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War Crimes Trials: Between Justice and Politics

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WAR CRIMES TRIALS: BETWEEN JUSTICE AND POLITICS

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ALLAN A. RYAN, YAMASHITA'S GHOST: WAR CRIMES, MACARTHUR'S JUSTICE, AND COMMAND ACCOUNTABILITY (2012). Pp. 416. Hardcover $34.95.

CHARLES ANTHONY SMITH, THE RISE AND FALL OF WAR CRIMES TRIALS: FROM CHARLES I TO BUSH II (2012). Pp. 328. Hardcover $103.00.

Few international developments in the twentieth-century are more striking than the increasing use of law to punish perpetrators of mass violence, whether war crimes, crimes against humanity, or genocide. While war crimes prosecutions have occurred in earlier time periods, such trials were rare and often of dubious quality. For instance, in the first known war crimes trial in 1305, the English executed Sir William Wallace (of *Braveheart* fame) "for waging a war of extermination against the English population, 'sparing neither age nor sex, monk nor nun.'"[1] Of course, whatever his military conduct, Wallace's true crime, and the reason for his prosecution, was treason, not war crimes. Moreover, he was subjected to extensive judicial torture, something we would today consider to be criminal in and of itself. For centuries, the laws of war were largely a matter of custom, though royal ordinances were sometimes issued for specific military campaigns in medieval Europe.[2] Consequently, the trials that occurred varied considerably in both the crimes prosecuted and the procedures followed. Therefore, despite scattered antecedents, it makes little sense to speak of "war crimes trials" as a general phenomenon before the modern period.

In the nineteenth century, the United States took the lead in formally codifying the laws of war with the Lieber Code of 1863, promulgated shortly before the First Geneva Convention of 1864.[3] Of course, at about that same time, the U.S. was also prosecuting Native Americans for killing women and children while defending their lands in Minnesota; out of an initial list of 300, thirty-three were eventually hanged.[4] One scholar has observed of this incident: "[t]his early attempt to apply

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1. John H.E. Fried, *War Crimes Violate the Laws of War*, *in* WAR CRIMES 13, 16 (Henry H. Kim ed., 2000).

2. THEODOR MERON, WAR CRIMES LAW COMES OF AGE: ESSAYS 1-2 (1998).

3. JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 2-4 (2012).

4. LARRY MCMURTRY, CUSTER 43 (2012).

law to war (even though the U.S. government did not consider the ongoing battles with the Indians a war) produced a primitive form of political justice . . . ."[5] Whether the formalizing initiative of the Lieber Code compensated for the barely disguised lynchings in Minnesota is debatable. Although the trend toward codification continued with the Hague Conventions of 1899 and 1907, it is clear that before the mid-twentieth century, the laws of war, although developing, remained underspecified, and enforcement was arbitrary and inconsistent at best.[6] Above all, the laws of war, whether customary or codified, were seen in this era of imperialism as pertaining only to conflicts between "civilized" nations.[7] Being civilized meant, among other things, having an identifiable and internationally recognized state, having a standing, uniformed military, and fighting in a manner consistent with European norms (e.g., in open battle, rather than raids).[8] It should be clear that this understanding of "civilization" was deeply racialized and, more or less, overtly intended to exclude colonized peoples.[9]

In the second part of the twentieth century, the sporadic and largely ad hoc application of the laws of war began to change, starting with the International Military Tribunal and the American-led successor tribunals at Nuremberg.[10] Thereafter, starting as early as the 1970s and clearly picking up steam in the 1990s, it became increasingly common to prosecute perpetrators of wartime atrocities and other forms of mass political violence in a process that Kathryn Sikkink has termed "the justice cascade."[11] These prosecutions have proceeded in both domestic and international courts.[12] Famously, the United Nations created a permanent International Criminal Court ("ICC") in 1998 in Rome (with the court coming into existence in 2002) and, just as famously, the United States declined to join the court, with President George W. Bush even going so far as to "unsign" the Rome Treaty.[13] Despite U.S. opposition (as well as that of China and Russia), the ICC has established itself as a functioning element of international governance.[14] Enshrined in the Rome Statute is the jurisdictional doctrine of "complementarity," which gives domestic courts first crack at the mass crimes under the ICC's jurisdiction, thus formalizing joint domestic and international jurisdiction for war crimes, crimes against humanity, genocide, and (eventually) aggression.[15]

As the christening of this trend as a "justice cascade" implies, these twentieth century developments have often been treated as unambiguously positive, serving the general goal of seeing justice done in the world and aiding in political transi-

5. PETER MAGUIRE, LAW AND WAR: INTERNATIONAL LAW AND AMERICAN HISTORY 29 (2001).

6. Fried, *supra* note 1, at 16.

7. Devin O. Pendas, *The Magical Scent of the Savage: Colonial Violence, the Crisis of Civilization, and the Origins of the Legalist Paradigm of War*, 30 B.C. Int'l & Comp. L. Rev. 29, 34-36 (2007).

8. GERRIT W. GONG, THE STANDARD OF "CIVILIZATION" IN INTERNATIONAL SOCIETY 14-19 (1984).

9. *Id.* at 21-22.

10. GEOFFREY BEST, WAR AND LAW SINCE 1945, at 67-69 (1994).

11. KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS 5 (2011).

12. BENJAMIN N. SCHIFF, BUILDING THE INTERNATIONAL CRIMINAL COURT 76-77 (2008).

13. *Id.* at 167-81.

14. *Id.* at 168.

15. *Id.* at 115-17.

tions from authoritarian to more democratic and liberal regimes.[16] Consequently, such prosecutions are often lumped together with other judicial-political processes, such as lustration and truth commissions, under the rubric of "transitional justice."[17] This historical trajectory has often been framed as a move from impunity, where political actors in wartime could literally get away with murder, to justice, where at least major perpetrators will be held accountable and punished for their crimes.[18] On this view, although acknowledging the limitations and ongoing challenges for justice, the trend toward criminal prosecutions for broadly construed human rights violations is seen as a clear improvement. According to Sikkink:

> The possibility of individual criminal accountability has provided useful but imperfect tools to activists, victims, and states to help diminish future violations. These human rights prosecutions will continue to fall far short of our ideals of justice, but they represent an improvement over the past . . . . The new world of greater accountability that we are entering now, for all its problems, offers hope of reducing violence in the world.[19]

The underlying logic of this cautiously optimistic interpretation of the history of war crimes trials is twofold. First, there is the empirical claim that criminal prosecutions for political atrocities have beneficial effects, in the form of deterrence and democratization.[20] This is the crux of Sikkink's argument. Her evidence comes mainly from Latin America; she argues that "countries in Latin America that used human rights prosecutions have better human rights records than countries in the region that did not use such prosecutions, or used them less frequently."[21] This may well be true, statistically speaking, but it does raise an important "chicken or egg" question. Perhaps countries more inclined to protect human rights are those more likely to stage prosecutions for human rights abuses, and not the other way around. Be that as it may, the second underlying claim of the optimists' position seems more consequential. This is that normalizing prosecutions for human rights violations and war crimes may help to diminish levels of mass violence and atrocity generally by spreading human rights norms and helping to (re)constitute the rule of law.[22] This is less an argument about deterrence than about the spread of cultural norms.

Many scholars are skeptical of this optimistic account. [23] Typically, the skeptics of trials for mass atrocities argue from a position of international relations "re-

16. *See generally* SIKKINK, *supra* note 11.

17. RUTI G. TEITEL, TRANSITIONAL JUSTICE 223-24 (2000).

18. YVES BEIGBEDER, INTERNATIONAL JUSTICE AGAINST IMPUNITY: PROGRESS AND NEW CHALLENGES 226-27 (2005).

19. SIKKINK, *supra* note 11, at 262.

20. *Id.* at 148-50, 169-70.

21. *Id.* at 167.

22. *Id.* at 169-74.

23. *See* Donald Bloxham & Devin O. Pendas, *Punishment as Prevention? The Politics of Prosecuting Génocidaires*, *in* THE OXFORD HANDBOOK OF GENOCIDE STUDIES 617 (Donald Bloxham & A. Dirk Moses eds., 2010).

alism."[24] At its most basic, according to this perspective, the international arena is characterized by an "absence of an arbitrator or laws," which means that "war [is] a possibility."[25] Accordingly, international law is seen as nearly an oxymoron. It calls fundamentally into question the notion that international legalism will have a significant impact on state actors. To the extent that states obey international law, they do so because such compliance is seen as cheap and as consonant with the state's preconceived interests. As Jack Goldsmith and Eric Posner put it: "International law emerges from states' pursuit of self-interested policies on the international stage. International law is, in this sense, *endogenous* to state interests. It is not a check on state self-interest; it is a product of state self-interest."[26]

This realist skepticism has its own limitations, however. For one thing, the development of criminal prosecutions for past atrocities has taken place as much in domestic courts as it has before international tribunals, so the realist's account of self-interested states acting in an anomic international arena is rather beside the point for major dimensions of the history of war crimes trials. Moreover, the vision of an anarchic international sphere where states pursue self-evident geostrategic interests greatly underplays the role of ideology; which is odd, especially when talking about the twentieth century where the significance of ideology would seem to be self-evident. In particular, it tends to treat the notion of "national interest" as an a priori given, rather than a historically emergent category, with variable content. States view their interests differently over time, and there is no reason to think that obedience to, and enforcement of, international norms cannot sometimes come to be viewed as a compelling state interest. Of course, this implies that the reverse can be true as well and that states may also lose interest in international law over time. For instance, under its recent conservative government, Canada has abandoned its former leadership role as a member of the "coalition of the willing" that led the push for creating the ICC, and has adopted a more U.S.-style skepticism of international legal institutions.[27] Yet, it is hard to see that anything fundamental has changed about Canada's actual strategic interests; the shift has been an ideological one.

So rather than naturalizing some notion of state interest, I would suggest alternative grounds for skepticism regarding the potential of war crimes trials to effect social and political change. The optimists overstate their case for what war crimes trials can achieve because they tend to misapprehend the relationship between law and politics. (Politics is being conceived broadly here as the social organization of power relations). The optimists see criminal prosecution as a means for taming mass violence through the application of law. The analogy is to the process whereby states came to first claim, then to actually operationalize, a monopoly of legitimate force in the domestic sphere; the notion being that something analogous

24. Paradigmatically, see JACK L. GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2006).

25. RAYMOND ARON, PEACE AND WAR: A THEORY OF INTERNATIONAL RELATIONS 51 (1966).

26. GOLDSMITH & POSNER, *supra* note 24, at 13.

27. Ryan Liss & Joanna Langille, *It's Not Just the Drought Treaty: In International Law, Canada has Withered*, GLOBE AND MAIL (Mar. 29, 2013, 8:56 AM), http://www.theglobeandmail.com/commentary/its-not-just-the-drought-treaty-in-international-law-canada-has-withered/article10549743/.

could be replicated on the international stage.[28] Of course, even the most diligent boosters of international legalism are forced to concede that (at least currently) there is no international executive akin to that existing within the domestic state; hence their frequent turn to culturalist arguments. The issue of legitimacy is crucial here, and points to the link between politics and the state, conceived not just as an institution exercising force, but one seen as authorized to use force. As Max Weber noted, a state is only a state if "its administrative staff successfully upholds the claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order."[29] A state exists when people (its citizens) accept its use of force. So the question becomes, could international tribunals come to be viewed as placing legitimate constraints on action, and their sanctions accepted as legitimate acts of force? In other words, can prosecutions for mass atrocity foster political legitimacy? Under what conditions? What kind of legitimacy? In other words, are such trials necessarily democratizing? Or can they foster authoritarian legitimacy as well? And does this legitimizing function occur as a result of such trials being "just," or is the relationship between justice and political legitimacy contingent? Can unjust trials foster political legitimacy?

The state's monopoly on force works, when it does, because it is widely accepted. Where it is not, we see failed states and civil wars. For law—domestic or international—to have any impact on mass political violence, it must be accepted as legitimate. That requires two conditions: trials must be considered "just" and they must be considered politically effective. Whether such conditions apply can only be determined contextually. There is no universal answer to these questions.

The two books under consideration here each address the legitimacy of war crimes trials in their own way. In so doing, each calls into question the optimists' account of the trajectory of transitional justice, without embracing the anarchic understanding of international justice characteristic of the realists. Allan Ryan, in *Yamashita's Ghost*, offers a gripping and meticulous reconstruction of what can only be described as a gross miscarriage of justice, while Charles Anthony Smith, in *The Rise and Fall of War Crimes Trials*, offers a sobering long-term account of the history of criminal prosecutions for mass atrocities, arguing for the priority of politics over law in that history.[30] Both books reveal the deeply and intrinsically political nature of trials for mass atrocity, but both argue (implicitly in Ryan's case, explicitly in Smith's) that politics in such trials operates in tension with, even in opposition to, justice.[31] This, I would suggest, is mistaken. I would suggest rather that justice is not so much the antithesis of politics, as it is one form that politics can take.

Yamashita's Ghost is in many ways a wonderful book. It offers a griping narrative of General Tomoyuki Yamashita's trial in Manila in the fall of 1945 for crimes

28. *See generally* ROBERT H. BATES, PROSPERITY AND VIOLENCE: THE POLITICAL ECONOMY OF DEVELOPMENT (2001).

29. MAX WEBER, ECONOMY AND SOCIETY 54 (1978).

30. ALLAN A. RYAN, YAMASHITA'S GHOST: WAR CRIMES, MACARTHUR'S JUSTICE, AND COMMAND ACCOUNTABILITY (2012); CHARLES ANTHONY SMITH, THE RISE AND FALL OF WAR CRIMES TRIALS: FROM CHARLES I TO BUSH II (2012).

31. *See generally* RYAN, *supra* note 30; SMITH, *supra* note 30.

committed by his troops during the battle for the Philippines.[32] The book reads like a legal thriller, in the very best sense of the term, and although most readers will already know the outcome of the trial, Ryan manages to generate a surprising amount of genuine suspense. In the end, of course, Yamashita was found guilty under the then novel doctrine of command responsibility (a conviction ultimately upheld by the United States Supreme Court) and then executed. Ryan leaves little doubt that he was wrongly convicted and that the doctrine of command responsibility, at least as outlined in the Yamashita case, was ill-conceived.[33]

Ryan enumerates the myriad flaws with the Yamashita case, including the dubious legitimacy of the authorizing order, the vague and unrealistic nature of the charges, the deep flaws in the rules of procedure and evidence followed by the court, and undue influence on the proceedings by General Douglas MacArthur, whose priorities were political, not judicial.[34] Taken together, these mean, on Ryan's reading, that Yamashita was neither charged with reasonable crimes nor received a fair trial.[35] This was because General MacArthur had created the commission in such a way as to almost guarantee the outcome he wanted. "The emergence of the Tiger [Yamashita] as an honest, candid, and sincere military leader who had a coherent and credible account of his inability to prevent the atrocities of Japanese troops might have impressed the psychiatrists and motivated his lawyers, but it was not in MacArthur's script."[36]

Unlike the International Military Tribunal at Nuremberg, whose authorization came from the London Charter, negotiated between the United States, Great Britain, France, and the Soviet Union, and eventually signed by an additional nineteen countries, Yamashita was tried before a Military Commission, convened under the sole authority of General MacArthur in his capacity as Supreme Commander of the Allied Powers, and effectively the sole ruler of postwar Japan. In that executive capacity, MacArthur issued orders on September 24, 1945 to the U.S. Commander in the Philippines, General Wilhelm Styer, to appoint a military commission to try Yamashita.[37] Ryan makes it clear that MacArthur was within his authority as Commander of Allied Forces to constitute such a military commission.[38] He also makes it clear that such commissions are at best fragile institutions.[39] Because, unlike Courts Martial, they are not defined statutorily by Congress, their jurisdiction, remit, rules of evidence, and procedure are all defined on a case-by-case basis by the convening military commander. This creates enormous latitude for variation. If, by the early twentieth century, the expectation was that military commissions would more or less follow the rules laid down for Courts Martial, there was no legal requirement that they do so and, under MacArthur's convening orders, the Yamashita commission

32. *See* RYAN, *supra* note 30.
33. *Id.* at 69-71.
34. *See generally id.*
35. *See id.* at xii-xiv.
36. *Id.* at 88.
37. *Id.* at 61.
38. *Id.* at 280.
39. *Id.* at 51-58.

was expressly freed from most ordinary due process regulations.[40]

If the authorizing order created foundational problems for the Yamashita commission, according to Ryan, the actual charge was even more flawed.[41] MacArthur's order provided the only charge against the defeated Japanese general. Yamashita, it was alleged, "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against the people of the United States and of its allies and dependencies."[42] This proved to be "one of the most controversial aspects" of the entire case.[43] It seems reasonable to require military commanders to control their troops, but as Ryan points out, the term "permitting" raises more questions than it answers.[44] Does it require an act of affirmative permission, such as an order? Or, was it sufficient that the "failure" to control his troops created circumstances in which atrocities could be committed? "The difference between these two readings is crucial."[45] The former would mean the prosecution had to prove action or negligent inaction on the part of Yamashita, while the latter more or less made Yamashita's guilt a foregone conclusion. "If proof of those acts [atrocities] was itself sufficient to prove the failure to control his forces, and if that failure was a 'violation of the laws of war,' then it was hard to imagine that Yamashita had any defense whatever to MacArthur's charge."[46] In any event, it was this latter—essentially tautological—understanding of the doctrine of command responsibility that prevailed in the trial.

Yamashita was able, during the trial, to demonstrate that most of the worst atrocities were committed by troops only recently placed under his command, that his command of those troops was only "tactical" and did not extend to disciplinary matters, that the atrocities were committed despite his orders for the troops in question to withdraw from Manila, and that he and his headquarters had already withdrawn to the mountains and were thus largely out of contact with the troops in question. He claimed to be entirely unaware of the atrocities being committed, and the prosecution was unable to provide any evidence to the contrary, merely arguing that the atrocities were so widespread that he must have known of them. This was an astute legal maneuver, as Ryan notes, but one that essentially changed the nature of the charge from "permitting" to "knowing," even though the prosecution failed to actually demonstrate either permission or knowledge.[47] Despite this, Yamashita was convicted, based solely on his official military position as commander of Japanese forces in the Philippines. This ran counter to the well-established principle of legality that individuals can only be held accountable for what they do, or negligently fail to do, not for who they are. The prosecution's case was essentially "that the

40. *Id.* at 57-58.
41. *Id.* at 62-64.
42. *Id.* at 61.
43. *Id*.
44. *Id.* at 62.
45. *Id.*
46. *Id.*
47. *Id.* at 61-65.

command relationship alone was sufficient to convict the commander of marauding troops, because the crimes themselves were obvious proof that the commander had not prevented them."[48] Although the court's judgment was terse and did not outline its legal reasoning, the guilty verdict effectively confirmed this prosecution theory.

These fundamental doctrinal problems were exacerbated by deep procedural flaws as well. MacArthur's authorizing order "made it quite clear that no rules of evidence whatever were to apply. Anything the commission wanted to consider—anything it thought might 'be of assistance' or have 'probative value' or 'information relating to the charge'—it could consider."[49] Hearsay, and even double or triple hearsay, was regularly allowed. Unauthenticated documents were entered into evidence. Extraneous testimony of no direct relevance to the charge against Yamashita was rampant. Defense objections on all these grounds were regularly overruled. As an experienced litigator, Ryan is especially effective in dissecting these procedural flaws. He leaves the reader feeling that the only difference between the Yamashita trial and a Soviet-style show trial was that Yamashita had a capable and dogged defense team. Even if the defense failed to win any of its legal points, either before the commission or, ultimately, before the United States Supreme Court, it was at least able to call attention to these flaws and protest against the injustice of the trial as it was unfolding.

Finally, Ryan stresses that the Yamashita commission was less a trial court than it was an organ of MacArthur's executive authority. All of the officers on the commission (as well as the prosecution and defense counsel) in effect worked for MacArthur and were subject to his command authority. Although Ryan acknowledges that "no evidence has ever come to light" proving direct communication between MacArthur's headquarters and the commission, he makes it plain that there are strong circumstantial grounds for suspecting that such improper communication in fact did take place.[50] On several key procedural issues concerning uncorroborated affidavits and granting a continuation so the defense could prepare for last minute supplemental charges filed by the prosecution, the court changed its mind mid-trial; a move almost certainly "dictated" by MacArthur.[51] MacArthur made known his desire for a swift conviction and received daily transcripts of the trial. "It is therefore only natural to surmise that his headquarters was advising the untutored generals on the elements of the crime or even, less formally but equally improperly, telling them that the evidence was sufficient for a conviction."[52]

For Ryan, these failings not only fatally undermined Yamashita's trial; they also helped create a deeply flawed legacy as well.[53] Because of the precedential nature of law, specific doctrinal developments can have lasting impacts, for good or ill. Ryan's ultimate point is that the doctrine of command responsibility came into the

48. *Id.* at 171.
49. *Id.* at 98.
50. *Id.* at 238.
51. *Id.*
52. *Id.*
53. *Id.* at xiv.

world with serious birth defects.[54] The American-led successor tribunals at Nuremberg tried their best to transform the almost absurdly vague and tautological doctrine articulated by the Yamashita commission into a workable legal category, mainly by requiring proof that commanding officers were at least aware of the atrocities they were supposed to prevent.[55] Yet in the end, Ryan is right that the whole notion of command responsibility is in tension with notions of individual accountability under law. It creates a kind of functional culpability of officers for acts they may or may not be able to prevent. The ultimate problem is that:

> The doctrine was not only created in the Yamashita case; it was created specifically *for* Yamashita. And it was created in order to convict him, by devising a link previously unknown in the law that attributed to him crimes that he did not order, did not participate in, very probably did not know about, and almost certainly could not have done anything about even if he had known of them.[56]

Consequently, Ryan concludes, "Yamashita's ghost lingers in the law."[57]

In this conclusion, Ryan is almost surely right. And his call for a more coherent, more relevant, and above all, more plausible understanding of command responsibility is very well taken. Yet Ryan is perhaps more idealistic about what international law is or can be than is warranted by the historical record. "Sometimes," he notes, "a trial is more than a process of reaching a verdict. Sometimes it is theater and spectacle, catharsis and redemption."[58] This is a crucial point, one which Ryan himself often seems to forget. For instance, he laments that the prosecution added a supplemental bill of particulars the day before the trial was to start listing fifty-nine new incidents of atrocity to be considered in the case.[59] He is critical of this not only because the already overburdened defense was not given additional time to prepare—a perfectly valid point—but also because:

> It is hard to imagine . . . what the prosecution hoped to prove by the new allegations that it could not prove with the original ones, other than to demonstrate in lengthy detail what everyone in the room—indeed, everyone in the Philippines—already new: that extensive and horrific crimes had been committed by Japanese soldiers on civilians and prisoners of war.[60]

Yet catharsis and articulating publically the tragic stories "everyone" already

54. *Id.* at 338-41.

55. In addition to Ryan's book, also see Kevin Jon Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law 262-71 (2011).

56. Ryan, *supra* note 30, at 339.

57. *Id.* at 341.

58. *Id.* at 88-89.

59. *Id.* at 90.

60. *Id.* at 92.

knows is precisely the point of such transitional justice trials and is the very source of their political power.[61] The prosecution, in calling a myriad of eyewitnesses to testify to atrocities that Yamashita neither ordered nor participated in, was nevertheless giving voice to the victims, and in this respect, was perhaps ahead of its time in understanding the psychological and political significance of cases such as these.[62] For an American government, seeking to grant independence to the Philippines on terms that would keep its former protectorate well within the American sphere of influence, such cathartic theater was arguably indispensable. It created a narrative of shared suffering, in a way that MacArthur's paternalistic "I shall return" could not. This was especially crucial given America's own history of committing atrocities in the Philippines.[63] In this respect, MacArthur may have understood something of the true purpose of the trial that Ryan, thoroughgoing lawyer that he is, does not.

If Ryan believes that international law can be haunted by past injustices, he also seems to believe that it is possible to exorcise the ghost of politics from international law and condition it to operate in a more autonomous, and hence fairer, manner. Charles Anthony Smith is not so sure law can be purged of politics.[64] Tracing the trajectory of war crimes trials (again in the broadest sense of the term) from *Charles I to Bush II*, as the subtitle of his book puts it, Smith seeks to analyze the interplay of politics and justice.[65] He explicitly sets these up as independent variables, each potentially at work in war crimes trials, but neither reducible to the other. His question is "whether human rights tribunals, either ad hoc or standing, are products of the high call to justice or instead are tools utilized in the normal dimensions of political processes and political consolidation."[66] Justice, he defines as a combination of substantive (fair charges) and procedural due process (fair trial procedures), aimed at deterrence and retribution.[67] Politics, he defines in these transitional settings as "political consolidation here mean[ing] the effort at maintaining and solidifying the newly secured or defended control over the institutions of government."[68]

Smith sees an almost cyclical trend in the history of war crimes prosecutions, from an early phase characterized as almost purely political, with the consolidation of new or renewed authority driving the proceedings, to a phase after World War II where due process norms came into the foreground, to a more recent return to more purely political proceedings (or blocked proceedings). As he puts it:

> When taken either individually or considered as a whole, these tribunals seem to be undertaken in order to accomplish political con-

61. *See, e.g.*, MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1999); MARK J. OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW (1999).

62. *See* ANNETTE WIEVIORKA, THE ERA OF THE WITNESS (Jared Stark trans., 2006).

63. *See generally* PAUL A. KRAMER, BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, AND THE PHILIPPINES (2006).

64. *See* SMITH, *supra* note 30.

65. *Id*.

66. *Id.* at 6.

67. *Id.* at 7-8.

68. *Id.* at 8.

> solidation rather than to ensure a proper dispensation of justice. The international community moved the concept of war crimes tribunals along a path of jurisprudential development that meant each successive iteration moved closer to delivering an instrument for the dispensation of justice.[69]

The "war on terror" has, on Smith's account, interrupted and perhaps reversed this trend toward greater "justice" in war crimes trials, causing a reversion "to political consolidation and expediency as the primary, perhaps sole, function of the tribunals."[70]

The reason for this is that there has been—and probably can be—no clear victory in the war on terror, and for Smith, justice flows from victory. "[I]n the absence of clear political winners or losers, war crimes prosecutions are simply not feasible."[71] Where the outcome is negotiated, or where there is a political stalemate, trials will either not happen at all (e.g., Northern Ireland), or be quite limited in scope (e.g., Argentina), or be replaced by alternative semi-judicial but non-punitive mechanisms like truth commissions (e.g., South Africa).

The seemingly obvious counter to Smith's argument is the creation of the permanent ICC, which, following the lead of the ad hoc tribunals for Yugoslavia and Rwanda created in the 1990s, has very strong due process protections, both substantive and procedural, and which appears to be operating independently of victory conditions in any of the conflicts it has addressed. (One sees this, for instance, in the indictment of Sudan's President, Omar Bashir). Smith's counter to this position is to point out that the ICC has concentrated virtually all of its attention on weak states from the global south, and "completely avoiding any engagement about the behavior of the Western states during the conflicts affiliated with the so-called War on Terror."[72] The doctrine of complementarity, which was justified as a way of ensuring that prosecutions would be the work of people most directly involved to the extent possible, has served instead to preclude international prosecutions of powerful state actors. Because such states invariably have functioning legal systems, capable, at least in principle, of investigating and prosecuting war crimes and other political atrocities, the ICC denies it has jurisdiction.[73] Thus, according to Smith, justice is a "luxury" that is dependent upon political victory for its viability.[74]

Smith's skepticism toward war crimes trials is thus more sweeping than Ryan's, and seems to me to be quite persuasive on its own terms. Yet like Ryan, Smith sees perhaps greater antagonism between justice and politics than in fact is the case. If the optimists naively see justice as producing positive political outcomes quasi-automatically, the pessimists tend to see an irreducible contradiction between political and legal imperatives. But what if law is simply one form that poli-

69. *Id.* at 266.
70. *Id.*
71. *Id.* at 277.
72. *Id.* at 286.
73. *Id.* at 286-90.
74. *Id.* at 15.

tics can take? What if legal justice is not a luxury to be indulged in when politics has previously achieved its instrumental goals (consolidation) through other means, but rather is one specific means for achieving those goals? To me, the tendency to treat politics as the antithesis of law, and to treat politicized trials as necessarily becoming "show trials" seems to be mistaken.

Law is a form of politics, not just in the obvious sense that it is based on statutes and treaties created through political processes, but in the more specific sense that trials are political acts; certainly the kinds of war crimes and human rights tribunals under consideration here are deeply and inevitably political. The question is what kind of politics they pursue. And here, I would suggest, the answer tends to be contextual. There are circumstances where the kind of due process fairness both Ryan and Smith see as essential is politically useful, and there are other circumstances where it is not. This, in turn, hinges on legitimacy. In some circumstances, due process fairness serves a powerful legitimating purpose, at least in the eyes of those staging the trial, if not necessarily those of the people being prosecuted. This was the case with Nuremberg.[75] In other contexts, legitimacy comes from other sources, for instance the revolutionary will of the people, in which case due process becomes superfluous. The ICC may not prosecute the powerful, but there can be little doubt that those whom it does prosecute will benefit from very generous due process provisions, because the ICC has virtually no other source of legitimacy. Justice in war crimes trials needs to be understood, not as the antithesis of politics, but as one of its forms.

75. For the disjuncture between Allied intent and German reception at Nuremberg, see Devin O. Pendas, *The Fate of Nuremberg: The Legacy and Impact of the Subsequent Nuremberg Trials in Postwar Germany*, *in* REASSESSING THE NUREMBERG MILITARY TRIBUNALS: TRANSITIONAL JUSTICE, TRIAL NARRATIVES, AND HISTORIOGRAPHY 249 (Kim C. Priemel & Alexa Stiller eds., 2012).