocates, and judges have been addressing these issues.

How should we balance the impulse to punish mass atrocities and end impunity against the demands of due process and legality? Although the Iraqi Special Tribunal clearly fell short in balancing the demands for vengeance with the call for justice, history does offer examples of some more satisfactory solutions. And now Professor Jonathan Hafetz of Seton Hall Law School has written an outstanding guide to navigating these questions and analyzing the solutions tried in various tribunals since World War II. Educated first as a historian at Amherst and Oxford and then as a lawyer at Yale, Hafetz has extensive human rights and national security litigation experience as well as a distinguished record of publications in these fields. He brings formidable knowledge and talents to bear in analyzing international criminal law's record since 1945. This review essay focuses on his treatment of the International Military Tribunal at Nuremberg in order to draw out his analysis of the record of fairness of international criminal law trials.

In PUNISHING ATROCITIES THROUGH A FAIR TRIAL, Hafetz meticulously examines the historical record to demonstrate how international tribunals have approached fairness in the application of international criminal law. He addresses several of the law-oriented facets of transitional justice—the varieties of widespread conflict (especially wars between or within states), and substantive international criminal law—but he focuses mainly on how tribunals have and have not offered fair trials. He does discuss moral and sociological constructs of fairness, but he is chiefly dedicated to exploring legal perspectives of fairness as measured by due process. For Hafetz, a criminal justice system ensures fairness by adopting and applying procedural and evidentiary rules to ensure an unbiased determination of the culpability of the accused. Along the way, he also addresses concerns for fairness to victims and other witnesses and sometimes to the societies from which they come. But he generally assumes that what makes a trial fair is its adherence to procedures for finding facts and applying law that ensure the accused is not railroaded into an undeserved punishment.

For purposes of this book, the justice of international criminal law boils down to procedural fairness in international tribunals or courts. With this focus, Hafetz carefully avoids moralizing, preferring to illuminate the processes that trial lawyers follow to determine right and wrong. In particular, he provides a detailed historical account of the procedures that international criminal courts have employed to deal with due process concerns, collective punishment, and the selection of cases to bring. The book opens with a clear-eyed assessment of the post-World War II tribunals to

establish an analytic framework for determining the fairness of trials since then and even into the future. Accordingly, this brief review focuses on Hafetz's analysis of the Nuremberg trials to highlight his powerful argument, rigorous analytic framework, and meticulous attention to detail.

Hafetz packs in a tremendous amount of insight and analysis of the history of the international criminal trials. Starting with the single best survey of procedure at the International Military Tribunals at Nuremberg (1945-46) and for the Far East at Tokyo (1946-48), this slender but profound book proceeds to assess the United Nations *ad hoc* criminal tribunals for the former Yugoslavia (1993-2017) and for Rwanda (1994-2015). Subsequent chapters review the more recent international and hybrid tribunals, and then the International Criminal Court. Finally, it addresses fairness issues raised by proposals to try terrorism cases in international criminal courts. In each of these studies, Hafetz discusses the three main issues that frame fairness for him: ensuring due process for the defendants, applying some form of collective punishment or vicarious liability to reach the leaders and not just the trigger-pullers, and managing the selectivity of prosecution to avoid the appearance of partisan application of the power of the law. Hafetz shows how successive courts learned important lessons from their predecessors, to develop increasingly fair trial procedures. This record of development itself is evidence of consistent good-faith efforts to generate increasingly fair trials out of a recognition that trials must be fair—and be seen to be fair—in order to generate more respect for and compliance with the rule of law. They acknowledge the need for peace to rest on justice.

An International Military Tribunal at Nuremberg almost did not come about in 1945 because Soviet leader Joseph Stalin and British Prime Minister Winston Churchill were demanding justice in the form of vengeance. U.S. President Franklin Roosevelt's administration was divided over how best to deal with Germany's crimes.[3] Within the administration, Secretary of War Henry L. Stimson was the main proponent of trials to signal to the world the high-minded values of the Allies and the principles upon which a post-war world order would rest. Historical precedent for trials was not encouraging. Efforts to try criminals after the First World War

3. *See* HAFETZ, chapter 1; Adam Roberts, *Land Warfare: From Hague to Nuremberg*, *in* THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 116, 133–5 (Michael Howard, George Andreopoulos, & Mark R. Shulman, eds. 1994); *see also* GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 147–205 (2000).

failed entirely to deliver either justice or a stable peace, let alone both. When news of Treasury Secretary Henry Morgenthau's plan to pastoralize Germany leaked and started to gain support, Roosevelt started to lean toward the trial framework devised by Army Colonel Murray Bernays. And in May (shortly after FDR's passing), President Harry S. Truman appointed Associate Supreme Court Justice Robert Jackson as chief counsel for Nazi crimes, sending him to London tasked to negotiate with representatives from the Soviet Union, United Kingdom, and France to produce a charter for the IMT. While this brief history may seem familiar, I recount it so the reader will pause and observe that the choice of justice over vengeance, once made, has hardly been revisited since. In three-quarters of a century that followed, the dominant strand of post-conflict history has been one of justice through individuated legal processes. Stalin's proposal to summarily execute 50,000 Nazis has had no progeny. Neither has Morgenthau's plan to convert Germany into a vast tract of grazing land. Instead, history belongs to Stimson, Bernays and Jackson.

The IMT cast the die for international criminal justice, revealing its promises and its pitfalls. An ambitious undertaking, launched in haste, the IMT pursued numerous, ambitious, and oft-conflicting objectives, each detaild by Hafetz. *First*, the trials sought to decide particular defendants' guilt or innocence and impose appropriate punishment. *Second*, they were intended to help create a basis for post-war international peace and security by punishing aggression, as the "trial to end all wars" and marking aggression the "supreme international crime." *Third*, they were meant to guide Germans to accept the criminality of their former leaders and to create a thorough record of Nazi atrocities to forever discredit them and to facilitate Germany's transition to a peaceful place in the post-war world order. *Likewise*, they were intended to demonstrate the world's abhorrence of Third Reich and establish moral superiority of the Allies. *Similarly*, they would provide closure using criminal proceedings to generate a definitive accounting of mass atrocities that would quicken common values and collective conscience. And *finally*, the framers of the London Charter wanted to set an example that criminal justice could and would be applied for the gravest of crimes, resisting the proposition that some crimes explode the limits of law and defy the structure of a judicial proceedings. These myriad impulses shaped the trials in many ways. Hafetz focuses on decisions affecting due process, collective punishment, and selective prosecution.

As Hafetz explains clearly, the initial and most fundamental

due process challenges that the IMT confronted were the questions surrounding legality. How could Germany's leaders fairly be held criminally liable for actions not specifically criminal at the time of commission? Although the London Charter gave the IMT political legitimacy, it left undemonstrated the legal basis for these charges. Waging aggressive war was prohibited by Kellogg-Briand Peace Pact of 1928, which Germany had signed. But that treaty failed to define aggressive war, provide for criminal sanctions, assign criminal responsibility to individuals who waged it, or establish a court to try alleged violations.[4] Ultimately, this obstacle was overcome on the basis of argument posed by Jackson's chief assistant, Telford Taylor, that members of the High Command knew their actions were wrong and that crimes are committed by men not by entities, so men could be punished. Taylor[5] argued that the higher principle of the accused's moral responsibility (that they knew or should have known that what they were doing was criminally wrong) should prevail over the lower principle of *nullum crimen sine lege*. According to Hafetz, this solution was a signal legacy of the IMT and underscores the enduring tension between legality and impulse to hold responsible those who transgress basic moral norms. While Taylor's argument prevailed in a tribunal established by the Soviet, French, British, and American victors, questions about its fairness have remained ever since. This discomfort led ultimately to the 1973 U.N. General Assembly Definition of Aggression and the 2010 resolution amending the 1998 Rome Statute of the International Criminal Court.[6] Even so, an act of aggression remains hard to judge in a non-partisan way.

The principal of legality likewise raised qualms about charges of crimes against humanity ("CAH"). Widespread attacks by a state's agents on its own civilian non-combatants seemed to violate norms recorded in the Hague Conventions of 1899 and 1907, but they

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4. Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), Aug. 27, 1928; 94 L.N.T.S. 57; OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 288–91 (2017) (demonstrating that the IMT had heard more persuasive arguments but settled uncomfortably on this theory).

5. For more on Taylor's contributions, see *Essays on the Laws of Wars and War Crimes Tribunals in Honor of Telford Taylor*, 37 COLUM. J. TRANSNAT'L L. 649–1047 (1999) (Special Issue).

6. G.A. Res. 3314 (XXIX) (Definition of Aggression) (Dec. 14, 1974); Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court art. 8 *bis* June 11 2010, C.N.651.2010.TREATIES-8; *see also* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

were not clearly a violation of international criminal law. So prosecutors at Nuremberg tied their cases to war crimes or aggressive war to argue CAH were part of war effort and that war nexus justified intrusion on the sovereign autonomy of States. This meant that CAH committed prior to or outside the scope of war went uncharged. In subsequent tribunals, the requirement for this connection has been considerably weakened, as CAH norms become increasingly accepted as binding due to the development of human rights law and ICL jurisprudence.[7]

The IMT's judges made innumerable other decisions about the process due to the accused, and in the end Hafetz concludes that they did a credible job. They endowed the accused with a presumption of innocence. For conviction, they required proof beyond a reasonable doubt and explained to the accused their right to trial and receipt of the indictment. They required that the accused be provided with a list of approved defense counsel (and allowed others), explanation of charges, translation of proceedings, and assistance of counsel. And they allowed the counsel for the accused to present evidence, to cross-examine witnesses, and even to request that the tribunal summon witnesses for the defense. One the other hand, the accused had no right against self-incrimination, right of appeal, or protection against double jeopardy. *In absentia* trials were allowed. There were no formal rules of evidence; evidence of probative value was deemed admissible. Affidavits were admitted and used widely despite not being subject to cross-examination. And although the IMT did have the power to summon witnesses and evidence, it was not usually used in support of the defendants. Moreover, as Hafetz observes, there was a great deal of *ex parte* communication between the American Chief Prosecutor Robert Jackson and the Judge Francis Biddle.[8]

In addition to the legality and other due process issues, the IMT confronted unprecedented challenges in defining the liability of organizations and their leaders. As Taylor argued, people perpetrate

7. Richard May & Marieke Wierda, *Trends in International Criminal Evidence*, 37 COLUM. J. TRANSNAT'L L. 725 (1999).

8. Jackson and Biddle knew each other well, having both received senior appointments in the Roosevelt Administration. The prosecutor, Jackson, had served FDR as Solicitor General and then as Attorney General until nominated in 1941 to serve as an Associate Justice of the Supreme Court, a post from which he took a leave of absence in order to serve at London and then Nuremberg. The judge, Biddle, had been Attorney General immediately after Jackson and was subsequently appointed by President Truman to the IMT as consolation for having been replaced in that office by Tom C. Clark.

criminal acts and should thus be held responsible. But membership in an organization that is committed to the propagation of widespread and notorious atrocities arguably confers liability even absent clear evidence that an individual physically engaged in the destructive acts. Originally, Bernays had wanted to try organizations such as the SS and the Gestapo as entities, to streamline the ensuing trial and conviction of their members. At the IMT, however, the judges limited this form of liability by requiring that the prosecution show the organization to be a group in which members would understand collective purpose and that the criminal objectives were shared among members. So the IMT acquitted four of seven organizations charged, convicting only the Leadership Corps, the Gestapo, and the SS. And even then, the IMT would require that prosecution prove that anyone subsequently prosecuted for membership had joined voluntarily and knew that it engaged in crimes enumerated under the London Charter. This narrowing of group liability ensured that there was no follow-up with the thousands of summary trials that Bernays had envisioned. In subsequent chapters of PROSECUTING ATROCITIES THROUGH A FAIR TRIAL, Hafetz carefully demonstrates which strands of Nuremberg's Joint Criminal Enterprise theories have survived and which have been discarded as unreasonable extensions of liability.

Finally, the IMT confronted significant issues related to the selectivity of cases. This cluster of issues has plagued the prosecutors at Nuremberg and ever since. Decisions to charge violators of international criminal law have always reflected some kind of prioritizing that reflects politics and other interests.[9] Naturally, this issue is particularly acute in special purpose tribunals, such as the IMT. The London Charter ignored any concerns about the decision to charge only one side in the war instead of all crimes committed during the Second World War. This decision effectively amnestied the Soviets for invading Poland and all participants for any war crimes (which were committed on all sides if not necessarily with the depravity, scale, and special intent of the Germans and Japanese). It led to cries of Victors' Justice, claims that the IMT sought to refute but that still resonate two generations later.

Although the London Charter did not contemplate charging

9. For the most recent example, see Alex Whiting's explanation for the ICC Pre-Trial Chamber's April 2019 decision not to allow the Prosecutor to open an investigation of members of the U.S. armed forces and the CIA for potential war crimes and CAH in Afghanistan. Alex Whiting, *The ICC's Afghanistan Decision: Bending to U.S. or Focusing Court on Successful Investigations?*, JUST SECURITY (Apr. 12, 2019), https://www.justsecurity.org/63613/the-iccs-afghanistan-decision-bending-to-u-s-or-focusing-court-on-successful-investigations/ [https://perma.cc/X8KB-AAXU].

Allies, it did not preclude defense counsel from raising questions of fairness arising from this decision. When Großadmiral Karl Dönitz's lawyer, Otto Kranzbühler, sought to defend the order to employ unrestricted submarine warfare, he introduced Fleet Admiral Chester Nimitz's response to an interrogatory showing that *Kriegsmarine* practices were substantially the same as those employed by the U.S. Navy, and therefore not contrary to custom. With this deft legal tactic, Kranzbühler raised the question of Victors' Justice while technically avoiding the impermissible use of a *tu quoque* defense. And he saved Dönitz from the punishment for breaches of the international law of submarine warfare.[10] As Hafetz picks up the discussion of Victors' Justice in subsequent chapters, he documents how concerns about selection of cases informed charging decisions in the *ad hoc* tribunals for former Yugoslavia and, to some extent, Rwanda as well as in the International Criminal Court. In a final chapter, he also applies some of these lessons learned to explain why terrorism cases fit so poorly in the ICL context.

Following detailed analysis of the selectivity and other critical issues confronting the IMT, Hafetz concludes that Nuremberg created a basic standard that due process was required and that on it hinged the perceived fairness and integrity of the trial's proceedings. He observes, as many others have, that the verdicts also provide meaningful evidence of their fairness. Of the twenty-two people indicted, three were acquitted and others were acquitted of some charges (*e.g.*, Doenitz of the war crime charge for unrestricted submarine warfare). Of those convicted, only twelve received death sentences. This admirable record of fair trials stands in contrast to that developed in Tokyo and Manila to reckon with Japanese leaders; these trials have been condemned in the decades since as falling short of international standards of fairness.[11] And it is the legacy of Nuremberg that has slowly and haltingly led to the development of international criminal law as we know it today.

Looking back at the afternoon in November 2006 that I spent at the Kuwait Lawyers Association, I see how much progress has been made in the development of international criminal law. I take

10. International Military Tribunal, *Judgment of October 1, 1946 in* 22 TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY 507 (1950).

11. Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post-World War II Crimes Trials: Did They Provide an Outline for International Legal Procedure*, 37 COLUM. J. TRANSNAT'L L. 851 (1999).

inspiration from the reactions of the lawyers around me—who had every cause to apply the hand of vengeance—showing their disdain for the work of the Iraqi Special Tribunal. And with the laudable new contribution of Jonathan Hafetz, I now see more clearly how today's standards were born at Nuremberg and have been diligently developed in decades since. While ICL still faces challenges arising from its numerous and oft-conflicting principles, the development of standards for fair trials goes a long way to ensuring that societies reckoning with mass atrocities can achieve both peace and justice.