Dissenting from Nuremberg and Learning from Rwanda: An Historical Examination of the Effect and Applicability of the Nuremberg Legacy for Contemporary Rwanda with an Assessment of Gacaca Trials

by

Amanda R. Fuller
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Chapter One: Introduction

The International Military Tribunal (IMT) convened at Nuremberg in 1945 was the first serious attempt to address, in a rational and institutional way, crimes committed during war. This response was groundbreaking, fundamentally changing the way in which the modern world reacts to what is now known as genocide. Genocide refers to the dual intentionality of destroying people and groups, its full definition and relationship to other forms of mass atrocity appears later. Nuremberg captivated the attention of the world and history because of its treatment and exposure of the Nazi attempts at racial purity through extermination. But it fascinates scholars of contemporary genocide because of the tremendous impact it has on modern responses to entirely different situations.

The memory of the tribunal differs significantly from the historical truth. Invoking Nuremberg usually suggests a trial that held Nazi leaders accountable for events now termed the Holocaust and other brutalities of war. However, the planners of the trial wanted to adjudicate the criminality and premeditation of World War II. The tribunal at Nuremberg gave crimes against humanity little attention, and thereby overlooked the genocide of World War II. Moreover, the founding document for the Nuremberg trial, the London Charter, marginalized crimes against humanity by subordinating them to the prosecution of the other three indictable offenses at Nuremberg. The Nuremberg Tribunal was but a part of a larger phenomenon of judicial response, including a second IMT at Tokyo and a series of successor trials culminating in the Israeli trial of Adolf Eichmann. Divorcing Nuremberg from its
context distorts its historical accuracy and philosophical significance, which leads to inappropriately treating Nuremberg as a good model for adjudicating genocide.

During the Cold War, the future significance of the Nuremberg Principles remained unclear because ideological conflict between the United States and the Soviet Union continually trumped human rights interests. The tension between the aims of the architects and the interpretation of the world lingered for nearly fifty years without resolution. The fall of the Soviet Union and the emergence of a single superpower transformed the world order. Increasing concern developed for the atrocities of the 1990’s and those committed during the Cold War. The vast majority of conflicts in this era involved one or both of the superpowers, who committed, facilitated or overlooked the atrocities. While strategic interests once prevented attention on human rights abuses, after the end of the Cold War, the world community began to focus on how to address the increasing numbers of crimes committed against civilians, generally perpetrated by their governments. The shift in focus from conventional warfare to civil wars and other instances of repression transformed the retrospective light in which Nuremberg came to be seen. It is this retrospective understanding with which this thesis takes issue.

Thus, the 1990’s contained two distinctive phenomena. First, a growing interest in human rights, and second, a romanticization of Nuremberg as a Holocaust Trial. A fusion of these two phenomena transformed the Nuremberg Principles into the legal inspiration for the UN ad hoc tribunals of the early nineties. The world community mined the popular “memory” of Nuremberg as a genocide trial in order to align itself with one of two antagonistic interpretations of it, namely, the idea of
Nuremberg as a Holocaust trial rather than the idea of Nuremberg as a trial against war. The Cold War effectively kept the differences between these two versions of the trial from becoming a subject of discussion or debate. One of the objectives of this thesis is to explicate those differences and deconstruct the impression that Nuremberg has broad application for responding to mass atrocity.

The formation of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) occurred precisely because of the application of the Nuremberg crimes against humanity precedent, which my thesis argues was not an “actual” precedent, but a “precedent” constructed retrospectively out of loose associations and popular thinking. Since the ICTY and ICTR trials focused exclusively on crimes against humanity, they vindicated the widespread but historically inaccurate interpretation of Nuremberg as a crimes against humanity trial. Evaluating the ICTR provides insight into which lessons from Germany proved applicable or inapplicable after World War II. Moreover, a critical evaluation of the ICTR produces a fuller understanding of what an adequate judicial response to genocide requires in the contemporary era. Rwanda also employed an alternative, more informal response called the “gacaca” (ga-cha-cha). Rwanda’s experience with the gacaca, as contrasted with Nuremberg, offers a perspective to analyze the relevance and impact of the Nuremberg ideals of retributive justice in response to mass atrocity.

This thesis is a historical reconstruction of the significance of Nuremberg, contextualized within the historical record of the trial itself combined with other judicial institutions that reflect and inform the legacy of Nuremberg. The IMT at
Tokyo provides Nuremberg a contemporary and nearly identical judicial institution except in a different cultural setting and different theater of the war. Tokyo occupies an occluded position in historical memory, often forgotten even among historians, but it demonstrates many of the crucial failings of Nuremberg as a precedent. The Israeli trial of Adolf Eichmann in 1961, convened to address a crime often considered settled at Nuremberg, indicates that the IMT failed to address adequately a major aspect of World War II. The compulsion to try Eichmann derived from feelings that Nuremberg overlooked the Nazi exterminations as events separate from the war. The IMT failed to acknowledge that the destruction of the European Jewish population was itself an objective of the German leadership. The Eichmann trial also demonstrates the tension between the conception of Nuremberg and the facts and effects of the trial.

Situating Nuremberg within a larger picture, including Tokyo and Eichmann, illustrates the flaws of two major premises of using Nuremberg as a precedent. First, Tokyo demonstrates that the Nuremberg model is not universal, as its advocates contend, because it failed to resonate in a different cultural setting. Second, the Eichmann trial illustrates that Nuremberg was not comprehensive because it marginalized the major victim group of the Nazi’s crimes against humanity. Both of these are failings of “recognition,” an essential component of life.  

Recognition acknowledges that human beings comprehend the world in which they live through various relationships with other people and institutions. Interpersonal connections reinforce our humanity through mutual recognition. The significance of an individual  

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cannot be reduced to an atomist conception of humanness, but rather, is always contextualized in a particular community including a complex history of relationships with others. The events of genocide are devastating precisely because of the deprivation of an individual life and refusal to recognize the common humanity of an entire group. Mass atrocity destroys both people and their communities. An adequate institutional response must, therefore, reflect the reality of genocide by attending to a restoration of recognition at both the individual and social levels.

The presentation of the Nuremberg model as universally applicable is the most important and fundamental problem with using it as a guide in other time periods and social circumstances. The historical examination of the trial in Chapter Two will explore the historically situated nature of the Nuremberg Tribunal with an eye to several key features: the importance of the Americans in pushing the project, the internal divisions among the American cabinet, the political nature of the London Conference and the relative importance and construction of the charges. The chapter will discuss the political motivations of the various actors. In addition to the political character of each of the actors, the underlying conceptions of justice, in large part shared among the powers, affected the final form taken by Nuremberg. These political motivations and goals are crucial to understanding exactly what Nuremberg’s architects wanted to accomplish.

The tribunal stemmed predominately from an American proposal put together by Henry Stimson, predicated on American conceptions of justice and demonstrating an attitude referred to by political theorist Judith Shklar, as legalism. Shklar’s argument argued against the prevailing opinion of laws as apolitical and used the
IMTs at Nuremberg and Tokyo as a major source of support for her theory. This thesis accepts her conception of legalism and utilizes its presence in said trials as evidence of the particularistic nature of the trials and flaws as precedent. She describes legalism as, “the dislike of vague generalities, the preference for case-by-case treatment of all social issues, the structuring of all possible human relations into the form of claims and counter claims under established rules, and the belief that the rules are ‘there’-these combined to make up legalism as a social outlook. When it becomes self-conscious, when it challenges other views, it is a full-blown ideology.”

The legalistic mindset and belief that law is a set of discoverable truths lead to the further belief that the retributive legal system is universal.

The prosecution at Tokyo further exemplified the legalistic grounding of the trials by repeatedly referencing “natural law.” The natural law tradition represents an extreme version of legalistic ideology outlined above. Natural law theory claims that reality includes laws and norms originating outside the human community in contrast to the view that humans construct rules and norms. Natural law tradition resembles a secular version of canon law and makes up a large part of a more modern and less radicalized legal thinking than its religious counterpart. The tradition believes that the positive law of societies should correspond with the natural laws. Since the laws of nature remain constant, natural law theory argues that all legitimate law is identical and universal. However, natural law is no more universal than any other legalism.

Nuremberg created the false impression that a retributive justice approach was broadly effective. However, the resonance that Nuremberg found among Germans

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3 Ibid, 128.
4 Ibid, 179.
and Europeans more widely, derives from a shared legal culture. The German political elite and post-war leadership of West Germany, exhibited a strongly legalistic mindset. Additionally, although Europe contains many varied legal traditions, “the Nazis were tried by their fellow Europeans for having disrupted an order of which all were a part and to which all at least paid lip service… It was an intra-European affair, subject to European standards of judgment. It is not meaningless to speak of a European order, and of violations of that order, whereas the phrase “world community” is cultural and political nonsense.” The social cohesion of Europe supplied a context for all the involved actors. Increasingly as time passed, Nuremberg became abstracted from its historical origins and political situation such that the necessary social context of the trial faded.

The tenants of legalism as an ideology place it in direct conflict with politics. Moreover, legalism believes itself to be superior to politics. The legalistic point of view includes an attitude of superiority that lead to three detrimental effects: it limits the flexibility of trials, it produces a precedent of abdicating political duties to judicial institutions and it ignores the context of the situation. The British hesitancy to form the Nuremberg Tribunal best exemplifies the limitations of legalism on trials. The British objected because they argued the punishment of the Nazis should be an exclusively political act and should not adopt the trappings of a courtroom and thus corrupt the apolitical nature of justice. In contrast to the British conception, viewing trials as a political tool allows them, as an institutional response, more flexibility and applicability.

5 Ibid, 155-156.
6 Ibid, 188-189.
The second two effects of legalism’s attitude toward politics combine to form the majority of the flaws in the historical understanding and application of Nuremberg that this thesis addresses. First, the elevation of law as a phenomenon separate from socio-political circumstances vests a faith in trials as creative, rather than reflective, undertakings. By treating trials as capable of reconstituting communities or creating otherwise absent attitudes, there is a decreased need for effective political action. The reliance on judicial responses in combination with the unwavering faith that their formation and operation can create communal norms produces the belief they are adequate to resolve the larger social and interpersonal relationships. The high level of trust combined with the contempt of politics on a transnational level created a legal ethos on an international scale and a concept of international positive law that was treated as a, “…veritable substitute for all other forms of international politics.”7 The establishment of Nuremberg initiated and supported a foreign policy of substituting trials for effective political redress and encouraged the belief that this policy was normatively superior to political means.

The idea that trials can create something from nothing is flawed, as “law does not by itself generate institutions, cause wars to end, or states to behave as they should. It does not create a community. Only the disingenuous misuse of the word ‘autogenesis,’ allowing as it does the confusion of the validation of rules with their historic causes, origins, and force, can permit anyone to believe that law will create world society through operative judicial tribunals.”8 Tribunals that fail to inspire respect and trust among affected populations cannot serve as an appropriate redress,

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7 Ibid, 129.
8 Ibid, 131.
either political or judicial, because they cannot create social norms where social order is lacking or otherwise oriented.

The third effect of legalism’s conflict with politics is the dismissal of the specific socio-historical circumstances of each conflict. Since justice perceives itself as superior to politics and views the particulars as the realm of politics, legalistic thinking takes the form of decontextualized universalism. By claiming total applicability, legalism must treat all conflicts as essentially the same, thus neglecting the social subtext that produced conflicts and that deeply affects the future process of reconciliation. Without dialogue between the institution and the society, the trial loses the ability to affect change. In order to regain the exchange that legalism prevents, the strict division between justice and politics needs transformation into a fluid understanding of the interrelationship between the two, rather than an opposition. Such a recapitulation does not undermine the value of justice because, “it is not wickedness that creates a multiplicity of needs and values, but the inevitable diversity among people and the complexity of the demands that a highly developed culture makes upon them. This does not diminish the value of legalistic ethics or of legal institutions. To show that justice has its practical and ideological limits is not to slight it.”

Rather, legal responses gain greater usefulness and legitimacy when their relationship with targeted populations develops. Judicial institutions are one option in a multitude of political courses of action. They are not above or irreconcilable to other political tools, instead law “…is not an answer to politics, neither is it isolated from political purposes and struggles. Above all, it is not something that is ‘there’ or

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9 Ibid, 122.
‘not there.’ Rather, like any form of political belief and behavior it is a matter of degrees, of more or less, and of nuances.’  

The Nuremberg Tribunal established a mindset of universalism that appeared valid in Germany because of the shared social context of the trial and the affected German populations. However, it neglected the Jewish, Communist and Roma victim groups. The Eichmann trial is a consequence of the oversight of Nuremberg toward the European Jewry. While at Nuremberg the specific cultural aspects of the justice system employed remained concealed because of shared norms, the Tokyo Tribunal revealed the Western character of the international tribunal approach. In Tokyo, the trial remained an exercise of power by the victors, tolerated but dismissed by the Japanese at the time and subsequently, by history. Many theories addressing the general ignorance about the Tokyo Tribunal point to the procedural failings of the trial. While the procedural flaws are undeniable and receive abundant attention in Chapter Three, the dissonance between the trial and the Japanese populace prevented the proceedings from taking root at the time and allowed it to sink into the abyss of history. The international dismissal of Tokyo represented a refusal to learn the limitations of international retributive tribunals in non-western countries, a lesson especially salient in contemporary Rwanda.

The aspiration of universalism in association with the air of moral superiority of trials produces ineffective and possibly harmful trials and inhibits the pursuit of other means of redress. In 1964, Shklar prophetically predicted that, “it [support for an international court] is a substitute for foreign policy, for taking a stand on issues, for thinking about international relations. By concentrating on an aim that is 

10 Ibid, 143.
unrealizable in the foreseeable future and that demands nothing in the way of political action beyond research and statements of principles, it gives the appearance of having a purpose without having one.\textsuperscript{11} In 1994, after the world community failed to intervene to stop genocide in Rwanda, they established the ICTR in part as a means of recovering a damaged reputation on human rights. The failures of the ICTR, predictable given the abstraction from Rwandan society, demonstrate the potentialities of international tribunals becoming a way of abdicating responsibility.

To understand fully the significance of the Nuremburg Tribunal requires two things: first, a historical account of the events leading up to the trial and its structure in order to combat the popular myth of Nuremburg. In later chapters, demystification refers to the aim of separating historical truth from popular mythology. Second, Nuremburg must be situated within a wider phenomenon of judicial response in the wake of World War II, alongside the Tokyo and Eichmann trials. Chapters Three and Four analyze the fact patterns of Tokyo and Eichmann including the impact of Nuremburg on each and the aspects of the Nuremburg Principles they elucidate. When Nuremburg is isolated from the other trials, the impression of it shifts dramatically, especially in relationship to non-Western societies and victim groups.

The trials selected for examination in this thesis, Nuremburg, Tokyo, Eichmann, the ICTR and the gacaca, all exhibit key similarities. All the trials, excepting the gacaca, maintain an international character. Although Eichmann occurred in a single country, its events captivated the world and influenced several nations. I selected the ICTR, rather than the ICTY, because Rwanda currently employs two different theories of justice simultaneously. The duality of the response

\textsuperscript{11} Ibid, 135.
provides a unique opportunity to analyze theories of justice in direct comparison. Additionally, the successes and failures of the five institutions derive from the interaction between the structures and the affected populations. Thus, comparisons across time and boundaries reveal important similarities and interrelationships otherwise often ignored.

Before explaining the methodology and meta-narrative of the thesis, I will outline some crucial terms and distinctions that appear throughout the project. The first key set of distinctions is the types of trials at issues in the thesis. Four types of trials appear in the thesis: classical retributive trials, show trials, political trials and informal judicial institutions. Classical retributive trials and show trials directly oppose each other theoretically. The former provides the basis of domestic criminal justice in the majority of countries. The theoretical underpinning of such trials is a conception of justice as retributive, which operates on individuals as discrete entities who can and should face individual accountability for their actions. When a person commits a crime in a retributive model, the criminal hurts the society in addition to the particular victim or victims. The perpetrator victimizes others insofar as he disparages the humanity and dignity of the victim and remove rights and freedoms guaranteed for the individual. Crimes hurt society because they represent a transgression against the norms and rules of the society. Individuals willing to break laws are a threat to the entire society. In order to vindicate the humanness of both the criminal and the victim, the state should hold the criminal accountable through punishment. One of the assumptions underlying retributive theory is that the criminal
would assent to his punishment in the abstract even if he does not desire it in the particular.

Retributive justice views crime as committed against a state, upon the person of the victim. The solace to the victim derives from the state’s recognition of their personhood and reinstatement of the rights violated by the criminal. Thus, retributive theory does not perceive punishment as perpetrated for the sake of the victim or intending to restore anything to the victim, rather, it views not punishing a criminal for their wrongful act as a failing in the duty of the state. Therefore, punishment is compulsory and the state, in order to accomplish its duty, must pursue all criminals. The goal of retributive justice is to balance the wrong committed by the criminal through an act calculated to be proportionate in order to nullify the wrong and rectify the situation. The legalistic mindset outlined above corresponds strongly to belief in retributive justice. Both phenomena share hostility toward politics and particularities and perceive themselves as universals. Nuremberg aimed to create a retributive trial capable of addressing the events of World War II and subsequent wars.

In opposition to retributive trials, show trials aim at the elimination of a political enemy through judicial means. Some scholars refers to trials aimed at the elimination of a political enemy as political trials and then differentiate between liberal and illiberal ones. This thesis uses the term show trials to refer to the illiberal political trials and the term political trials for the liberal category. These trials display a conspiracy between the prosecution and the judges, both generally directed by the

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13 Ibid, 35.
14 Ibid, 149.
state. Chapter Two references the presence of a man strongly associated with show trials, A.J. Vishinsky, at the Nuremberg trial. During Stalin’s rule, Vishinsky masterminded and directed a series of trials rigged against political enemies during the Great Purge. The term, show trials, intends to describe a trial lacking impartiality and transparent rules, but rather, a political persecution vaguely masked by its location in a courtroom. As described in the next chapter, and alluded to above, the British resisted the Nuremberg plan, in large part because of a fear that it could not be fair or valid and thus amount to nothing more than a show trial, an idea they found repugnant. Conversely, the Soviet support for the Nuremberg plan arguably stemmed from the same expectation, but without the repulsion.

The thesis includes many procedural criticisms of all the retributive trials, however, at no point do I intend to insinuate or argue that any are show trials. Both Tokyo and Eichmann border on institutional prejudice such that it threatens their procedural legitimacy. The Tokyo Tribunal demonstrates a harmony of bias between the prosecution and the judges but not a conspiracy, rather, an uncoordinated synchronization that limited the procedural fairness but did not compromise the basic theoretical aim of the trial. The Eichmann trial also displayed many procedural failings, but the verdict demonstrated the independence of the judges from the prosecution.

The thesis argues that the Nuremberg Tribunal, the Tokyo Tribunal and the Eichmann Trial are all political trials. Chapters Two, Three and Four address the arguments for this hypothesis. The term, political trials, intends to refer to a trial predicated on retributive theory, but used for, or created by, political means. This

15 Geoffrey Robertson, 19.
kind of trial combines elements of both of the previous two types of trials, thus altering the criterion of evaluation. The strict obedience to procedural rules provides the criterion for evaluation of classical trials, and the effective accomplishment of the political goal represents the evaluation of show trials. The identification of a trial as a political trial does not dismiss its importance; rather, it shifts the process of evaluation from identifying rules violations to substantive assessments of the desirability of the political ends. Political trials can result from retributive trials of such importance that they become indivisible from their political outcomes. Additionally, political decision-making, reviewed in all three trials below, can transform a retributive trial into a political trial. Political trials, because of the transformation of ends, means and theoretical underpinnings, can be judged normatively. The ability to make normative or proscriptive statements about this class of trials is a radical departure from the classical model. However, it allows a broader evaluation of whether prosecution is the best possible action rather than compulsory. Trials as political acts appear often in transitional justice analysis because of a need to balance many ends such as retribution, peace, truth and reparations.

The final type of judicial institution is informal methods of adjudication. This type of institution exhibits limited relation to the other three types except that they are suggested in similar situations and aim to address societies in need of reconciliation. Informal trials include, “…direct links between the parties, litigation considered as a community problem more than an individual problem, a trial centered on the victim, social pressure rather than coercion as the principal motivator, a flexible and informal procedure, voluntary participation, and decisions achieved through mutual agreement
between the parties and the community, with the restoration of social harmony as the principal goal.”\textsuperscript{16} The Rwandan institution of gacaca, discussed in more detail in Chapter Six, is an informal judicial institution. This type of response is varied and highly context specific; as such, few generalizations can be made about the exact form of theoretical justice pursued. In this thesis, with specific reference toward the gacaca, restorative justice provides the predominant basis of informal proceedings.

Restorative justice, often contrasted to retributive justice, is victim-centric rather than perpetrator-centric. Restorative justice construes crimes differently, as primarily violations of the victim and secondarily of the society, although both objectives can operate simultaneously as in Rwanda. Sometimes referred to as reparative, it

\ldots is more that just a victim-oriented approach. It is explicitly ‘survivor-centered’. It encompasses the differential and overlapping needs of all people within a given society who have survived conflict and are now required to build a political community together, regardless of their divergent pasts. The central aim of reparation is to overcome the alienation caused by the offence and to rebuild the basis of trust for renewed co-operation.\textsuperscript{17}

This model of justice conceives of punishment as an attempt to reinstate the pre-crime situation and the dignity of the victim. Although there is no way to return to situations prior to such as murder, rape or maiming, the punishment symbolizes an effort to reconcile and engages the victim in the same effort. The process thus brings the community into the same theoretical space in an attempt to rebuild the social ties


\textsuperscript{17} Rama Mani, \textit{Beyond Retribution: Seeking Justice in the Shadows of War} (Cambridge: Polity Press 2002), 174-175.
broken by the crime. The restorative approach directly contrasts to the institutionalized separation inherent in retributive trials.

The second set of distinctions necessary for the thesis concerns the types of violations I consider: mass atrocity, war crimes, crimes against humanity and genocide. Mass atrocity encompasses the other three as well as other events of political repression, ethnic cleansings, civilian casualties of civil war and societal violence on a large scale. War crimes and crimes against humanity both appeared as charges at the Nuremberg Tribunal; although not the first historical appearance for either, their use as criminal charges lacked precedent. War crimes are acts committed against soldiers, against the rules of war. Crimes against humanity are violent acts carried out against civilians, most often during war but also in times of peace. Their systematic nature is a crucial element of the definition. After World War II, crimes against humanity became an increasingly broad term akin to mass atrocity, but invoking different feelings and generally describing civilian populations. In Chapter Two crimes against humanity refers to the technical charge, but adopts the broader meaning in later chapters. Genocide, as alluded to earlier, is defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide as any number of acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group. The thesis uses these terms throughout with these meanings in mind.

The thesis explores the judicial response to mass atrocity with an eye to the role of recognition in relationship to legitimacy. The first major project of the thesis is

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an historical construction of the response to World War II. This construction has three parts: Chapter Two explores the establishment and outcome of the Nuremberg Tribunal, Chapter Three examines the Tokyo Tribunal created at the same time and Chapter Four, the Israeli Trial of Adolf Eichmann convened sixteen years later. This project occupies the majority of the thesis quantitatively due to its influence over current decision-making and the difficulty in deconstructing it. The historical dominance of the Nuremberg Tribunal demands a close examination and in many instances demystification and contextualization. Without a careful reconstruction of the historical record, the applicability of the real events and lessons of the tribunal cannot be fully appreciated or argued. The thesis also engages with the popular legacy of the tribunal, since it transforms how and when the principles and precedents are applied. Last, the historical examination provides a forum to point out the elements of recognition, or lack thereof, which have gone unaddressed previously.

Recognition at Nuremberg operates subtly, accounting in large part for its oversight in later applications of retributive justice in response to war and genocide. Because Nuremberg lacked the institutional friction displayed in Tokyo, the importance of harmonizing with social norms remained obscured. The laws in operation at Nuremberg stemmed from varying degrees of commitment to retributive theory. Both the victors and the vanquished shared the same conception of justice. Additionally, the circumstances post-World War II precluded some of the most serious problems faced in other situations. The absence of perpetrators living as neighbors with victims, allowed for the marginalization of recognition of the Jews. The lack of vindication and recognition undermines the legitimacy of the tribunal as a
response to the Nazi Holocaust. However, the shared legal values of the Germans and
the victors provided a minimal level of respect, such that the German populace could
continue with their own domestic trials and utilize them as a way to break from their
past and define their future nation in contrast to the Nazi regime. The final form of
recognition, that toward the wider European and Western community, flowed
naturally from the position of the victors as the prosecutors and judges. The position
of the victors as adjudicators decreased the procedural legitimacy and impartiality of
the trial but increased the communication between it and the communities attempting
to rebuild after the conflict.

Nuremberg’s struggles and experiences with recognition cannot be limited to
the events in Germany in 1945. The evaluation of recognition operates on two levels,
the particular and the institutional. The particular success or failure of recognition at
Nuremberg is outlined above, but the institutional element of recognition includes the
application of the principles to other situations or retrospective reflection given future
events. The Tokyo Tribunal demonstrates the near simultaneous application of the
rules of Nuremberg to a non-Western nation, without the shocking scale and
uniqueness of the German extermination plans. The refusal of the tribunal to adapt or
address itself to the Japanese population was a serious failure of recognition and
decreased the legitimacy of the trial as a mode of response. Additionally, the inability
to acknowledge the situated nature of the tenants of Nuremberg illustrates a major
lesson unlearned from post-World War II. The inefficacy of the trial to generate
widespread feelings of accountability or to inspire domestic trials in Japan indicates
the affect recognition, or the lack of it, has on trust and respect toward the
institutional structure. The lessons of Tokyo became particularly salient when the memory and precedent of Nuremberg inspired the creation of the *ad hoc* tribunals of the 1990s.

The Eichmann trial retrospectively affects the analysis of the recognition present at Nuremberg and thus its legitimacy. The feelings of disappointment experienced by the Jewish community toward the Allied and subsequent trials, demonstrate the failure of those trials to vindicate the major victim group of Nazi crimes against humanity during World War II. History often divorces the procedural problems and societal issues raised by the Eichmann trial and the Nuremberg Tribunal. Chapter Four argues that the concerns exposed by the Eichmann trial are concerns with Nuremberg as well as the Israeli proceedings. The compulsion displayed by Israel stems from the flaws of Nuremberg; separating the two trials limits the understanding and evaluation of Nuremberg. The failures of recognition of such a large victim group affect drastically how the Nuremberg precedents seem to address other forms of mass atrocity such as genocide. The Eichmann trial, however, also fails to recognize the defendant and thus loses legitimacy because it cannot generate respect. Historically, the trial’s reputation is poor and the events addressed suffer a less trusted, discredited fate as a result.

The Cold War produced a temporal situation such that the most recent events dealing with judicial response to mass atrocity after Eichmann were the establishments of the ICTY and ICTR in 1993 and 1994, respectively. The final analytic chapter of the thesis contains the major thrust of the theoretical contribution of the project. Chapters Five and Six discuss the situation of Rwanda in 1994. Two
major judicial responses occupy the analysis of the chapter, the ICTR and the Rwandan innovation of gacaca courts employed as genocide trials. The ICTR represents the application of the Nuremberg concept to modern genocide; it is an international tribunal convened to address crimes against humanity in an attempt to aid social reconciliation. The thesis does not dispute or criticize the procedural fairness of the tribunal. Rather, I argue, that the legitimacy of the tribunal decreases because it fails to recognize the Rwandan populace. The insistence on apoliticalness and the refusal to acknowledge the culturally specific nature of the Nuremberg model prevent the tribunal from marshalling much support from the targeted population and thus being effective in its mission or legitimate as a response.

In many ways, the ICTR is the tribunal the liberal democratic Allies wanted to have at Nuremberg, and its inefficacy damages the argument that Nuremberg provides a model for broad usage. The lack of acknowledgement also perpetuates an insidious attitude that failure of trials in other cultures is not a reflection upon the trial or theory of justice, but a failing of the nation or culture to engage with a universal process. The chapter argues that mis-recognition characteristic of the ICTR decrease its legitimacy and need be taken into account for future applications of judicial response. The ICTR contrasts with the Rwandan implementation of informal judicial procedures called gacaca.

The gacaca focus on community settings and involve community members in an attempt to restore social cohesion through forgiveness and restorative justice. The gacaca focus on victims rather than perpetrators and attempt to breakdown distinctions between social groups in order to create a new identity of those who
survived the conflict. Gacaca represent a novel approach to judicial institutions established in the wake of genocide and can provide a point of comparison with the predominant method established and represented by Nuremberg. The evaluations of the gacaca system center around the impact they have within Rwandan society, especially focusing on their ability to generate respect and trust and engage the community in reconciliation. The system derives from Rwandan society itself and reflects the communal norms more than retributive justice; this aspect provides a key innovation. Whereas Nuremberg claimed universalism, the gacaca approach accepts and assumes particularity. The chapter concludes that the informal system includes many new problems and flaws, but does contributes greatly to the project of identifying and building an adequate institutional method to respond to mass atrocity.

Given the above framework, I argue that the legitimacy of trials cannot be reduced to following correct procedure. Trials are legitimate insofar as they preserve a bi-directionality of recognition between the judicial institutions and the affected parties.
SECTION ONE: WORLD WAR TWO TRIALS

History of World War II trials

In dealing with, and addressing the trials following World War II, it is necessary to make several key distinctions. The Nuremberg Trial has two histories; the first is the actual events of the trial, including the planning, legal precedents employed, evidence, testimony, verdicts and record. However, there is another, more powerful history. Although the former history may be the most accurate, only a relative few, mainly scholars of the subject or period, know it. The second history is what people, both at the time of the trial and since, have come to think of when one invokes the words “Nuremberg Trial.” This history is one of restraint, fairness and triumph of civilized institutions over barbarian Nazi cruelty. This history references the International Military Tribunal at Nuremberg as a “Holocaust trial.” This history entails the widespread, popular, legacy of the Nuremberg precedent when dealing with contemporary genocide trials. The popular history produces the conviction that an international tribunal did, and can, effectively deal with mass atrocity.

The International Military Tribunal for the Far East has a notably different history. Obscurity plagues the Tokyo Tribunal and Nuremberg overshadows it when remembered. This fate is most likely a result of the failures perceived as unique to it, as divorced from Nuremberg. The failures of recognition at Tokyo included politicization at the cost of both justice and political expediency and the forced application of legal norms and traditions that did not resonate with the Japanese people. Only history scholars study the “Tokyo Tribunal” at all, but the events of the
trial can provide many insights into not only the scholarly history of Nuremberg, but also explain why the Nuremberg legacy developed in the way it did.

The last trial of World War II, and the only “Holocaust trial” of the triad, is the trial of Adolf Eichmann in Israel. This trial can be understood as the last of the successor trials that followed the Nuremberg trial of the major war criminals. However, its role is unique from many of the other successor trials. The Eichmann trial was not only more widely publicized and monitored, but also more controversial because of its stated aims. One of these aims bears directly on the legacy of Nuremberg. The Israeli government and prosecution claimed that the trial of Eichmann, in Jerusalem, was necessary to achieve justice for the crimes against the Jewish people. The perceived need for a trial specifically aimed at the events of World War II termed the Holocaust, indicates a failure of recognition at Nuremberg itself, and the lack of justice for particular victim groups. Because of the controversy, much of the history of the Eichmann trial comes from the pages of the press. This particular type of coverage has a dramatic effect on the historical treatment of the Eichmann trial.

The legacy of this triad of trials is as malleable as their sources and proceedings. Discussions of the IMTs, before the 1990s, in both Europe and the Far East, centered on the criminalizing of aggressive war as the primary legacy of the tribunals. However, the formation of the ICTY and the ICTR transformed the legacy of the IMTs. Many criticisms of both trials evaluated how much closer the world order was to peace following the London and Tokyo Charters. These criticisms, often situated in the midst of the Cold War, include much skepticism about the success of
criminalizing aggression. Critics argue that the failure of the principles of the tribunals to extend to the Allies and the one-sidedness, not only limits the potential for outlawing aggressive war but also discredits the tribunals.

In more recent history, the legacies of the tribunals have begun to evolve to focus increasingly on “crimes against humanity.” This change occurred because of several events. First, the trial of Adolf Eichmann and the subsequent German trials indicate the nascent use of crimes against humanity to justify trials against acts of mass atrocity. Second, Nuremberg’s impact on the legal concept of crimes against humanity gained preeminence with the establishment of ad hoc tribunals for the ethnic cleansings in the former Yugoslavia and the genocide in Rwanda. Nuremberg and Tokyo provided the inspiration for the creation of the ad hoc tribunals.

The following section analyzes these three post-World War II trials. The central trial is the IMT that took place in the Palace of Justice at Nuremberg. This trial is the most recognizable and often invoked. The accuracy of its reputation is one issue at question in the section. Some of the problems posed to justice by the Nuremberg Tribunal are moot in modern times. Others, however, are still a matter of great concern, especially in the first age witnessing the reinvigoration of the International Tribunal. The Tokyo Tribunal and the Israeli trial of Adolf Eichmann allow an examination of principles at work at Nuremberg and their failings. The main thrust of using these counter examples is to demonstrate the uniqueness of the Nuremberg proceedings and to indicate that with changes in cultures, values, and ideas, the principles established by Nuremberg may not be applicable.
Each trial illuminates a flaw inherent to the structure of Nuremburg preventing full recognition. The failures of recognition decrease the legitimacy and normative value of Nuremburg and the other trials. Tokyo, widely criticized as unfair, demonstrates many of the pitfalls victor’s justice can cause. It represents political investment in a particular outcome to the detriment of the procedural fairness. The Eichmann trial, conversely, may point retrospectively to the dangers of a trial undertaken by individuals with too little investment in the outcome. The Allies’ concern at Nuremburg was not the prosecution of the Holocaust, but rather of the crimes committed against Allied forces. As a result, a major victim-group felt unrepresented by the trial and undertook to achieve justice they felt was lacking. The proceedings of this trial have also been criticized as unfair, and this too, like Tokyo, may support the argument about overly invested prosecutors and judges. One of the minor and often overlooked criticisms of Tokyo may also provide valuable understanding of Nuremburg’s applicability for contemporary times. The existence of colonialism at the time of the tribunal presents a foreshadowing of the multicultural and Western-centric criticisms now leveled against the ad hoc tribunals. The inability or unwillingness of the architects of the trial to accommodate cultural difference was the most historically significant failure of recognition of the trial.

The legacies of Nuremburg are likely always to be a source of disagreement, but the force of the trial is undeniable. To understand fully the impact achieved, it is important to appreciate the entire context and potentiality demonstrated by other contemporary or subject-related trials. This more well-rounded understanding of “Nuremburg” may also provide a deeper and stronger basis to analyze what
Nuremberg means now to tribunals and countries facing state-sponsored mass atrocity and genocide.
Chapter Two: The International Military Tribunal at Nuremberg

2.1 Structure

The Nuremberg architects focused on drawing connections between the proceedings they were constructing and past precedents. The Nuremberg creators believed that for the trial to accomplish the aims they set forward, as discussed below, it needed to maintain legitimacy, which flowed from close connections with other historical trials and legal precedents. The pursuit of historical judicial parallels produced a tenuous situation of trying to balance claims of legal legitimacy through precedent with arguments about the need to address unprecedented crimes.

There were four charges at the trial: conspiracy, crimes against the peace, war crimes and crimes against humanity. The charges differentiated crimes against the peace i.e. aggressive war, from crimes against humanity. The charter’s definition of crimes against humanity appears later in the chapter. Of the charges, only one was without any other acknowledged historical occurrence: crimes against humanity. The genocide of the Armenians by the Turks had occurred before World War II, but its acknowledgement as an act of mass atrocity came after the Nuremberg trials. There were documented instances of all the other crimes. In order to avoid claims of ex post facto prosecution, the attorneys drafting the indictment needed to indicate the origin of the laws they were trying to enforce and show that judicial response was appropriate and previously documented. There were two major sources used to accomplish these goals: first, the Kellog-Briand Pact and second, Article 227 of the Treaty of Versailles and other judicial actions following World War I.
The Kellog-Briand Pact of 1928, also known as the Pact of Paris, arose out of a global sentiment against war and in the hope of preventing another World War. The pact attempted to outlaw war, but did not criminalize it, as would later be claimed by those finding precedent for the Nuremberg Trial. The Pact declared that the signatories, “…condemn recourse to war for the solution of international controversies…” and that settlement of disputes, “…shall never be sought except by pacific means.”19 Despite the strong language suggesting that the Pact was international law it lacked both a definition of aggressive war and established judicial means to adjudge offenses or punishments to be faced.20 Germany, however, signed the Pact in 1928 and the Allies argued that it represented binding force upon the Germans, and thus enable prosecution on those grounds.21

The second major source of legitimacy derived from the Allied judicial response after World War I. The events post-World War I provided historical previews for international attempts at prosecution, domestic prosecutions of war criminals, and the possibility of trials in response to crimes against humanity. All of these phenomena provided little basis for optimism about the judicial pathway eventually undertaken at Nuremberg. To address the aggressive nature of the German Empire, Article 227 of the Treaty of Versailles provided that, “…the former German Emperor was to be tried by an international tribunal of five judges, one each from the USA, Great Britain, France, Italy and Japan. However, the trial of Article 227 was not a criminal trial. The German Emperor was not charged with a violation of any

21 Ibid, 58-59.
international law, instead he was charged with a ‘supreme offense against international morality and the sanctity of treaties.’”\(^{22}\) Although the Allies intended to determine through a trial a violation of morality and treaties, it was not a criminal prosecution for violating international law, “it was therefore to be a political trial, and not a judiciary process based on humanitarian conventions.”\(^{23}\) The Ally with the most reservation to this kind of act, even in the political form, was the United States. The U.S. was wary of putting a Chief of State under indictment because of the specious legality of such a prosecution, even if it was not a criminal trial. Additionally, they worried about the consequences the prosecution would have for the understanding of sovereignty.\(^{24}\) The U.S. also raised concerns about the German population’s probable rejection of the prosecution of the Emperor by the Allies. The German population’s perception of unfairness would only equate into the martyrdom of the Kaiser.\(^{25}\) All of the other five major Allies were in support of trials, but nonetheless, the trial never occurred and the issue receded into the background.\(^{26}\)

The other war criminals faced domestic prosecutions by the Germans themselves. These domestic trials at Leipzig were suspiciously lenient in their indictments and sentences. Only twelve of a list of forty-five alleged war criminals compiled by the Allies faced prosecution by the German courts. Only half of those resulted in convictions, all served sentences disproportionately lenient with the crimes committed, none longer than four years.\(^{27}\) The unwillingness to impose severe

\(^{23}\) Ibid, 28.
\(^{24}\) Ibid, 28.
\(^{25}\) Ibid, 29.
\(^{26}\) Drexel Sprecher, 16.
\(^{27}\) Yves Beigbeder, 29.
punishment on war criminals and the refusal to prosecute the majority of the list, indicates the attitude of the German people. The list and the designation by the Allies of criminality during the war did not equate into a German investment. The feeling that the Allies were imposing “victors’ justice” meant that the German populace did not accept the judicial actions as legitimate or fair. “Victors’ justice” was not just a factor in the acceptance of the proposed international tribunal, but also in the inefficacy of the domestic trials. Despite the proceedings being in German courts, the accusations were still seen as imposed and foreign.28

The last aspect of the judicial response in the aftermath of World War I was the feeble effort on the part of the new Turkish government to try the Ottoman leaders responsible for the displacement and death of nearly a million Armenians. The mob uprisings in response to the first death sentence of the court marshal, however, ended the effort to enforce accountability.29 The failure to pursue those responsible for the Armenian extermination directly contradicted an Allied announcement before the end of the war. The Allies declared that, “in view of these new crimes of Turkey against humanity and civilization, the Allied governments announce publicly… that they will hold personally accountable… all members of the Ottoman government and those of their agents who are implicated in such massacres.”30 The above statement marks the first usage of the term “crime against humanity,” providing a semantic precedent for Nuremberg, if not a legal one.

28 Ibid, 29.
30 Ibid., 29.
The experiences with judicial responses after World War I provided the London Conference, which produced the Nuremberg Charter, both historical precedents and fears over what a judicial response might mean in Germany after World War II. The circumstances facing the Allies included a series of heinous war crimes, clear violations of established treaties, numerous wars of conquest undertaken by the Germans and the increasingly revealed and reprehensible activities of the “Final Solution,” the planned extermination of European Jewry. Many of the crimes receiving the most attention were of particular importance to the most powerful and influential Allies, mainly the Soviets and the Americans. The crimes of the Final Solution did not directly affect any of the Allies and received less attention, despite the horrific nature of these crimes. The original inattention to these crimes translated into a legal marginalization of crimes against humanity, further examined below.

All four major powers needed to agree that the response was both adequate and legal. Such agreement required careful negotiation and scrutiny of the limited historical examples available to them. Because of the weak precedents supplied by the Kellog-Briand Treaty and Article 227 of the Treaty of Versailles, the decision to prosecute the German leaders in a judicial setting preceded the legal code of the time, rather than followed from it. The other experiences of domestic prosecutions remained part of the backdrop showing the potential failings of what the London Charter began.
2.2 Position of the victors

The establishment of an International Military Tribunal (IMT) was never a forgone conclusion in the Allied negotiations. The Tribunal was the product of political will and high-stakes compromise. The legal and political compromises of the Allied powers pervaded the entire process of establishing the Tribunal. Even the legal system of the trial derived from negotiation between the Anglo-American, common law powers (The U.S. and Great Britain) and the Continental, civil law powers (France and the Soviet Union). Germany also practiced civil law, thus the defense was unfamiliar with the law practiced by the Americans and British. Nonetheless, the legal system employed by the tribunal was predominantly Anglo-American, adversarial, common law. The political negotiations of the victorious powers characterized the final structure and progression of the IMT. The differences between the Allies caused divisions over the form of the trial, whom to indict, what crimes to prosecute and the identity of the victims of the Axis.

2.2.1 The Americans

Even within the leadership of the main proponent of trials, the United States, there were deep divisions over the appropriate response to the crimes of World War II. President Franklin Roosevelt’s cabinet was irreducibly at odds over how to deal with Germany. Secretary of the Treasury Henry Morgenthau Jr., and Secretary of War Henry Stimson, fought for the favor of the President’s opinion, which continually remained elusive and malleable, further intensifying the political competition. What emerged after Stimson’s ideological victory in the internal conflict
was a plan for the prosecution of leading German war criminals. He pursued this plan single-mindedly, without regard for other interests or goals. After the domestic resolution, the United States set about convincing a reluctant Great Britain and restraining an overeager Soviet Union. Each nation had preconceived notions of the role of trials and these opinions affected the eventual construction of Nuremberg. The trial developed to accommodate all the powers and interests represented. The character of the IMT at Nuremberg was one of contract and compromise; in many instances, one power would use another against a third to force a particular desire into the charter. The contrivance of Nuremberg underlies the harshest criticisms against the trial, but also provides its greatest strength as a response to war and mass atrocity.

In a memo on September 5, 1944, Morgenthau presented his plan to President Roosevelt. The plan contained two components: first, was a pastorilization of Germany and second, summary executions of the top Nazi war criminals.31 His plan assumed that deindustrialization would prevent Germany from becoming a military threat again and the guilt of the “arch” Nazi criminals was so manifest that they should be executed as quickly as possible.32 Morgentahu’s plan was deeply influenced by his own personal horror at the crimes of the Nazis; he was, “…of an assimilated Jewish background, [and] recently energized to do something on behalf of the Jews still alive in Europe, [he] was fired with a sense of heinousness and magnitude of Nazi atrocities.” 33 He had also seen his father’s experience with more diplomatic responses to mass atrocity. Henry Morgenthau Sr. had been ambassador to
the Ottoman Empire during the deportation of the Armenians and was unable to move official channels or powers to help them.\textsuperscript{34} Morgenthau Sr. wrote of the Ottoman Empire’s attitude toward the Armenian extermination, that “when the Turkish authorities gave the orders for these deportations, they were merely giving a death warrant to a whole race; they understood this well, and in their conversations with me, they made no particular attempt to conceal the fact.”\textsuperscript{35} Morgenthau Jr.’s personal investment coupled with his personal knowledge of the failure of Allied promises of judicial response to seek a more extreme and decisive response.

Morgenthau’s position also found support from the American people, who voiced strong hostility toward German war criminals.\textsuperscript{36} The desire for vengeance over legal punishment was powerful, following from increasing knowledge of German military tactics. Public opinion was further inflamed with the German violations of the Geneva Accords and the execution of American prisoners of war at Malmédy.\textsuperscript{37} The 1944 massacre of seventy American POWs at Malmédy in Belgium was one of the first American experiences with German war crimes in World War II. The U.S.’s location kept the domestic population from the bombings and crimes that plagued Great Britain, France and the Soviet Union. The exposure to German violations of treaties and rules of war shifted American public opinion to an increasingly anti-German sentiment.\textsuperscript{38}

\textsuperscript{35} Howard Ball, 29.
\textsuperscript{37} Drexel Sprecher, 31-32
\textsuperscript{38} Ann Tusa and John Tusa, 30.
Henry Stimson and the War Department had an uphill battle to convince the President of the value of legalism and trials in response to crimes of war. Stimson chose to rely on American legal principles, the American Constitution and Bill of Rights\textsuperscript{39} to underpin his arguments of the supremacy and necessity of trials.\textsuperscript{40} He wrote to the President, “this law of the Rules of War has been upheld by our own Supreme Court and will be the basis of judicial action against the Nazis.”\textsuperscript{41} These arguments were largely ineffective, apart from gaining Stimson a few influential and credible allies such as Supreme Court Justice Frankfurter.\textsuperscript{42} The majority of the cabinet and the President remained in favor of the Morgenthau plan.

Stimson worked tirelessly to create a legalistic response and to persuade the President of the dangers of the Morgenthau plan. Stimson believed that the Morgenthau plan assumed collective guilt and would generate German hostilities just as the Treaty of Versailles had done. He also wanted to protect the industrial capabilities of Germany for redevelopment of Europe.\textsuperscript{43} In a memo to the President on September 9, 1944, Stimson defended why he thought trials would have more effect. He argued that, “… the very punishment of these men in a dignified manner consistent with the advance of civilization, will have all the greater effect upon posterity. Furthermore, it will afford the most effective way of making a record of the Nazi system of terrorism and of the effort of the Allies to terminate the system and prevent its recurrence.”\textsuperscript{44} Stimson was also deeply concerned with the punishment of

\textsuperscript{39} Drexel Sprecher, 31
\textsuperscript{40} Gary Bass, 156.
\textsuperscript{41} Henry L. Stimson, “Memorandum Opposing the Morgenthau Plan,” cited in Michael R. Marrus, 27.
\textsuperscript{42} Gary Bass, 164.
\textsuperscript{43} Michael R. Marrus, 26-27.
\textsuperscript{44} Henry L. Stimson, “Memorandum Opposing the Morgenthau Plan,” cited in Michael R. Marrus, 27.
the entire German population, in that he, “… clung to the idea of individual responsibility for war crimes, which would focus Allied vengeance against the guilty rather than all Germans.”45 President Roosevelt shared the desire to avoid collective guilt, the idea that all Germans were collectively responsible for the massive crimes of the war, regardless of their individual actions and guilt.46 However, this one point of agreement did not persuade the President, and it was not until the Quebec Conference and the leakage of the Morgenthau plan that Stimson gained an advantage.

Roosevelt met with British Prime Minister Winston Churchill in Quebec in September of 1944 and took only Henry Morgenthau to the conference.47 Churchill was already in favor of summary executions of top Nazi officials.48 The Prime Minister displayed hesitation toward the pastorilization aspect of the plan but by the end of the conference, he agreed to the entire plan. The Quebec Conference was a resounding victory for Morgenthau and a major defeat for Stimson’s legalistic model. It was not until the outcome of the conference leaked to the press and the subsequent public uproar over the summary executions and deindustrialization49 that the President changed his trajectory and re-approached Stimson to develop fully the model that would eventually become Nuremberg. His reversal was nearly immediate: “Roosevelt backed away from the Morgenthau Plan with an easy flexibility of conviction. Lunching with Stimson, Roosevelt, ‘grinned and looked naughty and said

45 Gary Bass, 156.
46 Drexel Sprecher, 25.
47 Gary Bass, 165.
48 Ibid, 166.
‘Henry Morgenthau pulled a boner’ or an equivalent expression…”\(^{50}\) This reversal marked the bedrock of the eventual American approach to the Nazi war criminals.

2.2.2 The British

After the United States settled on its approach, it still had to convince the other powers to accept its model including not only the form of judicial response, but also the structure of the trials, aims and the principles forming the theoretical basis of them. The internal conflicts of the American cabinet were taking place slightly before and overlapping a consolidation within the British cabinet. However, the British cabinet decided on trials for lower level officials, but summary executions of the top fifty to a hundred Nazis.\(^{51}\) The rationale behind the British position was as deeply legalistic as that presented by Stimson. Churchill and the British argued that the guilt of the highest-ranking German officials was manifest, and that a legal acquittal was unacceptable. However, no legal model claiming impartiality could allow a government to compromise judgments by demanding politically necessary convictions.

Churchill wrote to Stalin explaining the reasons he thought a trial was a poor response, “Churchill argued that ‘the question of their [the German leaders’] fate is a political and not a judicial one. It could not rest with judges however eminent or learned to decide finally a matter like this which is of the widest and most vital public policy.’”\(^{52}\) Churchill feared that the political needs of the Allies to exact punishment on these top war criminals would come into conflict with the legal commitment to fair

\(^{50}\) Ibid, 169.

\(^{51}\) Ibid, 181.

\(^{52}\) Ibid, 182.
trials based on procedural rules. Anthony Eden, British Foreign Secretary and the dominant negotiator for the British, wrote a proposal for the British that voiced their position. In the proposal he wrote, “judicial procedure would seem inappropriate for dealing with Hitler and Mussolini… the guilt of such individuals is so black that they fall outside and go beyond the scope of any judicial process…” The British position never changed, but ultimately they relented under the pressure of the Americans and Soviets.

The conflict between the United States and Britain was not over the manifest guilt of the defendants in question or the appropriateness of trials generally. The United States and the British disagreed over whether or not trials for top Nazi officials could ever be fair and legitimate. The British position was more genuinely legalistic in this respect; they were unwilling to compromise a courtroom for a political battle. The fears of the British took the form of two potential outcomes: the failure of the trial similar to those at Leipzig after World War I or the perception of the trials as show trials, a concept they detested. The British were not against trials as a blanket policy; they included a proposal for trials for Nazi officials below the top potential defendants. Churchill was disgusted when at Tehran Stalin toasted to the execution of fifty thousand Germans. Churchill writes about the heated exchange he had with Stalin about the matter, “Stalin… pursued the subject. ‘Fifty thousand,’ he said, ‘must be shot.’ I was deeply angered. ‘I would rather,’ I said, ‘be taken out into the garden here and now and be shot myself than sully my own and my country’s

53 Ibid, 185.
54 Ibid, 185.
55 Ibid, 187.
honour by such infamy.’”\textsuperscript{56} The British wanted to protect the impartiality and reputation of trials as an institution, and they felt that a trial used in a political way would damage respect for the judiciary.

2.2.3 The USSR

The third ally, the Soviet Union, was on the opposite side of the spectrum from the hesitant British. The Soviets, if anything, were overly enthusiastic toward the prospect of trials. However, the Soviets did not have the same commitment to legalism as the Anglo-Americans. Early into the negotiation process, Stalin indicated how deeply he thought German guilt ran. At Tehran, Stalin angered Churchill by proposing that, “the German General Staff… must be liquidated. The whole force of Hitler’s mighty armies depended upon about fifty thousand officers and technicians. If these were rounded up and shot at the end of the war, German military strength would be extirpated.”\textsuperscript{57} Even once the Soviets ceded the punishment of the Germans to trials, they retained their vengeful emphasis.\textsuperscript{58} The expectation of the Soviets reflected their previous history of using judicial institutions as political enforcers.

By 1945, the Soviets had established a notorious history of trials as a political tool, notably with the so-called Vishinsky trials. The challenge of Allied negotiations including the Soviets was not getting them to commit to trials, but getting them to commit to trials that allowed for the possibility of acquittals. Part of the refusal to accept acquittals resulted from the Soviet’s more broad conception of what would

\textsuperscript{57} Ibid, 22.
\textsuperscript{58} Gary Bass, 196.
constitute guilt, “as in Soviet domestic courts, where political expediency could
determine guilt, so too Soviet international courts would punish Germans not only for
violations of international law…but also for broader offenses like being a German
soldier or working for the Reich.” Only the Soviet justice dissented from the
Nuremberg judgment, opposing the acquittals and “leniency” of the verdict.

The behavior of the Soviet delegation provided the most glaring examples,
and thus ammunition, for the criticism of bias and victors’ justice. The Soviets
insisted on charging the Germans with a crime later revealed as a Soviet crime, the
Katyn Massacre. The Soviets also called in the consultation of A.J. Vishinsky
himself, which produced hostilities from the other delegations. At one dinner party
Vishinsky, “[harped] on the theme that the defendants deserved death since the Soviet
Union had suffered so much at their hands. He also seemed to think that there were
too many documents being used and that the trial was proceeding too slowly.” His
comments were disturbing in part because they reflected the delicate balance
Nuremberg was trying to maintain between political efficacy and procedural fairness.
Vishinsky’s presence and complaints represented the dangerous potentialities of the
judicial medium as a political tool.

The attitude expressed by Vishinsky represented the conflict between the legal
conceptions of the Allies. The Soviets expected the trial to legitimate the executions
of top officials. Unlike the other Allies, the Soviets did not see Nuremberg as a
rationalizing unprecedented accomplishment of restraint. They also did not value the

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59 Ibid, 199.
60 Ibid, 202
61 Ibid, 201.
same political goals expounded by the Americans, such as creating a historical record and advancing international law. The issue of collective guilt deeply divided the Allies; the Soviets were unconcerned with collective guilt. In general, they believed that being German was a good indication of criminality. The Soviet attitude differed dramatically from the one shared by the British and the Americans. The differences in vision hindered cooperation and disrupted the consistency of the prosecution of the charges.

Justice Robert Jackson, lead American Prosecutor at the Nuremberg Tribunal ended his opening statement with the famous lines, “that four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.”63 These lines have become emblematic of the perception of Nuremberg as an exercise of willing, disinterested parties agreeing to submit to the rule of law and accept the judgment produced by it. The sentiment expressed by Jackson refuses to acknowledge the argument that Nuremberg only served to institutionalize and mask vengeance for political purposes. Jackson’s view, however, neglects the very real and difficult process by which Nuremberg was born, and in so doing fails to acknowledge some of the most effective aspects of Nuremberg as a response to a political crime. The compromises made to facilitate the trial provide much of the fodder for criticisms claiming that the IMT lacked legal value or legitimacy. However, those compromises were necessary for all the beneficial aspects of the tribunal, not just in the immediate, but also in the long-term future of the country of Germany, the future of international law and the inheritors of

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Nuremberg’s legacy. The tribunal’s long term effect on international law and international response to mass atrocity receives detailed analysis below.

2.3 The Charges

As stated earlier, the indictment of the tribunal included four charges: The common plan of conspiracy, crimes against the peace, war crimes and crimes against humanity. The Allies decided to divide the responsibility for the charges. The Americans prosecuted the first count of the common plan of conspiracy. The British prepared the charge of crimes against the peace. The Soviets prosecuted war crimes and crimes against humanity in the East and the French did the same for Western Europe. The delegation of the charges represented the priorities of the Allies. The Americans alone felt confident in the charge of conspiracy and the legal basis of the charge derived from American law. The charge of crimes against the peace dominated the American and British motivation for establishing the tribunal. The French and Soviets most wanted to impress the horrors of the Nazi regime on their countries. Unfortunately, since the delegations pursued charges that most affected their countries, crimes outside of those interests received little attention. The myopic approach of the Allies resulted in the disenchantment of a major victim group, which, as will be discussed in Chapter Four, spurred the Eichmann trial.

2.3.1 Conspiracy

U.S. Lieutenant Colonel Murray Bernays proposed the charge of conspiracy to handle both the thousands of arrested German officials and to provide a legal basis to
prosecute pre-war German crimes. The Bernays conspiracy plan meant that membership in an organization convicted on the charge was a crime in itself. Thus, for the lower German officials imprisoned, the only judicial question was whether they had belonged to an organization already declared criminal. Bernays’ exposure to conspiracy derived from his civilian experience with the Securities and Exchange Commission, however no parallel existed in Continental law or international law for organizational conspiracy. Stimson, Cordell Hull and James Forrestal adopted Bernays’ conception of conspiracy and presented it to the President. In a memorandum written by the three, they defended the need for the conspiracy by arguing, “…the criminality with which the Nazi leaders and groups are charged does not consist of scattered individual outrages such as may occur in any war but represent the results of a purposeful and systematic pattern created by them to the end of achieving world domination.” The Soviet and French delegation opposed the inclusion of conspiracy and aggressive war, but eventually relented.

To prove the charge of conspiracy the prosecution could present into evidence, “…the acts of any of the conspirators done in preparation for, in furtherance of, and in consummation of the conspiracy, regardless of the fact that, separately considered, certain of these acts could not be prosecuted as war crimes in the accepted and most limited definition of that term.” Jackson used a broad

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65 Ibid, 36.
66 Ibid. 36.
68 Telford Taylor, 80.
interpretation of the conspiracy charge in order to ensure American control over most of the trial.\textsuperscript{70} Since the American prosecution team presented first and the charter prohibited repetition in evidence, the other delegations had a narrowed purview.\textsuperscript{71} The American interpretation of their charge meant that, “Jackson could range freely over the entire case against the Nazi leaders; he encapsulated all the crimes of which they were accused. His theme to link them was one of premeditated, organized criminality, which, he argued, flowed intentionally into and from the greatest of all crimes- aggressive war.”\textsuperscript{72}

2.3.2 Aggressive War

The desire to “outlaw war” fueled much of the American insistence for the tribunal. In Jackson’s report to the President before the London Conference, he delineates the priorities of the United States: “our case against the major defendants is concerned with the Nazi master plan, not with the individual barbarities and perversions which occurred independently of any central plan. The groundwork of our case must be factually authentic and constitute a well-documented history of what we are convinced was a grand, concerted pattern to incite and commit aggressions and barbarities that have shocked the world.”\textsuperscript{73} The Americans presented as much of the aggressive war charge as the British, whose responsibility it was. One critic traced Nuremberg’s focus on aggressive war to the legalistic mindset demonstrated by the

\textsuperscript{70} Ann Tusa and John Tusa, 175.
\textsuperscript{71} Ibid, 176.
\textsuperscript{72} Telford Taylor, 151.
\textsuperscript{73} Robert H. Jackson, “Report to the President,” cited in Michael R. Marrus, 42.
powers. Shklar argued that because of the insistence to link Nuremberg to an established legal precedent,

…it becomes necessary to pretend that a legal system analogous to a well-established domestic order exists. In the case of three of the architects of Nuremberg that meant a system such as prevails in constitutional democracies. That was the first fiction. It lead to others, and to a greater concentration on charges which could be squeezed into the mold of municipal law (Such as waging aggressive war) than on novel but politically more important charges, like crimes against humanity.74

The architects of the Nuremberg trial viewed and presented the Nazi crimes against humanity as excesses of aggressive war. To them, the central focus and legacy of the trial was the prosecution of conspiracy to commit aggressive war. The many aggressive wars following the Nuremberg trial demonstrated that the trial failed to deter such aggression.75 In presentation of evidence and witnesses aggressive war overshadowed crimes against humanity, but in history the reverse has been true.

2.3.3 War Crimes and Crimes against Humanity

The charge of conventional war crimes faced the least amount of resistance. This charge best fulfilled the desire to claim that positive international law was the foundation for the Nuremberg Charter. The Hague Convention of 1907 had established and regulated, on an international level, the treatment of prisoners of war and the acceptable conduct of war. These crimes deeply affected the Allies themselves, whereas, the now infamous atrocities of the Nazi regime focused on the elimination of minority populations unrepresented by the trial. The crimes covered by

74 Judith Shklar, 146-147.
75 Mark Osiel, 226
the Hague Convention were those committed against Allied troops and prisoners of war. The more memorable aspect of both the French and Soviet presentations was the detailing of crimes against humanity.

The trial structurally excluded systematic investigation of the most heinous of the crimes against humanity, mainly those of the Holocaust. Article 6c of the charter allowed for prosecution of crimes against humanity based on, “…murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal…”76 Because of the purview established by the charter “the Holocaust [had to be weaved] into a larger story that was primarily about perverted militarism…This way of framing the story seemed to imply that the extermination of European Jewry had not been for the defendants a central end in itself, i.e., a central goal independent of its relation to aggressive war.”77 The mystification of the tribunal obscured the marginalization and failure of recognition at the trial. Since popular opinion viewed Nuremberg as a Holocaust trial, the failure of the tribunal to adequately address and reinstate the humanness of the Jewish population remained uncriticized and largely unnoticed. However, the de-emphasis on crimes against humanity occurred purposefully, and not through accidental omission.

Once the IMT was established, and the charges of war crimes and crimes against humanity were included, there remained resistance to prosecuting the crimes

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77 Mark Osiel, 96.
of the Holocaust. The dominant interest of the Allies was the punishment of crimes directly inflicted upon them, foremost, the waging of aggressive war. Robert Jackson’s opening speech echoed this emphasis, “this inquest represents the practical effort of four of the most mighty of nations with the support of 17 more, to utilize international law to meet the greatest menace of our times- aggressive war.”  

Roosevelt, and later Truman, agreed that aggressive war was not only the foremost crime, but also the worst. Although he did not make many overt statements about American priorities, “in a rare explicit statement on war criminals, Roosevelt had called for indicting the top Nazis for waging war. He mentioned aggression, not the Holocaust, atrocities against civilians, or war crimes.” Aggressive war most directly affected the Americans, the other crimes lacked such immediacy.

Stimson, the major force behind the creation of the Nuremberg tribunal, voiced objections to including crimes against humanity at all. He saw the charge as a particularly legally indefensible inclusion. His hesitation was a product of the conception of sovereignty of the time. Before World War II and the later creation of the United Nations, sovereignty meant a complete power to conduct national affairs without intervention from other countries. The conception of sovereignty as absolute within national borders was one reason the Americans objected so strongly to Article 227 of the Versailles Treaty. Stimson expressed his belief in national sovereignty when in one memo to the president he wrote, “I have great difficulty in finding any means whereby military commissions may try and convict those responsible for excesses committed within Germany both before and during the war which have no

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relation to the conduct of the war.”

Stimson almost certainly desired a tribunal that did not include the charge of crimes against humanity.

The doubts over the legality of prosecuting the Germans for crimes committed against their own citizens did not prevent contradictory notices of the intention to prosecute such crimes against humanity. On December 17, 1942, the American government released a report of eleven Allied nations and the French government in exile which noted, and condemned, the actions taken by Hitler’s regime in the process of the destruction of the Jewish population. The Twelve Nation Declaration on the “German Policy of Extermination of the Jewish Race,” included the commitment to, “…[e]nsure that those responsible for these crimes shall not escape retribution…”

The Allied reaction to the events of the Holocaust did not result from a lack of sympathy, as many comments from American and British leaders and officials indicates the concern and outrage at the extermination of the European Jews. The Allies were convinced that the best course of action was to stop Hitler. The hesitations to emphasize the crimes of the Holocaust at Nuremberg, stemmed from both concerns over precedence and sovereignty, and a larger prioritization of the crimes committed directly against the Allies.

Although there was an uncertainty to the inclusion, the four final charges included separate charges of both crimes against humanity and war crimes. Many of the war crimes also included the specific acts that are now associated with the

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80 Ibid, 175.
81 Ibid, 175.
82 Drexel Sprecher, 24.
83 Ibid, 28.
brutality of the Nazi regime and the events collectively known as the Holocaust.\textsuperscript{84} After the decision to split the charges, the French and Soviet prosecution teams, depending on the geographic location of the acts, assumed responsibility for crimes against humanity and war crimes. The Americas accepted the inclusion of crimes against humanity because of domestic pressure,\textsuperscript{85} but the willingness to cede responsibility for the charge to the mistrusted Soviets and the marginalized French teams indicated the limited concern of the Anglo-American prosecutions toward these two charges.

Jackson echoed the American priority toward aggressive war in his report at the conclusion of the meetings that produced the London Charter:

\begin{quote}
\ldots{}it [the London Charter] ‘ushers international law into a new era where it is in accord with the common sense of mankind that a war of deliberate and unprovoked attack deserves universal condemnation and its authors condign penalties.’ Jackson triumphantly ended his report on the conference by writing that ‘all who have shared in this work have been united and inspired in the belief that at long last the law is now unequivocal in classifying armed aggression as an international crime instead of a national right.’\ldots{} Amid all this effort on aggression, crimes against humanity got relatively short shrift.\textsuperscript{86}
\end{quote}

Jackson’s comments epitomized the attitude of the Americans and the British. The two teams were interested in setting an undeniable and strong precedent. The precedent they sought was not the one history remembers, however. Popular memory now considers Nuremberg as the first genocide trial. It is true that the indictment for the IMT was the first instance of charges of genocide.\textsuperscript{87} However, the American and British teams intended the message of Nuremberg to be a political one about

\textsuperscript{84} Ibid, 100-101
\textsuperscript{85} Gary Bass, 178-179.
\textsuperscript{86} Ibid, 177.
\textsuperscript{87} Drexel Sprecher, 101.
aggression and war; they thought the lasting legacy would be that justice could prevail over warmongers, not the establishment and beginning of genocide litigation.

2.4 The Legacies of Nuremberg

One of the most explicit and faithfully adhered to goals of Nuremberg was the desire to use trials as a method to combat collective guilt and to individualize responsibility. Before the trial, President Roosevelt made it clear that the insistence for an unconditional surrender did not equate to collective guilt, “…we and our Allies are entirely agreed that we shall not bargain with the Nazis conspirators, or leave them with a shred of control…we bring no charge against the German race, as such, for we cannot believe that God has eternally condemned any race of humanity…There is going to be stern punishment for all those in Germany directly responsible for this agony of mankind.” 88 The fundamental structure of a classical trial requires a specific identification of a defendant and a detailed indictment of a particular crime or crimes. Because of this identification, particular individuals face accountability for their acts instead of blaming a large, nonspecific group or society. Individualization of guilt partly aims to allow a society as a whole to move forward through separation from past acts.

The individualization of guilt is most important in societies where members of victim groups must coexist with members of perpetrator groups after ethnic or genocidal conflict. Post-war Germany did not face former enemies becoming neighbors. The one victim group that remained proximate to Germany was the Communists, but the partitioning of Berlin and Germany de facto separated West

88 Ibid, 25.
Germany from the Communists and placed East Germany under Soviet control. Many of the other victim groups, predominantly the Jews, left Germany for either Israel or the United States. However, despite the low incidence of cohabitation, Germany still needed to combat collective guilt. The reconstruction of Germany required that those guilty of war crimes be separated from the many Germans who were legally innocent or only guilty of following “orders” or “by-standing.” However, multiple forms of guilt applied to the German population. While trials addressed the criminal guilt of some, other social institutions were required to address the political, moral and metaphysical guilt of the population. 89 One of the major differences between the classical retributive trials of Germany and the Rwandan gacaca centers on the absence of an absolute distinction between all these types of guilt.

The trials after World War II helped form a new German national identity, “they evoked and articulated pervasive sentiments of indignation and reprobation, in a way that criminal prosecutions can do with particular efficacy. Through this experience…‘Germans constructed a new identity based on a fresh start [and] a clean break with the past…They forged a new…identity based on a rejection of Nazism.’” 90

Germany’s reconstruction was also a priority for the American and British Allies. Relations with the Soviet Union quickly deteriorated and a reconstructed Germany provided a well-positioned ally against Communism. The approaching ideological conflict with the USSR placed pressure on the Americans and British to work closely with the government that would become West Germany. 91 In order to

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90 Mark Osiel, 193.
91 Telford Taylor, 640.
make this political alliance, the Americans and British needed to work with people without appearing to work with the “enemy.” In order to validate the West German government and businesses, the Allies needed to dispel the idea that all Germans were guilty. The best way to keep all Germans from blame was singling out and proving particular individuals responsible for the war and atrocities.

The trial at Nuremberg provided an ideal forum to select specific people and organizations to blame for the crimes of the war. The extensive documentation of the Nazi regime allowed the prosecution, with the aid of the loosened evidentiary rules,\(^\text{92}\) to connect the defendants to many of the crimes that concerned the Allies most, namely, aggression and war crimes. The goal of combating collective guilt added importance to the selection of defendants.

The prosecutions’ trial preparation operated on a very constrained timeline. The defense had even less time for preparation. The selection of defendants was one of the first and most hurried parts of the pre-trial preparation. The prosecution needed to select defendants that would represent the varied aspects of the Third Reich: the army, navy, industry and labor, the Nazi party, SS and propaganda.\(^\text{93}\) The selection of the defendants and government organizations hinged on the premise of choosing individuals representative of the many facets of the Nazi regime.\(^\text{94}\) The consequence of any selection is that choosing these particular defendants excludes other members of the government who were equally involved in equally destructive operations. The


\(^{94}\) Ann Tusa and John Tusa, 92-93.
omission of these countless war criminals implies that they were not seen as “major.” However, the selection criteria, representativeness, meant that the defendants’ selection centered on comprehensiveness, not on heinousness. The same particular identification of individuals that combats collective guilt has this same effect. It also highlights the partiality of the trial. Nuremberg minimized the politicization of selection because the Nazis on trial, “the man-in-the-street would have known of them and labeled them as criminals long since.”\textsuperscript{95} The Tokyo Tribunal, analyzed below, displays the dangers of representative selection that Nuremberg avoided because of the well-known status of the Nazi leaders.

The selection challenge for Nuremberg did not end at defendants; the trial also had to choose the judges to preside over the tribunal. The judges came from the countries of the victorious allies: The United States, Great Britain, The Soviet Union and France. Each country selected one presiding judge and an alternate. The choice of justices from the aggrieved nations severely compromised the appearance of fairness. The prosecution was already comprised of lawyers from the victors. In a trial, a judge maintains the parity and orderliness of a courtroom. However, justices of an invested nation may not be impartial, and at the very least generate the perception of being biased. The use of judges and prosecutors from victorious nations and the specious nature of the legal basis combined to create the strong impression that Nuremberg was revenge dressed up as a trial.

The perception of the trial as victors’ justice is particularly harmful to the aims of the Tribunal. Although retributive justice is, ostensibly, the sole aim of a trial like Nuremberg, the choice of trials as the Allied response included ideological,\textsuperscript{95} Ibid, 92.
political and social motivations. The political objectives advanced by the tribunal were discussed above when the emphasis on crimes against peace was analyzed. Each of the Allies wanted the IMT to exemplify their particular political interests. The French and Soviet delegations wanted to expose the war crimes of the Nazi regime, since, as indicated earlier, both countries suffered terrible losses during the war. Additionally, France faced the added harm of Nazi occupation and the installation of a collaborator regime. Brutality characterized the Soviet-German war; both sides fought a war of extermination.

The Americans wanted to prove legally that the Nazi war was aggressive and thus to vindicate their actions before an official declaration of war. The Americans also had strong ideological interests: they wanted to convey a sense of rationality and control, a demonstration of the democratic ideals they espoused for Germany. The British were the most hesitant, wanting strict and swift justice, but anxious about corruption to the rule of law by having that justice meted out in a trial of unclear legality. The use of the trial as a political tool for all the Allies is one of the most important features, historically and politically, of the IMT.

The politicization of the trial was two-fold; it was both a political tool and created via political means. The London Charter was not a judicial document. Rather, the London Charter emerged from a conference of political representatives. Although some of those present at the conference played important roles in the subsequent trial, they convened in London as political emissaries of their governments’ interests, not

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96 Telford Taylor, 83
97 Ibid, 293.
98 Ibid, 308.
99 Ann Tusa and John Tusa, 63.
as disinterested legal scholars. One observer traced the success of negotiating with the Soviets after so many other failed negotiations to the agreement on the political end of the conference.\footnote{Sidney Alderman, “On Negotiating with the Russians,” cited in Michael R. Marrus, 49-51.} Indeed, the involvement of one of the later judges, Major-General Iona Nikitchenko, at the London conference casts serious doubts on his impartiality in adjudicating the trial, especially in perspective of some of his comments at the conference. Jackson recorded him as saying, “We are dealing here with the chief war criminals who have already been convicted and whose conviction has been already announced by both the Moscow and Crimea declarations…”\footnote{Richard Minear, 18.} It is unlikely that as a judge he would have been able to shed such entrenched beliefs about the guilt of the defendants.

The crimes of the indictment forfeited their universal nature given the political compromise producing the charter for the trial. The Soviets committed similar war crimes that they accused the Nazis of at the trial. The Soviet delegation pressured for the inclusion of the Katyn massacre among the war crimes committed by the Nazis. However, this particular act resulted from a direct Soviet command.\footnote{Telford Taylor, 640.} The French collaborators of the Vichy regime were ineligible for trial at Nuremberg and the charter excluded the fire bombings of Dresden and other acts committed by the Allies. The London Charter narrowed the scope of the trial exclusively to crimes committed by the Axis.\footnote{“Charter of the International Military Tribunal,” cited in Michael R. Marrus, 51-55.} Thus, the trial was structurally flawed; it disadvantaged the defense’s ability to argue \textit{tu-quoque}, the claim that both sides committed the same offense and thus the prosecution lacks “clean hands” to indict the defendants.
Although *tu-quoque* is not a recognized legal defense generally, the ability to argue it is crucial to arguing other aspects of a defense such as the offensive or defensive nature of some acts.

The defense suffered from the charter’s structural narrowing, but they also had significantly less access to evidence, fewer resources and inadequate time to prepare a case.¹⁰⁴ Trials are symbols of equal justice and that symbolism is part of their power and thus value as a response to mass atrocity. The obviously biased prosecution seriously damaged that power. The inequity of the trial undermined the procedural legitimacy and popular respect. For a crime to be a crime, it must be a crime for whomever commits it and proven against a defense free to argue and to prepare equally.

In terms of procedural fairness, Nuremberg did not fully accomplish its goal. The charter itself, and thus the structure of the tribunal, contain illiberal components. Article 19 states, “the Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence it deems to have probative value.”¹⁰⁵

Despite the often-repeated objections and criticisms toward the legitimacy and structure of the trial, there are positive aspects of the politicization. The combined interests of the Allies produced a deep investment in the success of the trial. Additionally, many of the criticisms of the trial take as granted the ability to have an impartial trial. Trials, however, are no different from other social phenomenon insomuch as they are socially constructed, and the views of fairness are thus partially

¹⁰⁴ Hannah Arendt, 221.
contingent. The compromises reached at London between the Anglo-American legal
tradition and the Continental tradition display the malleable nature of trial.

However, there is a distinction between the argument that trials are grounded
in a particular social context, and that justice and morality are wholly relative. Instead, trials themselves are tools; they maintain and help construct a new social
order. Since they are always in a state of flux with other relevant values, the
politicization of the Nuremberg Tribunal may provide an extreme example of this.
Recognizing this nature means that the Nuremberg trial, as a political trial, should not
lose all credibility once the politicization is noted. Instead, evaluations of Nuremberg
should also include evaluations of the historical context, the particular politics and the
objectives advanced by the trial. Integrated evaluation removes the ability to say that
Nuremberg was good, but not just. Justice may include aspects of political
expediency that the legalistic attitude is unwilling to admit.

The political investment of the Allies transforms the pursuits of the trial. The
fundamental basis of a retributive trial is that a wrong committed must be repaired.
Implicit in that basis is the notion of a victim or victim-group. The interests of the
Allies shifted the purview of the trial away from viewing Jews, Gypsies, Poles,
Communists and other groups targeted for extermination as the major victim groups.
Instead, the emphasis on war crimes and aggressive war, the curtailing by the
prosecution of crimes against humanity and the goals of the controlling powers, made
the Allies the focus of victimhood. It is undeniable that the verdict demonstrated
sensitivity to the atrocities of the Nazi ideology of racial purity. Julius Streicher,
convicted solely on count four, crimes against humanity for his vitriolic anti-
Semitism, received the death penalty. The other defendant convicted solely on count four, Baldur von Schirach, received only 20 years imprisonment.

Just as identification of specific defendants minimized the role of other war criminals, the identification of the Allies as the primary victims of the war necessarily displaced the crimes against the various ethnic groups persecuted by the Nazis. The displacement of these victim groups was a serious moral failing of the tribunal. The focus on only victors and nationals of victorious powers equated to a moral wrong against the victims of the Nazi genocide. Trials are a form of recognition, a forum for restoring a person’s dignity through investigation, accountability and possible punishment. The IMT denied the Jews this recognition, and because of the magnitude of the omission, committed a serious moral wrong. The politicized nature of the trial added the burden of representation contained in political acts. The deserved representation of the groups targeted for destruction was denied by the oversight. The architects of Nuremberg did not purposefully or maliciously refuse to recognize Jews and others, but it was a result of focusing on wrongs committed against the Allies. The moral failings of the Nuremberg trial reemerged in 1961 when Israel tried Adolf Eichmann and created a worldwide production to gain the recognition denied to them in 1945.

The legitimacy of the trial decreases in view of the absence of such recognition. The modern vision of Nuremberg is that of a genocide trial. The memory of Nuremberg prosecuting the Nazi leaders for the concentration camps and racial purity doctrines underlies the positive evaluation of the trial. To demystify the trial and to understand its focus on crimes against the peace removes the positive
counterbalance to the criticisms over legality and procedural failings. The Eichmann trial, discussed in a later chapter, illustrates the failings of Nuremberg in this respect and the claims of injustice leveled at Eichmann should also apply to the omissions of Nuremberg.

The importance of recognition extends to the population of Germany as well. The role of humanization before the law described above functions for those accused of crimes as well. Accountability for acts is an aspect of respecting an individual as an independent and free being. Respect relates intimately to recognition; both require an acceptance of common humanness and reciprocity in action. Criminal prosecution of individuals demonstrates respect through acknowledging that the person on trial acts as an independent being and thus deserves accountability for his actions. The concept of retributive justice, and its inclusion of respect for perpetrators, is strongly Western European and American. The use of such a system in response to the crimes of Germans evoked a respect from the German people, whether or not intentionally planned. Despite slight compromises between the two major legal traditions represented, the concept underlying the trial remained recognizable and intelligible to the German populace, a major intended audience for the lessons of the trials. The German population expressed interest in the trials and positive feelings toward them, additionally, “…only from the Nuremberg trial did a substantial majority of Germans learn about the existence of death camps. Nearly a quarter of Germans became aware of the extermination camps of the Jews in this way.”106 Insofar as the trial “‘reinforced dormant legal consciousness’ among the German people,”107 it

106 Mark Osiel, 191-192.
107 Ibid, 66.
succeeded in a major political aim and such success is one reason to value the trial in its demystified form.

The Americans had partially insisted on trials as a form of education for Germans about the crimes of the German government. The educative impact of the trials takes the form of the acquired knowledge of the camps gained from the trials. Additionally, countries without post-World War II trials are the nations with the lowest Holocaust awareness in Western Europe. The American and British also hoped that Nuremberg would inspire the German government to undergo their own successor trials. The German government did continue the judicial response, although it, and the rest of the de-Nazification measures, soon halted or slowed due to the approaching Cold War. The war crimes trials reoccurred when political pressure presented itself. In 1961, in anticipation of the Adolf Eichmann trial, the Germans renewed their efforts of prosecuting war criminals in order to avoid the political fallout of appearing complicit. The acceptance of trials as a response to the Nazi regime illustrates the power of employing systems with resonance, based on recognition of the particular cultural aspects and perspectives of the targeted population.

Before Nuremberg, response to war pivoted on executive action, summary executions or purges. These responses were openly vengeful. After Nuremberg, trials were the default response to numerous mass atrocities. Regardless of accuracy, Nuremberg is remembered as a victory of rationality and restraint over an irrational and uncontrolled fascism. In addition to symbolizing a success of structures, it evokes

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108 Ibid, 229.
109 Telford Taylor, 640.
110 Hannah Arendt, 16-17.
thoughts of vindication for the Holocaust. The Nuremberg trial in many ways began the rapid development of international criminal law. Despite the de-emphasis on the charge of crimes against humanity, the “outlawing” of mass atrocity is the longest lasting and most significant legal legacy of Nuremberg. Until recently, the most important legal legacy remained undecided; the architects intended to outlaw war, which the proxy wars of the Cold War obviously decimated. The establishment of the International Criminal Tribunals for Yugoslavia and Rwanda shifted the focus of Nuremberg’s legal legacy away from the intentions of the architects and toward the popular understanding of the IMT as a Holocaust trial.
Chapter 3: The International Military Tribunal for the Far East

3.1 Structure

The International Military Tribunal at Nuremberg was not the only judicial response undertaken in the aftermath of World War II. The Allies also established the International Military Tribunal for the Far East in Tokyo. The Tokyo Tribunal appears to be an afterthought to Nuremberg, but remains particularly revealing about the judicial responses to World War II. Nuremberg evaded or minimized many of the latent procedural failings and most damaging potentials of international tribunals. It avoided these failings partially because the Nazi regime extensively documented their activities and exhibited clear structures of command. Additionally, whether the German attacks in Europe were criminal or not, unique or not, they attacked, without provocation, numerous European countries and explicitly intended to wage an unprecedented war. In addition, the atrocities they committed horrified the entire world. Japan, and the leaders representing Japan at the tribunal, however, disputed that they began the war. The rhetoric of the Japanese leaders during the war years reflected the belief that it was a war against Western aggression and imperialism. However, the tribunal and verdict choose not to address the defense of the Japanese leaders, choosing instead to follow its own agenda without reflection.

One of the most serious failings of the tribunal was the inability or unwillingness to address the issues of Western-centricism and imperialism. The insistence of the architects of the tribunal on Anglo-American judicial procedure exemplified the cultural insensitivity. The occasional deference to universal or “natural law” to justify the actions of the victors’ further aggravated the perception
that the tribunal advanced a solely Western agenda. The Western-centricism of the trial was not simply a failing in justice, but also demonstrated a lack of recognition on the part of the Allies towards the Japanese. In order to provide proper recognition, the trial needed to acknowledge and address itself to the Japanese; both to the perpetrators and the population who needed such recognition to trust the fairness of the judgment. Without recognition from the institution, the Japanese people did not feel invested in the process. As a result, they were not responsive to the messages of the trial in the way that justice and morality necessitates. Tokyo provides insight into some of the insidious potentials that Nuremberg had not revealed; it also indicates some of the more salient features of judicial responses when exported to other non-western nations. The pervasive ignorance towards the Tokyo Tribunal may partially account for the ability to romanticize Nuremberg.

3.1.1 Similarities to Nuremberg

The International Military Tribunal for the Far East derived legitimacy primarily from the London Charter. Throughout the war, the dominant concern of the Allies was the German threat on the European continent. It was after VE day that the Allies turned their attention towards the Pacific Front and announced the plan to prosecute Japanese war criminals as they had declared about the Germans months earlier.\textsuperscript{111} The Potsdam Declaration announced the intentions of the Allies toward Japanese war criminals. That same document expressed some of the dominant aims of the tribunal, as point 10 stated, “we do not intend that the Japanese shall be enslaved

as a race or destroyed as a nation, but stern justice shall be meted out to all war
criminals, including those who have visited cruelties upon our prisoners.”

The Tokyo Tribunal shared the desire to combat collective guilt with Nuremberg. Other
aspects of the declaration reinforced the commitment to this goal, point 6 argues,
“there must be eliminated for all time the authority and influence of those who have
deceived and misled the people of Japan into embarking on world conquest.”

Tokyo Tribunal’s dependence on Nuremberg appeared first in the Potsdam
Declaration of intent and continued into the actual Tokyo Charter. Nuremberg had
been a controversial and complicated suggestion, requiring the London Conference,
filled with many conflicts and compromises. The Tokyo Charter, drafted by the
Americans, simply adopted most of the provisions negotiated at London. The
predominance of the Americans extended to the proceedings as well as the charter
and organization of the tribunal. The source of Allied agreement and the tribunal’s
claims of legitimacy stemmed from how closely the American-produced charter,
exercised by the decree of the Supreme Commander General Douglas Macarthur,
followed the London Charter and the precedent set by Nuremberg.

One of the procedures adopted from Nuremberg was the relaxation of rules of
evidence, a serious procedural issue in Germany. Article 13 of the Tokyo Charter
read, “the tribunal shall not be bound by technical rules of evidence. It shall adopt
and apply to the greatest possible extent expeditious and non-technical procedure, and

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112 Alexandr E. Lounév, “Legal Aspects of the Activities of the International Military Tribunal for the
113 Ibid, 33.
shall admit any evidence which it deems to have probative value.”¹¹⁵ Article 13 is identical to Article 19 of the London Charter. The relaxation of evidentiary rules included allowing the prosecution to admit press releases while the defense press releases remained inadmissible. In addition, the prosecution admitted evidence that the defense was unable to challenge such as conversations with individuals deceased or not present.¹¹⁶ The 1961 Israeli trial of Adolf Eichmann, discussed in more detail in the next chapter, also featured the abuse of relaxed rules of evidence in similar ways. The intention of such relaxations was the empowerment of judicial procedures to act as capable responses to the crimes of World War II. These accommodations indicated the architects’ acceptance that trial procedure made tribunals an unwieldy tool in complex situations. But the abuses of these relaxations, especially at Tokyo, illustrates the danger of lessening procedural rules intended to ensure fair and just trials.

The Eichmann trial shared another similarity with both IMTs. All three sought to use trials as an educative tool. The aim of revealing the criminal acts of the Nazi and Japanese governments was paramount to why the Allies chose trials over executive action (summary executions). The goal of documenting and revealing the criminal acts was both implicit at Tokyo through the reliance on Nuremberg and directly stated. In the opening statement of Chief Prosecutor Joseph Keenan, he argued, “…in this very courtroom will be made manifest to the Japanese people themselves the elements of a fair trial which, we daresay, perhaps they might not have

¹¹⁵ Ibid, 118.
¹¹⁶ Ibid, 120.
enjoyed in the fullness- in all their past history.” The arrogance of this statement is obvious, but the prosecution clearly hoped that the trial would serve as a model to educate the Japanese observers. The hypocrisy is also undeniable, had the Japanese based subsequent trials on the Tokyo Tribunal, there would be serious systemic flaws in the resulting judicial establishment. Keenan retained his faith in what the trial accomplished after its completion as well as its pedagogical value toward teaching the Japanese people what they did, he stated, “I think that the foremost service they [the IMTs] rendered was to establish the facts authentically, particularly with the Japanese people.” Trials necessitate an accumulation of documentary evidence, making them particularly good tools of preservation. But when bias and political motives taint the selection of evidence, the resulting history is of a particularly pernicious character.

Another major similarity between the two IMTs was the desire to vindicate Allied policy during the war. At Nuremberg, this appeared in the form of insisting and emphasizing the aggressive nature of Germany, in order to justify the American policy of Lend-Lease and aid to the British. At Tokyo, the tribunal excluded the atomic bombings of Hiroshima and Nagasaki; this omission severely discredited the legitimacy of the trials in the eyes of the Japanese citizenry, but also allowed the United States to focus on its own victimhood at Pearl Harbor. The Americans may have been content with simply prosecuting the attack on Pearl Harbor. However, such a limited indictment would generate the perception of injustice when compared to the

117 Ibid, 74.
118 Ibid, 126.
120 Mark Osiel, 181.
Nuremberg defendants facing charges of conspiracy and crimes against the peace; thus forcing the Americans, to save face, to expand the purview of the trial.  

3.1.2 Differences from Nuremberg

Despite the many similarities and the use of Nuremberg as a model, there were some significant differences between the two tribunals. The differences reflected many of the particularities of the Pacific Theater of World War II. The United States dominated and controlled the Tokyo Tribunal, it involved more countries and the differences between the American and Japanese cultures produced major barriers to “fair” trials. The insistence on structuring the trials in such a similar way to Nuremberg despite major social, political and cultural differences, was one of the greatest failings of Tokyo, demonstrating the limitations of treating trials based in a particular cultural context as “universal.”

The selection of justices and prosecutors deeply influenced the legal tradition displayed by the tribunal. Like Nuremberg, the judges were nationals of the victor countries, as were the prosecutors. However, unlike Nuremberg, there were eleven countries involved: the United States, Great Britain, Canada, India, Australia, New Zealand, the Philippines, China (Nationalist), France, the Netherlands, and the USSR. At the creation of the tribunal, neither the Philippines nor India were independent countries but were added for political reasons. The United States Supreme Commander selected the justices, whereas at Nuremberg each nation had chosen its own representatives, both judicial and prosecutorial. Many of the justices were

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unqualified or poor choices: the Pilipino justice was a survivor of the Bataan death march (one of the crimes on trial), the Chinese justice was not a judge, and the Russian justice did not speak Japanese or English. The Australian justice, who also served as the President of the tribunal, had been a member of a commission on the Japanese war crimes in Australia. Additionally, the provision for absence and the low threshold for quorum lead to long departures on the part of the judges and facilitated manipulation by likeminded judges. The structures and allowances of voting at Tokyo were significantly more lax than in Germany. Nuremberg required all of the four justices to convene the trial and three of the four to make a decision. At Tokyo, only six of the justices had to be present to convene, and a decision required only a majority of those present.122

The selection of the justices led to accusations of national bias. The justices at Nuremberg faced the same accusations, but the conduct of the Nuremberg judges did much to their credit. The behavior of the Tokyo justices only compounded the idea that the tribunal was victors’ justice. Tokyo Tribunal President Webb abused the defense and created a prejudicial attitude toward the defendants.123 Contrast this impression with the one conveyed by the Nuremberg President, Sir Geoffrey Lawrence who was, “…a typical representative of the English judicial tradition, dignified, poised, courteous, certain of the manner in which the trial should be conducted. Justice must be done, but also must be seen to be done.”124

The justices are a crucial component in demonstrating a trial is fair and just. The Nuremberg Tribunal gained historical credibility when three defendants received

122 Richard Minear, 87-88.
123 Ibid, 83.
124 Tokyo Symposium, 16-17.
acquittals, and many avoided the death penalty. The insistence of the Nuremberg justices on a procedurally just trial, and their critical attitude toward the prosecution, supported the claim by many that even if the trial was not perfect it was not simply a Vishinsky trial. At Tokyo, however, the justices aggravated and contributed to the criticisms against the trial. Rather than allow their behavior to support and further the goals of a judicial response, they often harmed it. In comparing the two IMTs, “…the impression is inescapable that the Nuremberg judges assumed an attitude of greater independence from the prosecutors as well as from the states they represented.”

A defense of the selection of the judges from the aggrieved nations was given by one of the dissenting justices, Justice Bernard, argued that the decision of the Allies to try the Japanese at all was sufficient proof of goodwill and provided the ability for the defendants to articulate their story.

Despite the fact that the vast majority of observers, both contemporaries to the trial and since, have dismissed the trial as a fiasco and show trial, lacking in procedural fairness and due process, the justices at the time were confident in the verdict. However, the fact that, “…the flagrant procedural flaws of the trial affected the judgment of only two justices. And only one justice seriously contested the tribunal’s version of recent Japanese history…raises serious questions about the tribunal’s impartiality,” and fuels the accusations that justices from victor nations have the potential to be fair, but are more likely to further their nations’ interests. An American defense lawyer predicted the probable historical verdict when he argued that, “…under the circumstances of this trial both in the present day and in history,

125 Ibid, 17.
126 Richard Minear, 78-79.
127 Ibid, 80.
[it] will never be free from substantial doubt as to its legality, fairness, and impartiality.”128

The nationality of the justices was not the only thing that distanced them from the Japanese populace and defendants. Six of the eleven justices (a majority even with the full court present) practiced in the Anglo-American tradition; in fact, five justices were from the British Commonwealth. The Tokyo Tribunal moved even further into the Anglo-American tradition because of the shared legal experience of a majority of the justices. The increased presence of Anglo-American legal concepts through the judges, compounded the Tokyo Charter’s dependence on the London Charter.129 Reliance on Anglo-American legal procedure had produced some difficulty in Germany where it conflicted with the Continental legal tradition. However, at Nuremberg all five countries party to the trial were able to adapt, and there were compromises between the Allies at London. Tokyo did not have an independent opportunity to negotiate any legal difficulties. Additionally, at Nuremberg each country had an equal prosecution team, but at Tokyo, there was a single Chief Prosecutor, the American Joseph Keenan, who operated in Anglo-American fashion.130

Japanese legal tradition was completely incompatible with Anglo-American tradition. The inability of the Japanese defense council to defend adequately their clients forced the tribunal to provide American lawyers for defense council to assist with the understanding of the procedure.131 Some of the most scathing criticisms of

128 Ibid, 77.
129 Tokyo Symposium, 19.
130 Yves Beigbeder, 57.
131 Tokyo Symposium, 19.
the trial and its lack of parity came from the American lawyers who had increased awareness of the extent of the procedural flaws they were facing. In the appeal sent by the American defense council to the Supreme Commander they argued,

…the verdict is not that of the tribunal, but of a clique of it…It is known that death sentences were imposed by vote of six to five in some cases, of seven to four in others, but in no case by vote of more than seven judges. The law of most of the civilized world requires unanimity for imposing a sentence of death, and usually for conviction of a crime; we Americans would consider it an outrage that six or seven men out of eleven should convict and sentence to death, and the community of civilized nations must regard it as an outrage here.\textsuperscript{132}

The Supreme Commander dismissed these arguments and endorsed the sentences of the tribunal without modification. Historically, the above declaration signifies a serious challenge, citizens of the trial’s dominant power identified the proceedings as biased, unfair, unrepresentative of their legal tradition, and unworthy of the claim to universality and “civility,” that had been used to justify the trial.

3.2 Selection criteria as a political exercise

Selection of justices, prosecutors and legal concepts from the victorious nations allowed an increased expression of particular political interests. But those political interests manifested in a multitude of ways. The selection of defendants, including the omission of the Emperor, hinged on predominantly political, not judicial grounds.

One of the major flaws of the Tokyo Tribunal demonstrated both the underlying political motivations of the tribunal and the American dominance. The Tribunal decided not to try Emperor Hirohito. The Russians protested the omission

\textsuperscript{132} Richard Minear, 90-91.
and insisted the indictment should include the Emperor. However, the Americans worried that prosecuting Hirohito would destabilize Japan, harm the potential of a successful transition into a constitutional monarchy, and discredit the trials of other Japanese leaders through a backlash against all trials. As prudent and defensible as this choice may be, the only rationale is political self-interest. The exclusion of the Emperor was the epitome of the United States manipulating a procedure they claimed represented the judgment of the “civilized world,” and it was a judicially indefensible idea.

Under the Meiji Constitution, the Emperor bore complete legal responsibility for the acts of his state; the legal case against him was stronger than against some of the lower officials tried at Tokyo. As it was, the United States, and thus the tribunal as a whole, went to great efforts not only to omit the Emperor but also to ensure that his name was untarnished throughout the procedure. Since he was the leader of the country that allegedly waged aggressive war, this forced political exception is an obvious injustice. Moreover, it was bad prosecutorial strategy; the exclusion of the Emperor provided the sole ground on which President Webb dissented from imposing any death sentences. This omission also aggravated the image that the trial was producing “poor history.” Perhaps the most important impact of the absence of the Emperor was the effect it had on the population’s perception of their own responsibility, “…to exclude the Emperor from criminal liability was also implicitly

133 Yves Beigbeder, 56.
134 Ibid, 57.
135 Mark Osiel, 221.
137 Richard Minear, 113-114.
138 Mark Osiel, 139.
to exclude the Japanese people at large from moral responsibility.”\textsuperscript{139} The American agenda undermined a major goal of trials, holding those responsible accountable. As a result, it produced a collective innocence that removed the onus to continue the judicial project.

Once the decision to exclude the Emperor was final, the Allies still needed to choose which other defendants would stand trial. Unlike Nuremberg, there were no organizations prosecuted. Therefore, it was solely the selection of specific individuals to stand trial for the accused crimes. Like Nuremberg, the prosecution wanted to select a spectrum of different types of individuals in order to set an example for the many other similar officials that may be probable defendants in other successor trials.

Despite the desire to preserve diversity among defendants, the prosecution did not select an industrialist or businessman. Nuremberg had indicted an architect and a banker among other non-military or political defendants. Tokyo, however, despite the importance of Japanese industry in the war, did not indict a representative of the business community. A prosecution lawyer admitted after the tribunal that the reason for excluding a member of the economic sector was that an acquittal of such a person would, “…be taken as a blanket condonation of the actions of the Japanese business community.”\textsuperscript{140} Another reason the prosecution would not want to place the business community on trial, was that such investigation might have adversely affected the productivity of the country’s industry, infringing on reconstruction plans and industrial supply in the Cold War. The decision not to indict a member of the business community demonstrates the prosecution’s unwillingness to pursue someone who had

\textsuperscript{139} Ibid, 183.
\textsuperscript{140} Richard Minear, 37.
any chance at exoneration. Another prosecutor said that for an individual to be indicted by the tribunal, “…the evidence against him was so strong as to render negligible the chances of acquittal.”\textsuperscript{141}

One of the few procedural criteria for selection was that all defendants before the tribunal faced the charge of crimes against the peace.\textsuperscript{142} This restriction demonstrates that Tokyo, like Nuremberg, focused primarily on the prosecution of “aggressive war,” not on crimes against humanity or conventional war crimes. The emphasis on crimes against the peace was another aspect and implication of the attempt of the Allies to use the trial to vindicate their own wartime policies. A consequence of the baseline requirement, however, is that the fact that the defendants were “[sic] major, dwarfed the actual level of suspicion or allegation against them.”\textsuperscript{143}

The inclusions of some of the defendants came at the insistence of the Soviets, most notably the inclusion of Shigemitsu Mamoru, who received the lightest sentence and played a minor role in the war. This kind of inclusion resulted from the desire to express not a judicial principle, since that, according to the prosecution would have had to be universal, but this accommodated the political interests of an ally. In Keenan’s own word about the preparation of the indictment, he found that, “…where the prosecution is composed of eleven great peoples each having its national interests and policies to consider…It is necessary to express the views of each nation…”\textsuperscript{144}

The views he is referring to are not views of justice or procedure, but of policy and

\textsuperscript{141} Ibid, 103.
\textsuperscript{142} Ibid, 21.
\textsuperscript{144} Richard Minear, 109.
position. The damage such political decision-making inflicted on justice is undeniable; the lack of domestic prosecutions after the Tokyo Tribunal is attributable to the emphasis on aggressive war and the Western-centric insistence that the tribunal represented “natural law,” instead of their own partial and culturally determined view of law.145

3.3 Power over historical purview

Defendant selection was not the only scope over which the prosecution exercised crucial control. They recognized the importance of the period under examination in the trial. The prosecutorial emphasis on aggressive war discussed above, required Pearl Harbor to be the instigating incident of the conflict. Japan wanted to expand the time under examination to include American policies such as Lend-Lease and the oil blockade, and to argue that the war they were fighting was not aggressive, but liberating. They saw the war as extending back to the Western colonial expansion in the Pacific.146 The colonial dimension of the war and the trial will receive closer analysis below. The prosecution also excluded the atomic bombings of Hiroshima and Nagasaki, which, as discussed earlier, allowed them to focus on Western victimhood and to avoid arguments of their own human rights violations. The arguments over the starting point of the war and the historical timeline are crucial to understanding the extent to which the American-dominated prosecution created a trial that simply talked past the Japanese. Instead of engaging the implications of Allied policy and colonialism, the tribunal and prosecution insisted on

145 Mark Osiel, 183.
146 Ibid, 133.
the narrower historical scope. The combination of the omission of the Emperor and the obviously self-serving time constraints, created a version of history that Japan rejected, and most Western scholars did as well. The version of history constructed by the tribunal acquired the derisive name of as the “Tokyo Trial version of history.”  

The control exerted over the timeline was not merely a simple function of the Allies serving as prosecutors and their selection of evidence. The narrowing of the historical purview was an act of power, made possible only because of their position as victors. 148 The omission of Allied crimes had a similar delegitimizing effect as discussed in an earlier section about Nuremberg. The difference in Tokyo was one of magnitude. The German atrocities revealed at the time of Nuremberg, such as the concentration camps and the gas chambers, overshadowed the acts of the Allies in Germany, like the Soviet massacres and the Dresden fire bombings. In Tokyo, there was a reversal of the differential of scale. The Americans purposely used fire bombings in wooden cities and they alone used atomic weaponry. There is no question, however, that the Japanese were responsible for serious crimes against humanity. The Japanese had committed atrocities in many of the nations they occupied; the best-known example is the rape of Nanking. 149 Despite the knowledge of these crimes, the tribunal largely overlooked them. It is likely the omission of crimes committed in China, the Philippines and Manchuria was not purposeful like the omission of Allied crimes. Rather, the oversight is a further indication of the lack of recognition given to colonized and Asian peoples by the Allies. The nationals of various Pacific nations were not members of the victorious powers, thus a trial

147 Ibid, 139.
148 Ibid, 245.
149 Howard Ball, 67.
directed at the vindication of the Allies was unable to provide a space for prosecuting the crimes committed against Pacific peoples.150

3.4 Tokyo's impact on the Legacies of Nuremberg

The Tokyo Charter, with its dependence on the London Charter, was an “importation” of the Nuremberg Principles to the tribunal for the Far East, despite serious and fundamental differences in both the Pacific war and the legal culture of Japan. The London Conference was the location of many compromises between the Allies, many of which arguably corrupted the judicial form through political decision-making. However, some necessary compromises pursued in London and devoid of political interest, were the ways to harmonize the Anglo-American and Continental legal traditions. The differences between the two systems are important but relatively subtle. The system used at Nuremberg, though Anglo-American dominant, was a reasonable compromise that did not sacrifice a substantial measure of justice. When transported to Tokyo, the compromises made in legal procedure did not equate into an equitable system for the Japanese or the non-Western justices. The lack of an independent conference for the Tokyo Charter did not make it any less politicized, and the absence of compromises with the other Allies allowed the Americans to dominate, in addition to creating structural inequality for the defendants. As discussed above, the prosecution provided American defense lawyers to accommodate the lack of familiarity of the Japanese lawyers with Anglo-American law. The stopgap solution of U.S. lawyers, rather than a reevaluation of the legal code utilized by the

tribunal, demonstrates the refusal of the Allies to address, not only the Japanese, but also the Eastern countries more generally, as equals.

The Western-centricism was not limited to the structural inequity implicit in the Tokyo Charter; the numerous references to “natural law,” and the “judgment of civilization” compounded the feeling that the tribunal condescended to the Japanese people. But the law of nature, when used by Chief Prosecutor Keenan was really just a,

…foreign ideology, serving his nation’s interests, to a group of people who neither knew nor cared about this doctrine. The assumption of universal agreement served here merely to impose dogmatically an ethnocentric vision of international order. It was the claim that these universal rules were ‘there’ – the assumption of general agreement, which was so contrary to the cultural realities of the situation – that made the application of natural law seem both arbitrary and hypocritical under these circumstances.\textsuperscript{151}

The references to natural law illustrate the ignorance of the Allies to their own position as culturally situated actors. The bias of the tribunal toward both Anglo-American politics and law was obvious to the Japanese. But the insistence that the tribunal served as a judgment for “civilization,” highlighted the partial nature of the proceedings and the fact that the Allies were not prosecuted for their crimes.

The structure of the trial and the rhetoric of universality resulted from an underlying lack of recognition on the part of the Allies toward the Japanese leaders, people and the other Asian peoples involved. The non-recognition of the trial toward the Japanese was a continuation of a perspective created by colonization and fostered by the racial element of the Pacific war. As a result of the trial being a high-profile instance of the attitude of the Allies, it was a “…kind of morality play, a reaffirmation

\textsuperscript{151} Judith Shklar, 128.
of a world-view that had been one factor in the making of World War II. To the extent that this world-view was itself invalid, the Tokyo trial was harmful rather than helpful.\footnote{Richard Minear, 179-180.} Whether the trial was ultimately harmful to the process of decolonization is beyond the scope of this thesis, but the effect of the promulgation of this worldview via the trial was counterproductive to the goals announced for it.

3.5 The disappearance of the Tokyo Tribunal

As argued in the previous chapter, Nuremberg inspired the later successor trials undertaken by the German government. The successor trials were by no means exhaustive or even adequate, but the German situation was preferable to the Japanese where there were no domestic prosecutions. The International Military Tribunal for the Far East was the only major trial to adjudicate the criminality of the Japanese.\footnote{Kinoshita Junji, “What the Tokyo Trial Made Me Think About.” The Tokyo War Crimes Trial: An International Symposium, Ed. Hosoya Chihiro, Andō Nisuke, Ōnuma Yasuaki, Richard H. Minear. (New York: Kodansha International Ltd., 1986), 146-147.} The Japanese failure to pursue criminal prosecutions independently is a function of the perception that the trials were merely a demonstration of power on the part of the Allies, and the lack of investment resulting from non-recognition.\footnote{Tsurumi Shunsuke, “What the War Trials Left to the Japanese People.” The Tokyo War Crimes Trial: An International Symposium, Ed. Hosoya Chihiro, Andō Nisuke, Ōnuma Yasuaki, Richard H. Minear. (New York: Kodansha International Ltd., 1986), 139.} The combination of these factors has the unfortunate effect of allowing the Japanese populace to view the defendants at the IMT as not facing justice, but rather, being unlucky. The idea that the selection and punishment of war criminals is arbitrary, “lacks the power to lead people to pursue the responsibility of their leaders for war based on a clear distinction between those in power and the masses, who have no real power of their
own. In this sense, it is politically defective.” 155 Thinking of the defendants as unlucky defeated a major purpose of trials: individualization of guilt. The idea of “bad luck,” means there is no real difference between individuals and their levels of responsibility, and thus, the differentiation needed for individual accountability is never fully made. The result of combating collective guilt in Japan is that it may have worked too well.

155 Ibid, 144.
Chapter Four: The 1961 Israeli Trial of Adolf Eichmann

4.1 Structure

The International Military Tribunals at Nuremberg and the Far East were not the only judicial proceedings undertaken for the punishment of Axis war criminals, although the Pacific theater was far more limited past the IMT. The Nuremberg trial was a single element of a larger judicial response in the European theater. The trial at Nuremberg only tried those alleged criminals whose crimes defied national bounders. Other European trials included those of the collaborators of the Vichy regime prosecuted in France, crimes committed within particular nations and against those nationals tried in those localities, and German courts took up the task of domestic prosecutions and lustrations. Some of these patterns of prosecution continue to the contemporary era. However, most prosecution of European war criminals had subsided or been deemphasized for political reasons in the early days of the Cold War.

In 1961, the young nation of Israel, founded partially because of the Nazi atrocities of World War II and composed of many survivors and their children, illegally kidnapped Adolf Eichmann, a wanted war criminal, from Argentina. He had been a bureaucrat in the Nazi regime and was responsible for the organization of deportations of European Jews and other minorities to the concentration camps in the East. His prosecution brought to international attention the specific crimes of the Holocaust, which were not a major emphasis of the IMT at Nuremberg. The motivations behind the procedure and the events of the Israeli trial shed light on the achievements and failings of the Nuremberg Trial. In this chapter I will discuss the
fact pattern of the trial, arguing that its events indicate the need for recognition left by Nuremberg. The chapter reconnects between Nuremberg and Eichmann in order to demonstrate the troubled relationship between Nuremberg and crimes against humanity, and thus, its applicability as a precedent for that area.

The interests of the Israeli government were not exclusively or even mostly in the interests of “justice.” Israel, as a state, had much of their national myth and solidarity tied up with the events of World War II and the German persecution of the Jews. The Eichmann trial intended to impress two key lessons onto Jews of the Diaspora and Israelis alike, and a third message directed toward the world at large. The messages for Israelis and Jews were one of “continuity with the past,” and of the safety provided only by Israel. The desire of the state of Israel, when newly formed, was to create a rupture between the Holocaust and the new state and nation. This process, however, caused a major divide between European Jews who had survived the Holocaust and then emigrated to Israel and the younger generation of Jews who had been born in Israel or who had no direct exposure to the destruction.\textsuperscript{156} The Eichmann trial, thus, ‘…was intentionally designed to restore a sense of continuity with the past, to extend collective memory in this regard. It would do so by deliberately emphasizing how little the victims could do and how they had resisted nonetheless.’\textsuperscript{157}

The second message, primarily directed toward the Diaspora, was that Israel alone could provide security for members of the Jewish faith.\textsuperscript{158} The final aim of the trial, intended for the world, was to illuminate the dangers of anti-Semitism, the near

\textsuperscript{156} Mark Osiel, 202.
\textsuperscript{157} Ibid, 202
\textsuperscript{158} Hannah Arendt, 8.
complete annihilation of the Jewish people and the full atrocity of the Holocaust, as an event separate from World War II; a message overlooked at the Nuremberg Trial. As Hannah Arendt notes, in her extensive coverage and description of the Eichmann Trial, “the audience was supposed to represent the whole world, and on the first few weeks it indeed consisted chiefly of newspapermen and magazine writers who had flocked to Jerusalem from the four corners of the earth. They were to watch a spectacle as sensational as the Nuremberg Trials, only this time ‘the tragedy of Jewry as a whole was to be the central concern.’” These were the aims of the Eichmann Trial: national solidarity among survivors and Israeli-born Jews, a warning of the danger of living in the Diaspora, and the horrors of the Holocaust for the entire world to view.

4.2 The “cast”

To accomplish these goals, the Eichmann Trial, more than either of the International Military Tribunals, was structured like a play, a literal “show” trial. The Chief Prosecutor for the trial was Gideon Hausner, who was simultaneously the Attorney General of Israel. He was under close supervision by Prime Minister David Ben Gurion, who had ordered the kidnapping of Eichmann. The Defense Counsel was Dr. Robert Servatius, who had served as Defense Counsel at the IMT at Nuremberg. There were three judges; the presiding and most involved judge was Moshe Landau. Finally, the last key member of the trial was Adolf Eichmann himself.

\[159\] Ibid, 6. The individual Arendt is quoting is Gideon Hausner, Attorney General for Israel and Lead Prosecutor for the trial. The comments she quotes are from his opening statement.

\[160\] Ibid, 19.
Each participant contributed to the overall success or failure of Israel’s goals or the demands of justice.

4.2.1 Gideon Hausner

Hausner often made many long-winded and rhetorical speeches, allowed witnesses to continue with open-ended questions and, through his powers of Attorney General, was able to obstruct the efforts of the defense in procuring evidence and witnesses. His opening statement, like the opening statements at both Nuremberg and Tokyo, gave some of the best indication of what the real goal and intention of the trial was. While opening the trial he stated, “it is not an individual that is in the dock at this historic trial, and not the Nazi regime alone, but anti-Semitism throughout history.”161 This explicit stand, not only declared in his opening statement but also followed throughout the trial, was one of the major sources of criticism that the trial was not an act of justice but of politics.

His opening statement also supplied the justification for why Israel should and could try the defendant, he said, “…when I stand before you, judges of Israel, in this court, to accuse Adolf Eichmann, I do not stand alone. Here with me at this moment stand six million prosecutors…”162 with such rhetoric the prosecution gave substance to the [argument], that [the trial] was established not in order to satisfy the demands of justice but to still the victims’ desire for and, perhaps, right to vengeance.”162 The attempt was to employ the “passive-personality principle”163 to establish legitimacy for the Israeli court. But the twin objections of political manipulations and

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161 Ibid, 19.
162 Ibid, 260-261.
163 This term refers to the invocation of others to act as their representative and to gain greater force.
motivations of the trial and the possibility of the trial being an elaborate costume for revenge, combined to make many observers doubt the validity and fairness of the trial, and to dismiss it as staged.

Hausner also was able to shift the tone of the trial through his emphasis on witness testimony over documentary evidence, although not to the exclusion of it. This emphasis is nearly a direct reversal of the Nuremberg Tribunal, where documentary evidence formed the bulk of the prosecution’s case, while using only sporadic eyewitnesses.\textsuperscript{164} This was part of the effort to generate and maintain attention, as well as to foster an empathetic response. It is a very different experience to hear a survivor of Auschwitz recount the horrors of the camp than to read a manifest of transport or an order to deport a train to Auschwitz. The judicial difficulty, however, is that Eichmann may have authored the manifest or order, but the daily life of the camp was unknown to him. Thus, the use of eyewitnesses is a strong indicator that, “…this case was built on what the Jews had suffered, not on what Eichmann had done.”\textsuperscript{165} An additional problem with eyewitness testimony in the Eichmann trial is the denigration of memory. This argument, often used to justify statue of limitations, argues that as time passes memories degrade after being of questionable accuracy in the first instance. This concern grows when the amount of time between the end of World War II and the trial combine with the horrific and emotional experience of survivors, which has often been recounted multiple times and been added to and changed with each retelling. Additionally, the large body of

\textsuperscript{165} Hannah Arendt, 6.
literature and its wide exposure could also have affected the memories of the witnesses.

The judges originally resisted the long line of witnesses, who were often divorced from the issues at hand. But eventually the procession continued without obstacle, causing even supportive publications like Yad Vashem to comment on “the right of the witnesses to be irrelevant.”\(^{166}\) Hausner was obviously not the sole architect of the Israeli strategy during the trial; he represents and provides, within the courtroom, the voice for the feelings of the government and many survivors. His behavior and decisions reflect perhaps not something sinister, but rather, a frustration that the story he was telling in the only space available, had not been told sixteen years before.

**4.2.2 Robert Servatius**

Dr. Robert Servatius was the individual charged with attempting to counter Hausner’s claims to legitimacy and justice. This was not Servatius’ first time to be in the position of defending a Nazi war criminal; he had been a member of the defense team at Nuremberg. From nearly the beginning of this trial, however, Servatius was alone in this task,\(^ {167}\) except for the increasingly energetic support from the defendant himself.\(^ {168}\) Eichmann had chosen Servatius somewhat rashly, and only later did he begin to comprehend the enormity of the task ahead of his sole counsel. It was this realization which motivated his involvement in his own defense.\(^ {169}\)

\(^{166}\) Ibid, 225.
\(^{167}\) Ibid, 3.
\(^{168}\) Ibid, 243-244.
\(^{169}\) Ibid, 243.
Dr. Servatius’ first defense motion claimed the tribunal could not sit in judgment of Eichmann and that the entire procedure was illegitimate and illegal, though the claim never received adequate response by the prosecution or in the final judgment. Servatius claimed at one point, “the only legitimate criminal problem of the Eichmann trial lies in pronouncing judgment against his Israeli captors, which so far has not been done.” Despite this strong rhetoric, Arendt points out that at other public occasions, Servatius spoke “favorably” about the trial and positively compared it to the Nuremberg proceedings.

Despite Servatius’ possibly positive feelings toward the conduct of the trial, Hausner, in his capacity as Attorney General, hamstrung Servatius’ ability to construct a defense. Hausner and many other Israelis felt that the best location for a trial of Eichmann would be in Israel, part of the defense of this position was a promise for immunity and transportation for defense witnesses. However, when Servatius did try to call witnesses he faced both the problem of his witnesses already being convicted and imprisoned as well as Hausner refusing to maintain his promise. Hausner refused to grant the immunity he promised and even the more reasonable promise of transportation. In fact, as Arendt comments, Israel was probably the worst location for Eichmann, it, “was the only country in the world where defense witnesses could not be heard, and where certain witnesses for the prosecution, those who had given affidavits in previous trials, could not be cross-examined by the

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170 Ibid, 239.
171 Ibid, 22.
172 Ibid, 22.
173 Ibid, 7.
174 Ibid, 220-221.
defense.” 175 This lack of parity is the most serious charge against the trial. Although the motivations were questionable and the legality of the trial was more specious than the IMT, the inability to mount a defense is a procedural flaw of such type and magnitude to invalidate the fairness of the verdict.

The difficulties faced by the defense were not just purposeful manipulations on the part of the prosecution and the government of Israel. Both sides of the case were, like much of history and the world, informed in large part by the selection of evidence for the prosecution’s case at Nuremberg. 176 The dependence on this source of information for knowledge of the Nazi regime is obviously biased, but the defense did not have the ability, funding or time to develop and discover other documents. 177

The law under which Eichmann stood indicted only compounded the inaccessibility of evidence and witnesses. Written into the law was a provision for deviation from rules of evidence as long as it puts into the court record the reasons for doing so. This provision consequently means that statements and affidavits entered into evidence were from other trials. As a result, the defense was unable to cross-examine or challenge this evidence, especially since the elapse of time found many of the witnesses who made the statements deceased. 178

Not only was the primary trial biased and procedurally flawed, the appellate possibilities were even more curtailed and abusive. The appellate court was less kind to Eichmann. The court denied his appeal of the death penalty and executed him

175 Ibid, 221.
176 Ibid, 221.
177 Ibid, 221.
178 Ibid, 220.
before his attorney, Dr. Servatius could even return to Israel,\textsuperscript{179} making Servatius the most notable person missing at the execution of Adolf Eichmann by the State of Israel.

4.2.3 Moshe Landau

The judges of the trial, most notably Justice Landau, were the controlling influence over the prosecution’s ulterior motives and witness selection. The verdict of the tribunal directly addresses the often asked question about “how could this happen?” and “why didn’t you resist?” that the prosecution posed constantly. The court’s judgment says,

\begin{quote}
All attempts to widen the range of the trial had to be resisted, because the court could not ‘allow itself to be enticed into provinces which are outside its sphere…the judicial process has ways of its own, which are laid down by the law, and which do not change, whatever the subject of the trial may be.’ The court, moreover, could not overstep these limits without ending ‘in complete failure.’ Not only does it not have at its disposal ‘the tools required for the investigation of general questions,’ it speaks with an authority whose very weight depends upon its limitation.\textsuperscript{180}
\end{quote}

This part of the verdict shows the most fully legalistic moment of the trial. The judges were continually the watchdogs of justice in the courtroom. This is generally the duty of the judge in any trial, but it required more vigilance in this instance.\textsuperscript{181} Eventually their resistance relented and the prosecution displayed increasing liberality.\textsuperscript{182}

The judges also showed sophistication in their understanding of the unique legal complexities of the case before them. The crimes of Nazi bureaucrats like

\begin{flushright}
\textsuperscript{179} Ibid, 250.
\textsuperscript{180} Ibid, 253-254.
\textsuperscript{181} Ibid, 4.
\textsuperscript{182} Ibid, 225.
\end{flushright}
Eichmann presented extreme difficulty for the law, as indicated by the Nuremberg Trial. Within the verdict, the judges also addressed the challenges of this particular case and the implications it has for legal and criminal responsibility. The verdict notes,

…in such an enormous and complicated crime as the one we are now considering, wherein many people participated, on various levels and in various modes of activity – the planners, the organizers, and those executing the deeds, according to their various ranks – there is not much point in using the ordinary concepts of counseling and soliciting to commit a crime. For these crimes were committed en masse, not only in regard to the number of victims, but also in regard to the numbers of those who perpetrated the crime, and the extent to which anyone of the many criminals was close to or remote from the actual killer of the victim means nothing, as far as the measure of his responsibility is concerned. On the contrary, in general the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hand… 183

This description of the criminal Nazi hierarchy indicates the insightfulness of the judges. Despite the criticisms over the procedural fairness of the trial, many of which are very serious, the verdict issued by the judges was able to cut through much of the drama attempted by the attorneys. The verdict instilled a degree of legitimacy that was increasingly absent during the trial. The verdict refused to accept the responsibility for many of the aspects and goals that Hausner had attempted to accomplish, such as answering large questions about the source of the Holocaust and attempts to create collective memory and social solidarity. The resistance of the judges to participate in the prosecution’s agenda exemplifies the tension between strictly legal demands and the larger, politicized demands accompanying trials of this importance.

183 Ibid, 246-247.
4.2.4 *Adolf Eichmann*

The final and central character of the proceedings was Adolf Eichmann. He was responsible for the deportation of Jews to the concentration camps, meaning his role was exclusively involved with “the Jewish question.” After the defeat of Germany, he escaped from Allied detention and fled to Argentina, which is where Israeli officials kidnapped him. He proved himself a rather cooperative defendant, giving many interviews and writing an account of his activities. He was deeply interested in explaining his job and feelings toward the Jewish people, asserting firmly that he is not an anti-Semite. After the announcement of the verdict, he expressed disappointment and frustration.\(^{184}\)

During one of his pre-trial interviews, he explained why he did not evade capture even once he realized he had blown his cover. He explained that the feelings of contemporary young Germans moved him, he said that,

> After these conversations about the guilt feeling among young people in Germany, which made such a deep impression on me, I felt I no longer had the right to disappear. This is also why I offered, in a written statement, at the beginning of this examination…to hang myself in public. I wanted to do my part in lifting the burden of guilt from German youth, for these young people are, after all, innocent of the events, and of the acts of their fathers, during the last war…\(^{185}\)

This statement indicates several things about Eichmann himself. First, and perhaps most importantly, it indicates that he feels guilty, and hopes that the crimes of the Nazi regime and himself be punished and not allowed to hang over the heads of future Germans. Second, it indicates a desire to “put right” the harm he had done

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\(^{184}\) Ibid, 247.  
\(^{185}\) Ibid, 242.
through his own actions. Despite this pre-trial statement, he participated rigorously in his own defense, further supporting the claim that he wanted understanding from the trial, not simply blame.

The behavior and statements of the court often referenced the proceedings of the IMT at Nuremberg; occasionally the Nuremberg precedent dominated the Israeli trial. In fact, Hausner even argued that the Nuremberg Tribunal would have addressed the crimes against the Jewish population had Eichmann been at the tribunal.\footnote{Ibid, 6.} This argument is highly doubtful, as discussed above. The hesitation toward strongly prosecuting “crimes against humanity” would have remained with Eichmann, especially the crimes against German nationals. Additionally, the likelihood of Eichmann’s selection for the trial, even if identified while in custody, is specious. Nevertheless, the crimes Eichmann committed were exclusively crimes against humanity perpetrated on the Jewish population. The central role of the Jewish Holocaust in the Nazi atrocities and the sidelined position such crimes were forced to take at Nuremberg have been discussed above.

4.3 Motivations to try Eichmann

The procedural violations outlined above belong to two categories: errors that affected the fairness of the verdict and errors resulting from the Israeli decisions to use the trial as a soapbox for discussing the Holocaust in general. The first category is the real issue in determining if the verdict and execution were unjust, the second, implicates a different idea of justice. The conflation of these two issues often results in referring to the trial as “unjust,” “political” or “illegitimate,” even without the
implication that Eichmann was innocent. The source of the division between these two criticisms may stem from the lack of attention towards crimes against humanity at Nuremberg. The most serious procedural flaws were the inequities shown to the defense in relation to the transportation and accommodation of witnesses, the flexibility of the rules of evidence that disadvantaged the defense, and the lack of resources and time to prepare an adequate case. Despite these flaws, the evidence against Eichmann was overwhelming, partially as a result of the documentation of the IMT and the Nazi regime more generally. The verdict of the judges disregarded many of the theatrical and extra-legal elements of the trial, and the punishment was appropriate for the crime he committed. However, the argument that his conviction and execution were inevitable, even in a perfect trial, does not nullify the perceptions of unfairness about the trial.

The perceived need that Israel acted upon resulted from two things: the inadequacies of Nuremberg to address these crimes and the new sovereignty that allowed Israel to claim the same rights of countries like Poland and France. This trial was a unique opportunity to ensure that, “…now, for the first time, the Jewish catastrophe ‘occupied the central place in the courtroom proceedings, and [that] it was this fact which distinguished this trial from those which preceded it,’ at Nuremberg and elsewhere.”\textsuperscript{187} The difficulty is that the trial accomplished this too well. A trial’s central figure should be the defendant, not the regime. The dissonance between the ideals of justice and the performance of it in Israel does not originate in 1961. It originated through combination of the political decisions and negotiations of Nuremberg, and the impulse to use trials as a form of vindication and truth-telling.

\textsuperscript{187} Ibid, 257-258.
The first element directly implicates the IMT, but the second element also resulted, implicitly, from the choice to look to the courtroom as a forum. The greatest legacy of Nuremberg in relation to Eichmann may arguably be the feelings of dissatisfaction produced by a forced dichotomy between procedural fairness and adequate vindication.

Fortunately, the Eichmann trial can claim another significant, less cynical legacy. Because of the announcement of the capture and intended prosecution of Eichmann, the Federal Republic of Germany renewed their efforts at prosecution of Nazi war criminals. The effect of the pending Eichmann trial produced unprecedented publicity and indictments of individuals who otherwise would not have been pursued.188 This was not necessarily an aim or even expectation of the Israeli government, but it had been one of the goals of the original Nuremberg trial, which was more successful with the distance and lessening of the claims of the Cold War. Additionally, the Cold War had kept the Western Allies from putting too much pressure on the Federal Republic of Germany because the publicity could have damaged the credibility of a newly crucial ally in the war against Communism. The phenomenon of increased prosecution may have been possible because of the dynamics of the Cold War, but the motivation was the same self-interest that had minimized crimes against humanity at Nuremberg.

The German state realized that the Eichmann trial would bring international attention to the issue of war crimes and criminals. In order to exclude condemnation of complicity to the inevitable scrutiny that would follow the Israeli trial, Germany used the preparation time of the trial to proactively find former Nazi criminals who

188 Ibid, 14.
had evaded prosecution thus far.\textsuperscript{189} The sluggish move towards prosecution before the Eichmann trial contrasted sharply to the sudden move to protect the reputation of Germany by showing a willingness to pursue these criminals living in their midst. This contrast, motivated by self-interest, demonstrated very well that, “…[Germans] themselves did not much care one way or the other, and did not particularly mind the presence of murders at large in the country, since none of them were likely to commit murder of their own free will; however, if world opinion…became obstinate and demanded that these people be punished, they were perfectly willing to oblige, at least up to a point.”\textsuperscript{190} The very clear motivation for rejuvenated indictments supports the argument presented earlier that self-interest is a stronger reason behind trials than simple theoretical claims for justice.

4.4 Eichmann’s impact on international tribunals

Partially because of the deep interest that Israel demonstrated, the Eichmann trial and the procedures used in it were of specious quality at best. The kidnapping aside, once Eichmann was in custody there is no question of the appropriateness of a trial. Nevertheless, if Israel was unwilling or unable to provide a purely procedural and unaffected trial, then there must be another option in addition to the criticisms of the Israeli trial. Interestingly, Arendt was a very strident critic of Israel and the trial. Her criticism extended past this particular trial, which she saw as only one example of the problems with victors’ justice and single-state prosecutions. However, she acknowledges the clear importance of prosecuting men like Eichmann, and does

\textsuperscript{189} Ibid, 17.
\textsuperscript{190} Ibid, 16-17.
indicate what she thought, in 1963, would be a just and effective institution. Arendt’s 
hope and suggestion for the future of justice concerning genocide was in line with 
Karl Jasper’s suggestion in a letter to her about a permanent international criminal 
court.\footnote{Lotte Kohler and Hans Saner, ed., \textit{Hannah Arendt Karl Jaspers Correspondence 1926-1969}, trans 

Arendt argued that Israel, in possession of Eichmann and after having 
sentenced him, should have “waived” its right to punish. Arendt argued that in this 
instance, “Israel might then have recourse to the United Nations and demonstrated, 
with all the evidence at hand, that the need for an international criminal court was 
imperative, in view of these new crimes committed against mankind as a whole.”\footnote{Hannah Arendt, 270.} 
She continued this argument without even arguing that the United Nations would be 
resistant, but rather assuming its reluctance as a given, “it would then have been in 
Israel’s power to make trouble, ‘to create a wholesome disturbance,’ by asking again 
and again just what it should do with this man whom it was holding prisoner; constant 
repetition would have impressed on worldwide public opinion the need for a 
permanent international criminal court.”\footnote{Ibid, 270.} Her insistence on an international court 
stemmed from her belief that a single country, even if representative of the victim 
group of the genocide, is unable to fully appreciate and judge a crime as deep as 
genocide. It is not just that that court is unable; but also, Arendt argued, they do harm 
by hearing the case because, “the very monstrousness of the event is ‘minimized’ 
before a tribunal that represents one nation only.”\footnote{Ibid, 270.}
This suggestion, adopted from an argument made by Jaspers, runs counter to a history highly criticized by Arendt. The suggestion follows an extensive and thorough criticism of the International Military Tribunal at Nuremberg and is based on the assumption that the United Nations would have to be forced into this plan through continued “embarrassment.” Unfortunately, despite possible criticisms of “victor’s justice,” the lofty and idealistic goals of “justice” do not gain real meaning and corresponding political will until there is a tangible interest involved. It is true, as analyzed above, that the IMT was reflective of the Allies interests’ and often demonstrated inequality toward the crimes of the Allies. However, a criticism of the only international tribunal on those grounds does not argue persuasively or constructively for the possibility of a fair, truly international, criminal court. Instead, it indicates one more uncertainty about the viability of the creation of such an institution. Moreover, a permanent international criminal court, gained on the terms that Arendt describes, may in fact be a provider of justice in name only. Instead, as contemporary judicial responses to genocide have begun to reveal, an international tribunal is not an unimpeachable good. Arendt’s own argument indicates that even the Nuremberg precedent, often claimed by proponents of the ICC and the International Criminal Tribunals for Yugoslavia and Rwanda, is not a legal or just predecessor for such an institution.

Even if in the abstract an international body, established on Western conceptions of rule of law, was the best response to genocide, the prerequisites for such a solution to be effective are lacking. There is no guarantee for funding, support, or attention. Funding, support and attention never lagged toward the IMT at
Nuremberg and the Eichmann trial in Israel because of the court’s investment in the outcome. Arendt does not give any substantive reason to believe that indifference towards the crime or perpetrator would better provide for justice or future deterrence, she only points out the problems with the Nuremberg Tribunal, many of which are not as clearly negative as she argues.
SECTION TWO: RWANDAN TRIALS

Chapter Five: Retributive Responses to Genocide

5.1 The ICTR

Nuremberg firmly established the belief that rational, formal structures could adequately respond to events of mass atrocity. The marginalization of the Tokyo Tribunal and the dismissive attitude toward the Eichmann trial facilitated the romanticization and dominance of the conviction that Nuremberg-like institutions were capable of responding effectively to severe violence.

In the years between 1945 and 1990, the increasingly positive assessment of the Nuremberg Tribunal shifted to reflect the predominance of the Holocaust over aggressive war in the historical memory. Popular perception regarded the IMT as a genocide trial, rather than a trial intended to outlaw war. The concrete consequences of this shift remained unclear until the end of the Cold War. Throughout the Cold War era, discourse about judicial response to atrocity stagnated, which veiled the impact of the shifting popular conception of the meaning of Nuremberg. The absence of discourse also obscured the ignorance of the Tokyo Tribunal and its lessons, and concealed the impact such a shift had for international response to mass atrocity.

Although mass atrocities and genocides occurred during the Cold War, the politics of alliances often impeded response and acknowledgement of such events. In addition, the location of many Cold War atrocities helps account for the lack of response. The dynamic of the Cold War caused the world’s attention to shift toward the global north, while many of these atrocities occurred in the global south. The lack
of attention toward these southern regions contributed to the perception of the events as peripheral or insignificant to the larger power-game.

After the break-up of the Soviet Union, a single superpower dominated the world-order. That power, the United States, claimed a strong stance on human rights. Early American Cold War foreign policy permitted human rights violations within allied countries for strategic reasons. After his election in 1976, Jimmy Carter, diverged from this policy, criticizing American allies such as South Africa, Rhodesia, Nicaragua and Chile, for abuses of human rights. Carter’s successors, Ronald Reagan and George H.W. Bush, did not continue Carter’s human rights foreign policy. However, in 1992, William Clinton rejuvenated Carter’s concern for human rights in foreign policy. Clinton, on human rights grounds, ordered American intervention in both the ethnic cleansings of the former Yugoslavia and the civil war in Somalia.

Resulting from this post-Soviet, human rights directed political climate, mass atrocities received the international attention previously denied to them. Two major events began in the early nineties and eventually received an international response in the form of trials. These two events were the ethnic cleansings in the region of the former Yugoslavia and the genocide of Tutsis in the small African country of Rwanda. To address these events, the world community invoked the memory of the Nuremberg Tribunal and instituted international criminal tribunals for Yugoslavia and Rwanda (the ICTY and the ICTR respectively).
5.1.1 History of the Rwandan genocide

The Rwandan genocide of Tutsis and Hutu sympathizers occurred in the fourth year of an ongoing civil war.\textsuperscript{195} It began after the April 6, 1994 plane crash that killed the Hutu president, Juvénal Habyarimana.\textsuperscript{196} The massacres targeted the entire Tutsis population, and the systematic, organized nature of the events indicated a level of planning that dissuades any notion that the killings were spontaneous uprisings. Many observers trace the widespread violence is due to the mass media and widely broadcasted radio programs, which advocated killing all the “cockroaches,” the Hutu slur for Tutsis.\textsuperscript{197} The weapons of the genocide were predominately primitive weapons like machetes, knives and small arms. Many of the bloodiest massacres occurred in stadiums where thousands were gunned down and then the wounded were killed by hand, or in churches where local Tutsi populations congregated, hoping for safety.\textsuperscript{198} In addition to the murders, there was widespread theft and destruction of Tutsis property, one of the most serious obstacles to post-conflict reconciliation.

The genocide continued until the Rwandan Patriotic Front (RPF), one of the factions in the civil war, took power of the nation. The international community accused the RPF of committing equally heinous violations against the Hutu populations it encountered. Once the RPF gained control of the capital, Kigali, the Hutu government, \textit{interhamwe} militias, responsible for most of the killings, and hundreds of thousands of Hutu civilians, fled the country into neighboring Zaire. The

\textsuperscript{197} Ibid, 4.
refugee camps, and the intermittent raids into Rwanda staged from there, caused the RPF to forcibly dismantle the camps and pursue suspected génocidaires into Zaire, causing the conflict to escalate into a regional war. 199

During the genocide, the international community was aware of the occurrences in Africa and there were even UN Peacekeepers in the country, due to the power-sharing agreement intended to end the civil war. Awareness of the Rwandan genocide has risen due to popular movies and increasing education of African events and mass atrocity. But at the time, even people and leaders who knew of the genocide remained unwilling or unable to intervene. In late 1994, the UN established the International Criminal Tribunal for Rwanda, which began to hear cases in 1997. 200

5.1.2 Establishment

The ICTR, formed by the United Nations, depends on a predominantly Western concept of retributive justice. Retributive justice, as analyzed in the introduction, attempts to rectify retroactively a past injustice with a punishment directed toward the idea of “just desert.” The goals of Nuremberg, Tokyo and Israel found new manifestations in Arusha, Tanzania, the location of the ICTR. The architects of the ICTR envisioned it as educating Rwandans and the world about the events of the genocide, combating a culture of impunity and promoting post-conflict social healing. The tribunal was purposely located outside the country because of concerns over the ability of Rwanda to support an international tribunal. The location nevertheless hinders the accomplishment of the stated goals. The location is not the

199 Ibid, 234.
200 Jeremy Sarkin, 798.
only aspect of the ICTR distanced from modern Rwandan society. The rules and officials of the tribunal are foreign, including a completely different legal system (common law as opposed to Rwanda’s civil law system) and a highest sentence of life imprisonment as opposed to the death penalty. These differences and the failure of the international community to establish procedures that resonated with the Rwandan community, caused serious obstacles for the ICTR to serve as an effective response mechanism to genocide.

The establishment of the ICTR stemmed from two main motivations. First, the establishment of the ICTY eighteen months earlier placed the international community in the position of either establishing a similar response to the events in Rwanda or the appearance of racism and Western-centricism. Second, the international community failed to intervene during the hundred days of genocide, spending most of that time debating the existence of genocide and the minor details of the UNAMIR (United Nations Assistance Mission to Rwanda) mandate. Similar to the establishment of the ICTY, the establishment of the ICTR was, “...a post facto substitute for an effective, timely, military intervention by the UN Security Council. In both cases, the major powers showed their incapacity or unwillingness to prevent a man-made disaster of which warning signals had been given by the UN, their own diplomatic services, and/or by international and human rights organizations – or to stop it while it was taking place.” The countries that now push for retributive trials were aware and notably inactive during the genocide, leading to the suspicion that the


202 Yves Beigbeder, 171.
ICTR is a measure to assuage their guilt. However, the precise form for the response stems from a belief in a particular kind of “appropriate” response, traced back to Nuremberg, instead of the adequate measure necessary in a very different country.

In the international community’s rush to extricate itself from feelings of guilt and appearances of racism, they overlooked the differences between 1945 Germany and 1994 Rwanda. Additionally, the issues over recognition raised by Tokyo and Eichmann remained unexamined. The international community defended its choice of trials on the grounds of the universality of justice, but “…such positivist notions fail to recognize that courts, like all institutions, exist because of, not in spite of, politics.” The result of this failure of recognition was a tribunal motivated by previous inactivity and without reflection on the central basis of the ideas of legitimacy. In examining the impact and contributions of the ICTR to Rwanda’s judicial reactions to genocide, the facets of this founding are crucial in understanding and evaluating the objections of the Rwandan government, claims of inapplicability and insensitivity, and the impact of structure, distance and mismanagement. All of these components require contextualization within Rwandan social reality. Often the defenses of the ICTR and other purely procedural responses focus around the theory of retributive justice versus restorative or substantive justice. Although the theoretical basis is vital to assess the institution as a whole, the impact on the social fabric of Rwanda should dominate the appraisal of the ICTR.

5.1.3 The Rwandan dissent

The establishment of the ICTR by the UN Security Council passed on a 13-1 vote. The dissenting vote was the post-genocide government of Rwanda itself, who happened to occupy a temporary seat on the Security Council at the time. The importance of the dissenting vote of the Rwandan government cannot be overstated. The decision to vote against the ICTR was a shift from the previous stance of the government, who had approached the UN to establish a tribunal so to avoid the appearance of vengeance or “victors’ justice.” The shift in Rwanda’s position occurred because of three main issues: the location of the tribunal outside of the country, the maximum sentence allowable and the primacy of the tribunal over Rwandan trials. The Security Council chose to locate the tribunal in Tanzania, at the site of the previous peace agreements, Arusha. The government of Rwanda objected that this location emotionally and practically distanced the tribunal and Rwandan society.

The second objection of the Rwandan government was the use of life imprisonment as the maximum sentence of the tribunal. The Rwandan government intended to use the death penalty for their domestic prosecutions. The most heinous and indisputable architects of the genocide fell under the auspices of the ICTR, rather than the domestic prosecutions. Due to the absence of capital punishment in international judicial institutions and the preeminence of the ICTR, the major leaders would not receive the death sentence while the minor planners and popular

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204 Yves Beigbeder, 171.
205 Alison De Forges and Timothy Longman, Legal Responses in My Neighbor, My Enemy, 54.
participants might. European countries may reject the legitimacy of the death penalty, but similar objections to the punishment are largely absent from Rwanda.

Finally, the government objected to the power of the ICTR to trump their domestic prosecutions. The ICTR’s substantial foreign support guaranteed that the ringleaders’ trials would be in distant Arusha, without the possibility of the death penalty. The tension between the two jurisdictions came to bear over the detainment of Théoneste Bagosora in 1996, considered the leader of the genocide. The ICTR’s charter refused the Rwandan government the ability to try him or challenge the tribunal’s right to try him. These three theoretical concerns motivated the Rwandan dissent from the UN Security Council and all three eventually manifested concretely as feared by the government.

The Rwandan dissent matters for more than the validity or existence of their objections. The establishment of an international tribunal for a genocide exclusively contained within domestic borders, against the wishes of that country, faces a severe crisis of legitimacy. I do not argue that a country that refuses to pursue post-atrocity justice should be immune from international intervention. However, Rwanda pursued domestic trials and combated a culture of impunity. The ICTR represents the interests of a guilt-ridden international community and an ill-placed conviction, not the interests of justice or reconciliation in Rwanda. It also demonstrates a tenacious adherence to the Nuremberg precedent without consideration of applicability. In contemporary genocide, as argued by Jose Alvarez, “… international tribunals need to be kept as an option of last resort, [because] good faith domestic prosecutions that

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encourage civil dissensus may better preserve collective memory and promote the mollification of victims, the accountability of perpetrators, the national (and even international) rule of law, and national reconciliation.207 At the time of the UN vote, the Rwandan government already established the intention of domestic prosecutions. The possibility of “forgetting” in Rwanda did not exist.

The Security Council, empowered by the Genocide Convention of 1948, established the tribunal to address crimes against humanity, which are theoretically crimes against the entire human community. Although perpetrated on the bodies of a particular group, the prosecution of such crimes is the responsibility of the larger community. However, the violence committed against the Tutsis did not evoke any international response or intervention. Indeed, as discussed above, many crimes against humanity, including those during the Cold War, remain unacknowledged and unprosecuted. For genocide law and trials to be legitimate under this theory, they must flow from a serious belief in the harm committed against the human community, and that community must, in turn, respond to those crimes. Without such response, the claims of universal jurisdiction and harm to the human community are empty and are certainly not compelling to the community that experienced the immediate and actual harm.

5.1.4 Structure

The creation of the ICTR on the coattails of the ICTY meant that the basis of both tribunals was almost identical, except that the ICTR also included the intention of promoting reconciliation in its mandate. An evaluation of the capability of

207 Alison De Forges and Timothy Longman, Legal Responses in My Neighbor, My Enemy, 59.
Retributive justice to promote reconciliation reappears in a later discussion. The ICTR faced many practical difficulties because of its location in Africa, including attracting lawyers and judges. It also suffered from mismanagement of funds and cultural faux pas. The management flaws of the tribunal disenchanted many survivor organizations, who claimed it employed suspected participants in the genocide. It also lacked the ability to secure suspects, having no enforcement power of its own. The mismanagement, allegations of corruption and inability to secure suspects improved over time through anti-corruption efforts and changes in the regional political environment. However, the employment of suspected genocide participants persists, and is emblematic of the larger issues of insensitivity of which many Rwandans complain.

The tribunal displays insensitivity in two ways: the structure of the tribunal is inherently insensitive to particular world-views and second, the proceedings themselves contain instances of exclusion or insult. The insensitivity underlying both of these objections stems from the unerring belief in the “rightness” of Western retributive justice as a response to genocide. This attitude is a direct legacy of the IMT at Nuremberg and the subsequent acceptance of the principles. The international faith in the Nuremberg model ignores the feelings of disempowerment demonstrated by the Israeli trial of Eichmann and the many procedural failings and political inefficacy of the Tokyo Tribunal. Nevertheless, both of these experiences bear

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208 Yves Beigbeder, 183.
209 Helena Cobban, 51.
211 Yves Beigbeder, 180.
directly on the issues confronting Rwanda. The problem with international insistence on using a model based on Western retributive justice, without Rwandan input and against Rwandan sentiment, is that it might incorrectly imply that if retributive justice fails in Rwanda, the flaw was not with retributive justice, but with Rwanda. However, the international faith in retributive justice as demonstrated by Nuremberg is misplaced. The refusal to acknowledge the particular, non-universal nature of trials causes many of the grievous examples of insensitivity and harm towards reconciliation in Rwanda.

According to retributive theory, the intention of a trial is to achieve justice, partially through control of feelings of anger and revenge. Trials assert control through deflection of emotions. The institutions of courts act as intermediaries between victims and perpetrators. Retributive justice, as explained in Chapter One, envisions the injury of a victim as a transgression against society, and society pursues rectification through prosecution. The prosecution thus reestablishes social order and vindicates the victim through acknowledgement of a wrong. The retributive conception establishes a purposeful psychological distance between the victims and the accused. This structural component frustrates the few Rwandans who travel to the court. Retributive trials transform the role of victims, from the individual who suffered the crime, to a bi-product of a crime against society. Because of retributive trials’ focus on perpetrators, they minimize victims’ involvement; sometimes victims can serve as witnesses, but remain controlled and limited.\(^{212}\) In Rwandan criminal

justice, plaintiffs serve a much larger role that includes the bringing of evidence against the accused.\footnote{213}

The adversarial system, another fundamental component of the ICTR, is not only unfamiliar to Rwandans accustomed to the civil system, but also ill suited for sensitive questioning of survivors. Many witnesses feel insulted, attacked or retraumatized during cross-examination.\footnote{214}

Cultural missteps compound the above structural insensitivities into outright offenses. In addition to the employment of defense attorneys who are genocide suspects, there have been several instances of clear disrespect from the ICTR and its officials. The most noted instance was so egregious that many survivor organizations pulled their support and boycotted the ICTR. In 2001, the survivor organizations accused the judges of laughing during the questioning of a rape victim.\footnote{215} For some Rwandans, these disturbing events are the only accessible information about the ICTR. The geographical distance between the ICTR and Rwanda prevents the tribunal from having a direct effect on the daily lives of Rwandans,\footnote{216} a necessary component for the reconciliation that the tribunal intends.\footnote{217} The remoteness of the tribunal creates an obstacle to information for those individuals who are supposed to feel most empowered by the proceedings. In a survey taken among Rwandans, a majority (55.9\%) answered that they were not well informed about the ICTR, and

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\footnote{213} Alison De Forges and Timothy Longman, Legal Responses in My Neighbor, My Enemy, 57.
\footnote{214} Helena Cobban, 48, 51.
\footnote{215} Eric Stover and Harvey M. Weinstein, Conclusion in My Neighbor, My Enemy, 334-335.
\footnote{216} Ibid., 334.
\footnote{217} Ibid., 332-333.
another 31.3% answered that they were not informed at all.\textsuperscript{218} The lack of information translates into the absence of any impact on Rwandan society. The purposeful location of the ICTR away from Rwanda obstructs the stated desire of the ICTR to promote reconciliation, because, “even if the [tribunal establishes] a factual record of what happened, [it] cannot contribute to national reconciliation if those most affected by the violence are unable or unwilling to recognize and internalize this record.”\textsuperscript{219}

The ICTR is not, however, entirely a moot issue. For many Rwandans it is not even neutral. The choice to force genocide into a legalistic framework and submit it to the lengthy and procedural process of the adversarial system, produces a feeling of injustice for some survivors. The tribunal processes at a rate of a single case a year and costs, cumulatively, over a billion dollars.\textsuperscript{220} Additionally, the proceedings are very complicated and mete out what appear to victims and survivors to be disproportionately low sentences. These aspects of the ICTR are not only ineffective, but directly result in feelings of injustice.\textsuperscript{221}

\section*{5.1.5 Relevant differences}

The defenses of the ICTR center on the contributions that retributive justice makes to reconciliation. Under the theory of retribution, the urge for revenge shifts from the individual victims to a system of procedures and laws. The retributive

\textsuperscript{218} Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda, Timothy Longman, Phuong Pham and Harvey Weinstein. Pg. 206-226. My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity. Ed. Eric Stover and Harvey Weinstein. Cambridge University Press. Cambridge 2004. Pg. 213. Hereafter cited as Connecting Justice in My Neighbor, My Enemy. 0.07% answered they were well informed and 10.5% answered that they were informed.

\textsuperscript{219} Eric Stover and Harvey M. Weinstein, Conclusion in My Neighbor, My Enemy, 332-333.

\textsuperscript{220} Helena Cobban, 50.

\textsuperscript{221} Eric Stover and Harvey M. Weinstein, Conclusion in My Neighbor, My Enemy, 333.
system requires that particular individuals face charges for specific crimes, thus dispelling collective blame and inclinations toward group violence.222 This particular conception of individual responsibility, however, lacks universal acceptance. Rwandan culture does not view people outside of social context, making individual conceptions of guilt particularly inconsistent with a process of Rwandan reconciliation.223 Nuremberg lacked cultural tension between society and the institution, because of a roughly shared culture between the accused and the accusers. Despite the procedural failings of the IMT and the differences between the Anglo-American and Continental legal traditions, the basis of justice was the same. Thus, the trial resonated within the targeted German audience.

Three major differences between 1945 Germany and 1994 Rwanda hinder the ability of a Nuremberg type international trial to serve as an effective response to genocide. First, the cultural differences outlined above indicate that retribution alone cannot adequately address Rwandan society’s need for reconciliation. Second, the massive popular participation in the 1994 genocide differentiates the two events. The involvement of the populace in Rwanda is not simply a matter of scale, but actually a difference in type. Nuremberg-style mass atrocity trials work on a representative level. Individuals face accountability for their actions, but also as symbols of the other perpetrators. Trials require such symbolism because of the practical limitation of trying all those responsible.224 However, this means that trials are unable to address the majority of participants and thus, “…what is billed as individual justice actually becomes a de facto form of collective innocence that exonerates the far larger number

223 Helena Cobban, 67.
224 Eric Stover and Harvey M. Weinstein, Conclusion in My Neighbor, My Enemy, 333.
of individuals who were indirectly responsible for the physical, social, and psychological destruction of their communities." \(^{225}\) Nuremberg minimized this effect because the infrastructure of the Nazi apparatus facilitated the ability of symbolic trials to implicate larger groups of those responsible. The Rwandan genocide lacks such formal or centralized organizations, given the subaltern nature of most of the killing.

The final difference between the two instances pertains to the post-atrocity situation. After the end of World War II, there was an effective separation between the German population and the Jewish victim group. Reconciliation in a community where victims and perpetrators must also remain neighbors differs dramatically from reconciliation between two groups who do not have to cohabitate. The need for coexistence is an additional reason symbolic trials lack efficacy in this instance. Rwanda’s response needs restorative justice in conjunction with retributive justice. Restorative justice would potentially enable Rwandans to live peacefully. Peaceful cohabitation extends beyond simple coexistence to empower Rwandans to forgive each other. Thus, the response in Rwanda cannot hinge on victors’ justice or eye for an eye retribution, since either would be a continuation of the civil war. \(^{226}\)

5.2 Overcrowding and limits of civil trials

The government of Rwanda also pursued domestic judicial responses to the genocide. As the Tutsi guerrilla force RPF took control of the capital and country, it began to arrest suspected participants in the genocide. The Rwandan government

\(^{225}\) Ibid., 335.

\(^{226}\) Mahmood Mamdani, 272.
planned to respond to the events of 1994 with extensive prosecutions. However, due to the massive local participation in the massacres, the number of incarcerated suspects quickly rose to levels impossible for prosecution. The number of suspects in prison awaiting trial was approximately 122,000.\textsuperscript{227} Rwanda effectively reformed their general criminal justice system simultaneously with prosecuting genocide suspects. This method allowed the system to process up to one thousand suspects per year. However, given the sheer number of genocide suspects in detention, it would take over two hundred years to clear the prisons, and the inability to prosecute any other crimes.\textsuperscript{228} In addition to the impossibility of prosecuting such high numbers of suspects, the Rwandan penal system suffered physical destruction during the genocide and there remained only seven prisons to house prisoners. The conditions in the prisons presented the Rwandan government with the problem of serious human rights violations. In 1995 alone, 1,000 prisoners of the 7,000 detained at Gitarama Prison died.\textsuperscript{229} Rwanda recognized the practical limitations of their prosecutorial plan and in 2001 instituted the gacaca courts that operated on the Organic Law’s classing system.

5.3 The Organic Law

The Organic Law passed in 1996, classified suspects of genocide into four categories. The law specifically aimed at creating institutions to respond to the 1994 genocide. The first category of the Organic Law includes all those individuals accused of planning and leading the genocide, particularly sadistic or cruel killers and

\textsuperscript{227} Stef Vandeginste, \textit{Dealing with Genocide in the Context of Armed Conflict} in \textit{Burying the Past}, 264.
\textsuperscript{228} Ibid.
\textsuperscript{229} Helena Cobban, 19.
later, rapists. Only members of Category 1 are ineligible for the confession and sentence reduction element of the law. Category 2 includes those who attempted to kill or did kill under orders; Category 3 includes individuals accused of maiming and Category 4 are the individuals accused of committing property crimes. The law also includes a provision for sentence reduction in exchange for testimony against others. Such testimony alleviates one of the largest problems for prosecution, the absence of evidence due to a lack of witnesses or documentation.

In 2001, Rwanda passed another law directed exclusively toward a judicial response to the genocide, the Gacaca Law. It utilized the structure of the Organic Law and its plea-bargain system. The Gacaca Law established and provided the parameters of a system of decentralized, community-based, public hearing institutions. These gacaca would hear the crimes of Categories 2-4. Each administrative unit controlled a category, such that the smallest unit handled property crimes and the largest handled murders, also the appeals process ascended this administrative structure. These gacaca courts represent an innovation on the part of the Rwandan government and an attempt to make judicial institutions for genocide more reflective and responsive to the mass atrocity event itself. The gacaca introduce the unique elements of informal judicial institutions and restorative justice aiming at forgiveness and reconciliation. In the following chapter, I will focus on the gacaca, which represent the most novel development of post-atrocity justice in Rwanda.

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231 Stef Vandeginste, *Dealing with Genocide in the Context of Armed Conflict* in Burying the Past, 262.
232 Helena Cobban, 20.
Chapter Six: Rwanda’s Contributions to Trials, the Gacaca

6.1 The structure of the gacaca

The gacaca, which literally means ‘on the lawn,’ existed in Rwandan culture for many generations, generally used for more minor conflicts than criminal courts. Ambassador Sezibera, defended the use of gacaca in this more unusual circumstance. In an interview he said,

If we want to have justice and reconciliation in our country, we need to build our policy on four pillars... The first of these is that we need the deconstruction of the myths that have been built up, in order to help strengthen national unity and national reconciliation. Secondly, we need the punishment of the crimes committed. Third, we need the rehabilitation of those who were victims. And fourth, we need the construction of a new Rwandan national identity.

The form of gacaca instituted for the genocide courts was modified to incorporate some concerns for due process and the rule of law. But the philosophic underpinnings remain intact. It is a socially-based hearing where the convened community hears an accusation of a transgression and a defense. There are no lawyers or procedural rules of evidence or testimony. The aim of the gacaca process is an eventual agreement between the two parties and community input on the appropriate means necessary for restitution. In Western criminal law, the intention is to prosecute and punish the offender, thereby restoring dignity to the victim and treating the perpetrator as a moral agent. Conversely, Rwandan gacaca intends to reestablish social harmony through negotiation and compromise. The gacaca courts represent an

233 Cobban. Pg. 11.
234 Ibid. Pg. 12.
important part of Rwandan culture and its focus on community relations, not only individuals.

Although the gacaca trials are a judicial response to mass atrocity, they differ significantly from the conventional understanding of “trials” and especially from the Nuremberg model. Gacaca feature more participation for witnesses, victims and community members, they operate on social pressure rather than state coercion and are future-oriented. Gacaca are an example of a larger concept of “informal judicial institutions.” The title of “informal” should not imply any decrease in legitimacy; instead, informal judicial institutions are characterized by, “…direct links between the parties, litigation considered as a community problem more than an individual problem, a trial centered on the victim, social pressure rather than coercion as the principal motivator, a flexible and informal procedure, voluntary participation, and decisions achieved through mutual agreement between the parties and the community, with the restoration of social harmony as the principal goal.”235 These are considered “informal” because of the contrasts with conventional, “formal” procedures.

The increased participation of victims and community members is a significant departure from the Western retributive model exemplified by the ICTR. The architects of the gacaca system purposely envisioned a program that, “…would involve a large part of the population either as judges or as witnesses.”236 The involvement of mass participation is a crucial component of the ability of the gacaca


236 Ibid, 69.
to accomplish many of its stated goals. Community members provide the information integral to achieving justice, truth-telling, and social reconciliation.\textsuperscript{237}

The social pressure created by the institutional structure of the gacaca motivates the process. The genocidal nature of the crimes changes the type and intensity of the pressure but leaves the major driving force intact. The idea underpinning the gacaca is that the publicity of the hearings will generate expectations among community members for cooperation. The meetings are set up as a community event, and noncooperation equates to insulting the community. As a result, the expectation becomes that every member participates and assists. However, social pressure can exacerbate a problem previously identified in conventional trials. The revelations of witnesses through testimony about the events of genocide have tangible consequences. In the community setting, the reverberations of these revelations affect the immediate population, often because they are revelations about other community members. As a result, the eventual truth and judgment reflect compromises from multiple sides.\textsuperscript{238} Social negotiation is integral to the concept behind the gacaca because this negotiation and dialogue allows necessary flexibility for reintegration of perpetrators. With a static institution, perpetrators may not recognize the justice rendered. Without the cooperation of perpetrators as well as victims and the larger group of survivors, hostilities can persist.

The social condition in Rwanda points to the need for a kind of trial that can produce a more meaningful type of justice and recognition. The justice provided by retributive trials lacks a broader vision of social justice. Thus, for justice to be

\textsuperscript{237} Ibid, 78.
\textsuperscript{238} Ibid, 82.
effective there must be an acknowledgement of the shortcomings of conventional trials for Rwandan reconciliation. Retributive trials do not require an apology or confession on the part of the accused, nor do they require any form of asking for forgiveness. The absence of remorse in conventional trials is a crucial reason for Rwandan hesitation toward classical trials.\(^{239}\) The gacaca, as established, require a confession of guilt before coming before the court. The general pattern of perpetrators in the gacaca includes recognition of the genocide, their regret, followed by the confession of their involvement and concludes with a request for forgiveness.\(^{240}\) Even if this procedure becomes formulaic, it provides a possibility for forgiveness and reconciliation that is generally lacking in conventional judicial procedures. The Rwandan situation also better assures that the perpetrator will show remorse and ask for forgiveness because of the plea bargaining system incentivizing such behavior. However, in situations without some background compulsion such as Rwanda the perpetrator may not show remorse, seriously damaging the process.

Gacaca’s emphasis on forgiveness, as opposed to punishment, transforms the perspective of the trials from a past, perpetrator- oriented view to a future, victim-oriented view.\(^{241}\) A situation like Rwanda’s where the victims and the perpetrators must cohabitate requires a change in perspective from past orientation to future orientation. The orientation is especially vital to forging an identity of “survivor.” A


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survivor identity includes all people who remain part of the community after the genocide. A survivor mentality indicates that the genocide was not solely an event for individuals, especially of a particular group. Instead, survivor identity recognizes the importance of the genocide on all individuals of the community and country and the hope that as an inclusive whole the society can move forward together.

One of the most problematic aspects of pursuing a survivor identity is the obvious difference of standing between victims and perpetrators. Conceptually the dissolution of status differences between victims and other non-perpetrator survivors remains significantly more realistic than a complete integration of all individuals remaining in the nation. However, the creation of a survivor identity requires more than an expansion of the category of victim to include others; survivor identity necessitates the integration of perpetrators into the construct. The condition of perpetrator integration presents serious problems for the feasibility of creating a coherent and stable survivor identity and thus social reconciliation based upon it. The impact and aspirations of survivor’s justice receive more detailed analysis below.

The above differences between the gacaca and the classical retributive model provide salient reasons for the establishment of an alternative, gacaca system. The creation of nation-wide gacaca courts stemmed from the acknowledgement that rebuilding Rwandan society and breaking the cycle of violence required the entire community. Unlike the German Holocaust during World War II, the Rwandan genocide was not solely a centrally planned, top-down genocide. Although there was significant preparation and central direction for the genocide, the scale and intensity required massive subaltern participation. Since community involvement characterized
the genocide, the response must reflect the same communal character in order to provide a reciprocal environment for reconciliation and to attain the necessary information for truth-seeking. Additionally, Rwanda must grapple with cohabitation between victims and perpetrators that, as noted above, Germany lacked.

A second reason for the gacaca system was the desire and need for reintegration. The massive numbers of individuals involved in the genocide and imprisoned drained the economy at a crucial time, provided continuing ethnic tensions and precipitated human rights violations. Gacaca attempt to dissolve the distinctions present in formal trials between judges, victims and witnesses. The removal of such distinctions supports the building of a survivor identity through its implicit assumptions that, “...given the disruption of social order, all members of society are affected and are, as a consequence, party to the conflict. The objective, therefore, is not to determine guilt or to apply state law in a coherent and consistent manner (as one expects from state courts of law), but to restore harmony and social order in a given society, and to reincorporate the person who was the source of the disorder.” The restorative conception of justice entails a balance between judicial and societal norms among communities that are drastically different. However, it is not necessarily a blanket condonation of any response since they are institutions with central tenants and aims that enact and contextualize the judgments.

In addition to the motivations behind the establishment of the gacaca, the Rwandan government identified goals they wanted to accomplish with their response

243 Stef Vandeginste, Dealing with Genocide in the Context of Armed Conflict in Burying the Past, 269-270.
generally. The Gacaca Law reflected the above acknowledgement of the need for popular participation, the law states, “…the work of testifying is a moral obligation: no one has the right to derober (‘to conceal, hide’), whatever the cause. Above all, all the inhabitants must relate the facts that happened in their district and furnish proofs.”

Five major goals of the gacaca can be identified, all of which relate to the popular nature of the genocide and the social framework of Rwandan society. The five goals are: relieve the pressure on the formal judicial system, seek the truth of the genocide, recognize victims as social entities, encourage forgiveness between victims and perpetrators of all levels (including bystanders), and last, foster greater social reconciliation.

6.2 The goals of the gacaca

The goals of the gacaca are interrelated, each influencing others. Relieving the pressure of the judicial system enables a larger attempt to discover the truth and moves the process into a social sphere that values such truth. Establishing the truth restores dignity to victims through recognition of the crimes committed against them. Such recognition restores their position in the community and allows them to forgive perpetrators. Forgiveness allows an identity of survivor to emerge while simultaneously balancing it with respect for diversity. This unity and respect is the basis of social reconciliation.

244 Urusaro Alice Karekezi, Alphonse Nshimiyimana and Beth Mutamba, Localizing Justice in My Neighbor, My Enemy 72.
6.2.1 Relieve pressure

The genocide decimated the legal institutions of Rwanda. The reforms mentioned above have been remarkably successful, but the pressure created by the number of suspects is insurmountable. The crippling of the judicial system due to the insurmountable number of suspects and the need for another approach is the immediate cause for the gacaca. However, the imprisonment of so many individuals also has drastic effects on the economy, requiring a reintegration of incarcerated suspects. The government has to balance the desire to restore these individuals to society and the economy with the unacceptability of “forgetting.” It is important for the system to facilitate both the reassimilation of the suspects as well as willingness on the part of the victims and communities to accept them. Blanket immunity would further entrench ethnic hostilities. Additionally, such forgetting would be a continuation of the culture of impunity that many Rwandans feel contributed to the outbreak of genocide.

Despite the undesirability of forgetting, the detrimental effects of the level of imprisonment are undeniable. The economic pressure on the Rwandan government cannot be overstated. Agriculture dominates the Rwandan economy and requires tremendous manpower. However, the participants of genocide are mostly the same demographic as those who are agricultural workers. The incarceration of so much of the workforce places a significant drain on the economy, already struggling to recover from the destruction of the genocide.\footnote{Helena Cobban, 19.} Poverty affects the pursuit of justice as well as the economy. Modern genocide occurs almost exclusively in less developed countries, where poverty contributes to an environment where mass atrocity can
occur.\textsuperscript{246} In Rwanda, a majority of individuals believe in a connection between their current state of poverty and the 1994 genocide.\textsuperscript{247} Addressing the poverty is a crucial component of transition, but impossible through the classical model of trials. The gacaca also cannot deal with issues of poverty, but they can enable the release of hundreds of thousands of workers, a necessary basis for economic recovery.

The economic situation creates an urgent need to return the imprisoned suspects to their communities. Nevertheless, reintegration becomes possible only if these communities welcome and accept their return. A broad “forgetting” prevents such acceptance. The falsity of blanket forgetting undermines the possibility of a genuine forgiveness or communal acceptance. Individuals who return to communities without accepting responsibility or asking for forgiveness are a source of constant tension. Additionally, the development of a culture that respects human rights is necessary to break the cycle of violence in Rwanda. The development of this culture requires accountability for perpetrators.\textsuperscript{248} Retreating from the pre-existing commitment on the part of the Rwandan government to prosecute offenders also appears weak and decreases trust in the government.\textsuperscript{249}

\textit{6.2.2 Truth-telling}

To relieve the pressure while still pursuing accountability, requires a less conventional approach than retributive trials. One of the most important factors in an alternative approach must be truth-seeking. Without truth-seeking, individuals cannot

\begin{itemize}
\item \textsuperscript{246} Ibid, 210.
\item \textsuperscript{247} Ibid, 65.
\item \textsuperscript{248} Timothy Longman and Theoneste Rutagengwa, \textit{Memory in Rwanda} in \textit{My Neighbor, My Enemy}, 166.
\item \textsuperscript{249} Tuomas Forsberg, \textit{Philosophy of Dealing with the Past} in \textit{Burying the Past}, 71.
\end{itemize}
know who to forgive or how to reconcile. The issue of history occupies a particularly crucial space in Rwandan society. Many Rwandans trace the genocide to previous manipulations of history, thus, they associate the cycle of violence and the abuse of history. The recovery of history must be a central aim of a response that seeks to combat the cycle.

Ethnic violence existed in Rwanda before the 1994 genocide. The sporadic purges by the Hutu government against the Tutsi minority evaded prosecution because the government amnestied itself for the purges of Tutsis beginning in 1959 and subsequently in 1963 and 1973. Moreover, it also strove to legitimate the purges and used, “…two powerful mechanisms- the teaching of a falsified history and popular songs. The construction of the image of the Hutu as the victim of the Tutsi, autochthony, and the virtue of numbers all served progressively to legitimize violence that was essentially political…” 250 These historical manipulations resulted in the production of a political and social situation propitious to genocide. 251 Recognition of the historical nature of the 1994 genocide is reflected by the difference between Tutsi and Hutu beliefs of when the violence began, “genocide survivors sometimes spoke about the violence beginning with anti-Tutsi massacres in 1959, 1963, and 1973, while most Hutu asserted that ethnic relations were peaceful in their community prior to 1994—or at least prior to 1990…” 252 The truth-seeking component of the gacaca gains importance in light of the historical manipulation of truth in Rwanda.

251 Alison De Forges and Timothy Longman, *Legal Responses* in My Neighbor, My Enemy, 63.
252 Timothy Longman and Theoneste Rutagengwa, *Memory in Rwanda* in My Neighbor, My Enemy, 171.
The project of truth-telling assumes much larger significance given the scale of social destruction. Because of the widespread need for the establishment of a historical record it, “…cannot solely be a judicial issue; it is a political challenge and a challenge for society as a whole. This challenge is all the more important in a situation where the past and present are sometimes hard to distinguish.”253 Since the importance of truth-telling extends to every sector of society, it is crucial to involve all sectors in the process. Victims especially are empowered by truth-seeking. Telling the truth about what happened provides recognition of the crimes committed against them.254 The vindication of victims is a central goal of the gacaca, otherwise unaddressed by the classical trial model.

Truth-telling, however, presents its own serious of complications. Although there are strong reasons to believe that revelation of the facts allows victims to move on and feel vindicated and invokes feelings of remorse in perpetrators, these effects are individualized and often absent or reversed. The particular effects of discovering the identity of your assailant or the killer of a family member vary dramatically given the individual and the process of elucidation. Additionally, discovering such truth, especially incriminating details, without recourse or possibility to appropriate punishment, can compound feelings of victimhood and powerlessness as well as aggravate tensions and disillusionment with the system. Despondence from the judicial institutions and a loss of hope in justice creates possibly insurmountable obstacles to reconciliation.

253 Stef Vandeginste, Dealing with Genocide in the Context of Armed Conflict in Burying the Past, 251.
6.2.3 Recognition

Recognition and vindication of victims extends beyond truth-telling to a central feature of healing. Classical trials aimed at retribution focus on perpetrators and individual guilt. The emphasis on individual guilt problematizes the use of trials because many of the crimes of the genocide transcend the concept of the individual. The genocide followed from many social structures and phenomena, such as the culture of impunity mentioned above and a perceived tendency to blindly follow authority. The response cannot neglect or overlook these social phenomena if it intends to address them and deter such actions in the future. The focus on the individual retains efficacy in a society where law breaking is not the result of deeply imbedded social structures. However, the social character of the Rwandan genocide indicates that the processes at work in 1994 were not solely individual people, but also social institutions. Additionally, Rwandan culture does not perceive individuals as distinct from their social context.255 Not only do classical trials rely on a Western idea of individualized responsibility, they focus on the perpetrator. They aim at punishment and accountability for the transgressor, the victim exists only insofar as there is a perpetrator. The orientation of Western trials causes many victims to feel marginalized. In a system that hopes to achieve peaceful cohabitation between victims and perpetrators it is essential that victims feel vindicated.

A resonant response must correspond with the social context of the targeted community. Without such recognition, the response cannot penetrate the communal psychology to have a lasting effect. Rwandan society lacks a strong concept of people as atomistic and distinct; instead, each person gives and takes continually with those

255 Helena Cobban, 67.
around them. Individual accountability, the basis for the classic model, presents two difficulties for Rwandan culture. First, it does not correspond with Rwandan understanding of social relationships and second, it decontextualizes the truth to the point that it loses its comprehensibility in larger Rwandan society. A reflective response, like the gacaca, encompasses the community members and consequently their understanding of social ties. The gacaca also mirror the importance of social pressure as exercised in Rwandan culture. A linkage between the judicial response to genocide and the operation of the society at peace, helps transition the legal underpinning of the response into a social norm and attitude. The creation of a relationship between the judicial and social systems facilitates the integration of suspects within the community. The interrelating of systems also provides context for the revelations and interactions of the gacaca, necessary for a decrease in hostility. The isolating effect of individual accountability of classical trials in a communal society can cripple the process of reconciliation. The concept of a single person acting without any social context is incomprehensible in a communal society. Thus, a judgment based on the premise of individual guilt does not carry the meaning necessary for social change or respect for the decision. The recognition of interpersonal social connections also shifts the focus from perpetrators to relationships and victims as rights-bearers apart from the perpetrator.

Peaceful reintegration of perpetrators requires a community willing to accept and facilitate reintegration. To achieve that attitude among victims and community members, the process must engender feelings of vindication. Although vindication

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256 Ibid.
257 Mahmood Mamdani, 268.
differs from justice, a sense of vindication reflects a trust for the system on the part of the victim. The trust developed by the feeling that the process reflects the victim makes it more likely that the victim and community perceive the other decisions of the court as just and fair, and thus, accept them. The model of classical trials marginalizes victims and emphasizes the law-breaking nature of the accused. Such classical trials aim at the reestablishment of law, thus the act of crime dominates the procedure and overshadows the harms to the victim. In a community setting, the position of victims gains importance and an equal standing with that of the perpetrator. The leveling of the positions occurs because the evaluations of the process are evaluations of both claims from the victim and the perpetrator, not just an examination of the defenses advanced by the perpetrator. Recognizing a crime committed against a person substantively differs from recognizing a crime against a society.

6.2.4 Forgiveness

The gacaca courts focus on the claims of the victims and thereby reinstate their dignity as rights-bearers, independent of the perpetrator.\textsuperscript{258} Restoring a position of equality and independence is a necessary precursor for enabling a victim to forgive. The recognition and reinstatement of dignity of victims is not only beneficial because it advances social reconciliation, it also contributes to the legitimacy of the gacaca process itself. A trial that does not recognize and resonate with victims and affected communities is akin to a trial in a vacuum. Trials of this sort often dismiss

claims from victim communities as vengeful based simply on the source of the claims, not the substance of them. Trials in a purely theoretical state neglect the truth that their existence derives from a series of real events implicating real people. The exclusion of these realities is also the exclusion of the basis of the trial.

The situation facing Rwandan society challenges the basis of accepting a judicial response to mass atrocity at all. The Rwandan genocide represents a contemporary phenomenon that is similar to the Holocaust only in name. Modern genocides display unprecedented and unexpected elements. Rather than apply the response designed to address the crimes of World War II, there should be a reinterpretation of judicial response for these new circumstances. Rwanda’s response must incorporate cultural elements that promote cultural investment, address the nature of the conflict and facilitate social reconciliation. Accepting previous models of response does not adequately address the genocide in Rwanda. Previously developed responses derived from unique circumstances, not natural law, or another universally applicable doctrine. The circumstances of Rwanda differ dramatically from 1945 Germany, indicating that Rwanda should employ a dramatically different response.

The inapplicability of the Nuremberg model is not only because of time or distance. Within World War II responses, the failures of the Tokyo Tribunal, analyzed above, demonstrate the inapplicability of Nuremberg in 1945, in different cultural circumstances. Additionally, the perceived need to try Adolf Eichmann indicates the problems with a model, such a Nuremberg, which does not engender feelings of trust and vindication among the victim community. In Rwanda, feelings
like those displayed by Israel in 1961 could manifest in vigilante justice and reprisal killings. In order to establish a respect for the rule of law, the judicial response must take seriously the role it plays in social rehabilitation. A lack of cognizance about the larger significance of trials delegitimizes their position. The number and proximity of offenders, coupled with the cohabitation post conflict, present Rwanda with social issues unique from World War II judicial responses and necessitates a different judicial response.

6.2.5 Reconciliation

The Western conceptualization of law contributes to and causes some of the problems facing Rwanda. The legal system directs itself toward specific deviations from normal behavior. An operational legal system assumes that a large demographic of society will not to be committing crimes simultaneously. The legal system as described cannot accommodate an immediate influx of law-breakers associated with genocide. Even the trials at Nuremberg and Tokyo, as analyzed above, selected individuals to represent larger organizations and sectors of society. To prosecute all the suspects of genocide would cripple the Rwandan judicial system. Additionally, retributive justice on such a scale, given the remaining ethnic tensions and violence, would be akin to a massacre. The choice to prosecute a few representatives would lead to collective innocence because of the large number of released suspects.

Conversely, a theoretical problem with retributive justice is that the law does not focus on social relationships or individuals’ feelings. Because of the law’s dismissal of social connections it, “…cannot, nor should it, determine what the
elements of trust are that help individuals and communities build social networks that may lead to ‘harmony.’”259 A legal system is a product of a particular understanding of culture and society. The laws of a community are the explicit statements of what behaviors are acceptable or not. The role of law is to shape and reflect social permissibility. To separate the law from its social construction is to make it incomprehensible. In Rwanda, the Western conception of law as modeled at Nuremberg, does not align with the reality of society, limiting its ability to rebuild the connections in Rwanda. The retributive judicial system still has a place in Rwandan society. I do not advocate the gacaca courts replacing the conventional legal system of Rwanda. The above criticisms addressed the inability of retributive justice to address adequately the Rwandan genocide response. However, the demands of a post-atrocity situation differ from the needs of a peaceful society with an administrative structure. Genocide specifically tears the social fabric underlying a conventional legal system making it impotent to solve the problems facing the nation. Although the same social disruptions can cripple the gacaca system as well, the gacaca provide a forum to address the social injuries, whereas retributive trials specifically distance themselves from such particularities. In order to reach a place that facilitates a classical retributive system the government must determine a response specific to the Rwandan genocide.

Rwandan culture itself provides a basis to the gacaca system. While interviewing community members in Rwanda, Timothy Longman and Theoneste Rutagengwa discovered a distinct cultural understanding of reconciliation. They

explain a few of their interviews and the etymological root of the word reconciliation in Kinyarwanda,

As an older man told us, ‘Reconciliation is part of Rwandan culture. It is for forgetting the wrong committed or suffered. Without this, Rwandans will arrive at nothing.’ The word for reconciliation in Kinyarwanda is *ubwiyunge*, which comes from the same root used to discuss setting a broken bone, and this Rwandan concept of bringing together people whose relations have been ruptured was widely shared among the people that we interviewed. One survivor in Kibuye explained, ‘Reconciliation is the fact that those who did wrong ask forgiveness from those whom they offended and thus the two parties renew their social relations as before.’

The social conception of reconciliation espoused above, facilitates the goals of the gacaca. It also indicates that the Rwandan community does not want retribution as provided by the classical approach. Rather, Rwandans and Rwandan society desire the ability and opportunity to repair their communities. Recognizing such desires and incorporating them into the response adds legitimacy to the process because it better generates respect and the ability to advance its goals. Gacaca puts more pressure on the perpetrator to ask forgiveness than for the government to punish him. The shift between perspectives significantly reflects Rwandan understanding of transition and reconciliation. The infusion of Rwandan cultural character does not necessarily equate to a compromising of the ideals of justice. Victim communities’ claims should be evaluated on the validity of the claims, not immediately rejected because they originate from victims. The interestedness of victims often provides a reason that their claims receive less serious attention from judicial systems. However, the

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261 Ibid, 173.
politicization and self-interest of the victors in the World War II responses, rivals, if not surpasses, the bias implicit in victims’ claims.

The possibility for reconciliation stems from the gacaca’s and restorative justice’s ability to provide space for forgiveness. The rigid structure of retributive trials purposely prevents interaction among victims, witnesses, and suspects. The gacaca, however, mandate such interaction. The interaction of the process characterizes restorative justice, which, “…focuses on victims and perpetrators and tries to restore their dignity not through recrimination but by ‘mediation and dialogue’ so as ‘to generate the space for expressions of approbation, remorse, and pardon, as well as the resolution of conflicts.’”\(^{262}\) The approach of restorative justice allows a decrease in tensions, with the aim of making peace. Mandatory trials can often harden ethnic lines and may appear as victors’ justice, since the new victorious government pursues them.\(^{263}\)

An assumption of reconciliation is a cessation of serious violence. Without such a condition, all actions appear to be vengeance. Pursuit of justice at the expense of peace cannot provide justice at all. The gacaca operate by creating a shared humanity. The equalization of the gacaca, as argued above, places all members of the community in the position to make claims and statements. All their perspectives contribute to the truth-telling and the understanding of the genocide generated by the gacaca. Equality of this sort requires all participants to stop thinking of each other as enemies and to cultivate empathy. Empathy does not necessarily mean that the actions of the perpetrator are justified or accepted. Simply, the empathy of the gacaca

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\(^{263}\) Nigel Biggar, *Making Peace or Doing Justice* in *Burying the Past*, 16-17.
is the recognition of the common human community involved by the process. Recognition of this sort is what facilitates the creation of a new identity characterized by membership in a post-atrocity society. Empathy and rehumanization are not easy to achieve, they require a structure that can accomplish a rethinking almost as tremendous as the dehumanization needed to commit the genocide,

…it takes training to peer through a dark lens long enough to begin to see one’s neighbors as essentially inferior to oneself. Harder for most of us, perhaps, is training in the habit of seeing the worst of neighbors as still human like ourselves. To adopt that later habit is to acquire empathy for the ‘repulsive’…a habit quite different from either sympathy or excuse. To explain and to understand is not to justify; but to empathize is to discover the common humanity that links victims to their perpetrators.264

The gacaca’s interpersonal dynamics shape the cohabitation that the process aims to establish. Thus, it is absolutely necessary that rehumanization accompany the interaction, in order to establish social relationships that underlie a peaceful community.

The reconciliation of Rwanda requires a break from the past while still maintaining a salient memory of the events of 1994. To accomplish this, all members of Rwandan society must come together and recognize each other not as victim, perpetrator or bystander, but as survivors. The dissolution of distinctions is a precondition for the dissolution of ideas of superiority. Without distinctions, the community can adopt a stance of equality. As discussed above, the requirement of victims to acquiesce their status separated from perpetrators places an extreme burden on those most aggrieved and in need of vindication. The willingness of victims to accept perpetrators as equals dramatically affects the efficacy or possibility of

264 Donald W. Shriver, *Justice Served by Forgiveness* in *Burying the Past*, 38.
reconciliation through survivor identity. Although there are structural ways to encourage acceptance through the offering of forgiveness, the gacaca cannot assure such compliance.

The term survivor in Rwanda currently signifies a victim of genocide. However, victims were not the only group affected. The entire country suffered tremendous damage because of the civil war and the genocide. In order to move past divisive categories the term survivor must be more inclusive.\textsuperscript{265} The inclusion of other affected groups benefits the society as a whole, since many Hutu currently feel marginalized and unrepresented in the response to the genocide, which hinders the process of reconciliation.\textsuperscript{266} However, the community as a whole suffers from the threat posed by such widespread violence. The events of 1994 were so intense that even community members not implicated in the violence suffered from it.\textsuperscript{267}

While fostering the unity of a survivor identity, Rwanda must simultaneously begin to encourage a tolerance of difference. Classical trials are unable to instill the permissibility of difference because they operate through assignment of guilt and distinctions. The idea of reconciliation encompasses both of these ideas while striving for the formation of identity, “…at a group level, reconciliation involves the reconfiguring of identity, through visiting of prior social roles, the search for common identifications, agreement about unifying memories if not myths, and the development of collaborative relationships that allow for difference.”\textsuperscript{268} The gacaca are particularly suited to provide the space for these identities to emerge. Gacaca

\textsuperscript{265} Mahmood Mamdani, 272-273.
\textsuperscript{266} Timothy Longman and Theoneste Rutagengwa, Memory in Rwanda in My Neighbor, My Enemy, 176.
\textsuperscript{267} Nigel Biggar, Making Peace or Doing Justice in Burying the Past, 8.
\textsuperscript{268} Harvey M. Weinstein and Eric Stover, Introduction in My Neighbor, My Enemy, 18.
require that each individual act as themselves, not as representatives of a social system like in a formal jury. As people speak as themselves and tell their stories from the genocide, all the perspectives gain recognition. Through this process of dialogue, the hope is that all present realize the general effect the genocide had on the community and that they all in fact share the same community and the same humanity.

6.3 The viability of the gacaca

The notions of forgiveness and reconciliation as pursued by the gacaca and outlined above all require popular participation. A failure, or decreases in quality of participation, are thus serious criticisms of the process as a whole. Although many of the observations and commentary on participation appear to be practical as opposed to theoretical criticisms, they present possibly considerable obstacles to the aims of the gacaca system. Additionally, the reasons for strained participation may reveal underlying problems with the assumptions and predications of the system. The obstacles to participation can be grouped into three categories, two purely practical and the last a more serious problem with the basis of the system. The practical difficulties entail the locations of the gacacas and the time commitment required of citizens both at the gacacas and otherwise. The theoretical obstacle encompasses the pressure placed on survivors, which can result from the previous two but also make forging a “survivor” identity difficult.

The equatorial location of Rwanda affects any kind of outdoor procedure like the gacaca. In Gishamvu, one of the larger administrative units and higher-level
gacaca courts, the location facilitates access, but does not have any kind of shelter. Thus, rain results in cancellations and sun can cause overexposure.\textsuperscript{269} The simplicity of this objection and the ease of rectifying it, demonstrate the destitute economic condition of the country. This poignant fact also makes a stark contrast between the domestic responses and the ICTR, which has already cost over a billion dollars. Second, the mandatory participation (one day per week) for the gacaca poses serious economic hardship for community members. Already Rwanda requires one day per week for umuganda, mandatory community service. Another day a week is for church and a third for market. With the addition of the gacaca requirement, there are only three days for working.\textsuperscript{270} This highlights one of the major constraints on the Rwandan response more generally, the impoverished economy. As discussed above, the incarcerated suspects were almost entirely of working age, and the level of poverty in the country, especially among internally displaced persons, are life-threatening. These two factors combined with the shortening of the working week produce an untenable environment for economic rehabilitation, which may prove to be a precursor for social rehabilitation.

The low participation or low quality of participation could result from the above environmental and economic limitations. Low participation may also stem from remaining ethnic tensions or objections to the one-sidedness of the courts, discussed below. The impact of such low participation, regardless of cause, is two-fold: first, it prevents the goals outlined above that necessitate popular participation. Second, it has the effect of shifting the majority responsibility for accusations and

\textsuperscript{269} Urusaro Alice Karekezi, Alphonse Nshimiyimana and Beth Mutamba, \textit{Localizing Justice} in My Neighbor, My Enemy 78.

\textsuperscript{270} Helena Cobban, 70.
suspect lists onto victims. The inequity of participation in these basic and crucial tasks hardens the distinctions that gacaca tries to soften and creates obstacles to the creation of a single idea of survivors.\textsuperscript{271} Not only are victims mainly left with the task of making accusations without general support, there have also been no confessions outside of individuals incarcerated and using the plea-bargain system.\textsuperscript{272} The lack of broad-based support weakens the entire system because of the centrality of the concept of community involvement. Additionally, the isolation of victims as a group makes reconciliation as analyzed above impossible.

6.4 General problems with judicial responses in Rwanda

As mentioned above, a major objection to all three judicial responses – the ICTR, formal domestic trials, and gacaca - has been the prejudicial one-sidedness of the courts. The mandate of the ICTR limits it to acts committed in the time-range of the genocide, and thus precludes investigation the alleged massacres committed by the RPF after the genocide. The domestic response, controlled by the RPF lead government, also focuses on acts of genocide rather than war crimes and crimes against humanity. These structural features have led Rwandans, especially members of the Hutu majority, to doubt the fairness and legitimacy of the trials.\textsuperscript{273} The domestic trials have largely ignored the RPF crimes; even more problematically, the gacaca are “…expressly forbidden from treating cases of human rights abuses

\textsuperscript{271} Urusaro Alice Karekezi, Alphonse Nshimiyimana and Beth Mutamba, \textit{Localizing Justice} in \textit{My Neighbor, My Enemy} 79.
\textsuperscript{272} Ibid.
\textsuperscript{273} Alison De Forges and Timothy Longman, \textit{Legal Responses} in \textit{My Neighbor, My Enemy}, 49.
allegedly perpetrated by the RPF or its supporters.\textsuperscript{274} The result of these observations and beliefs is a perception of injustice. The feeling of injustice, and its effects are widespread and extend beyond radicals, indeed, “many Rwandans outside and inside Rwanda (and not only those in prison) do not sufficiently recognize the state and the justice rendered as theirs. It is a widely shared perception – whether fully accurate or not – among Hutu (including the so-called ‘moderate’ ones) that victor’s justice is being done.”\textsuperscript{275} Justice, especially in the pursuit of social reconciliation and forgiveness, necessitates a shared understanding and commitment to the project. The actions of the current Rwandan government directly undermine the aims of the gacaca and the ability to accomplish those goals.

\textsuperscript{274} Timothy Longman and Theoneste Rutagengwa, \textit{Memory in Rwanda} in \textit{My Neighbor, My Enemy}, 167.
\textsuperscript{275} Stef Vandeginste, \textit{Dealing with Genocide in the Context of Armed Conflict} in \textit{Burying the Past}, 266-267.
The Nuremberg Tribunal dominates world consciousness concerning approaches to mass atrocity. The principles of respect to individual accountability, education and retributive justice espoused in Germany, in 1945, remain important elements of contemporary dialogues over responses to genocide and crimes against humanity. However, as demonstrated by Section One, those principles existed in varying degrees and for varying reasons. More importantly, as Section Two illustrates, the Nuremberg Principles may be dated in view of the rapid changes of the twentieth century. Scholarship often creates a dichotomy between accepting particular precedents and rejecting them. I argue that the modern world need not reject the Nuremberg Principles, but rather must modify and contextualize them to incorporate the innovations and social realities of the contemporary world. In the last sixty-two years, the world experienced the fall of colonialism, the dismantling of a superpower, the rise of global diversity and globalization, and, sadly, the age of mass atrocity. The answers from over fifty years ago, regardless of their success, cannot remain salient given such dramatic change.

The IMT at Nuremberg succeeded in some aims and failed in others. It succeeded as a transitional measure, educative device and source of documentation. It was procedurally flawed and its principles were particularistic as demonstrated by the inability to export them to Japan. It failed to address all the involved parties as demonstrated by the Eichmann trial. The ICTR is procedurally flawless but lacks political efficacy, cultural resonance and real world significance. The gacaca accomplish the political recognition of Nuremberg, the cultural recognition absent
from Tokyo and the rehumanization desired from the Eichmann trial. The full analysis of the success of the gacaca requires more time and consideration, but its significance and position in relation to the other trials informs what legitimacy and mass atrocity response mean.

Nuremberg succeeded as a political act that documented the Nazi hierarchy and provided a way for the new Germany to break from its past and move forward without an ever-present guilt. The investment of the Allies in the outcome provided the necessary financial and political support, but also transformed the trial and its goals. The transformation from a conventional trial into a political trial changes the criterion used to evaluate the normative contributions of the trial. Political trials, occupying the space between classical trials and show trials, balance the multiple ends of attaining justice and encouraging particular governmental or social behavior. When evaluating Nuremberg, especially with the intention of applying its precedent elsewhere, the assessment must include the extent to which it accomplished the necessary balance and an analysis about the value of its non-judicial aims.

The political balancing of Nuremberg and the flaws of its structure remained unexposed in 1945 Germany. To see the full implication of the trial, the picture needs to contain Tokyo and Eichmann. These trials must be included, not simply because of their temporal or subject relationship, but because they each reveal facets of fundamental claims made by Nuremberg about universality and comprehensibility. Tokyo demonstrates the particularistic nature of Nuremberg. The importance of Tokyo’s inclusion extends beyond the realization that it failed to achieve justice or political goals; Tokyo contributes a view of the international tribunal in a culture that
does not share in the legalistic culture and mindset underpinning the Nuremberg Principles. The failures in Japan derived from a difference of values and the refusal of the Allies to acknowledge that difference. This oversight of the Tribunal prevented it from interfacing with the people of Japan, and thus, to gain the legitimacy necessary to thrive. The failure of the Tokyo Tribunal is both a political failure in Japan and a failure of legitimacy for the Nuremberg Tribunal as a universal model. Japan demonstrates the need for institutions to reflect the society they attempt to adjudicate and the need for trials to operate within society, not above it. The IMT for the Far East exposes the non-universal nature of Nuremberg and retributive justice, and the damage non-recognition causes for both the judicial and the political goals of the tribunal.

The trial of Adolf Eichmann stemmed from a strong political backlash. It redressed an imbalance remaining after Nuremberg. The story told in 1961 belonged at Nuremberg, which incorrectly receives credit for it. The Nazi Holocaust of the European Jewish population occurred as a separate, planned, prioritized goal of the fascist state of Germany. A trial designed to adjudicate war could not provide the space necessary to comprehend the Holocaust separate from World War II. Nuremberg, structurally, precluded the possibility of adequately recognizing the specific suffering of the Jews. The Israeli trial illustrates the extent to which Nuremberg transformed response and established trials as the appropriate recourse for both judicial and political messages. It also exposes the limited character of the IMT. Whereas the Tokyo Tribunal, when discussed, is connected to Nuremberg, the Eichmann trial rarely maintains such association. The relationship between Eichmann
and Nuremberg, however, resembles the relationship between Nuremberg and crimes against humanity, and thus, the most important relationship for using the precedent in modern society. The recognition pursued in 1961 and the radical measures utilized to achieve it, indicates that Nuremberg may be a successful political trial and an effective transitional measure, but a failure as a genocide trial.

The ICTR’s creation illustrates the strength of belief in Nuremberg’s model as a success. Additionally, it accomplishes what Stimson and Jackson wanted, a retributive trial that complies with all procedural rules. The failure of the ICTR, thus, demonstrates that legitimacy in judicial responses to mass atrocity and genocide requires more than a blind and perfect adherence to rules. The abstraction of the ICTR from Rwandan society and the refusal, as with Tokyo, to recognize the affected populace, undermines the trial and represent the lessons still unlearned. The ICTR, unlike the trials of World War II, is a classical retributive trial not a political trial. As a retributive trial, it is a success. However, the shift away from a political trial, and the necessary balancing inherent in that category, limits the ability of the ICTR to respond to a situation so complex. Situations of the kind facing Rwanda require a careful balance between a multitude of aims and needs. Legalism pervades the ICTR and obscures the need for and absence of dialogue between the institution and population.

As with politics, social circumstances inform trials. Neglecting this reality and fostering an attitude of dismissal toward the particulars of conflicts and crimes lowers the efficacy and legitimacy of trials. Rwanda differs from Germany, so too should its response. Nuremberg addressed itself to a society with a legalistic mindset that faced
a small minority of architects of atrocity facilitated by enormous numbers of bystanders. Rwandan society is communal and its genocide occurred through huge popular participation. Symbolic prosecutions and insistence on individual accountability does nothing to repair an entire society affected by the crimes and the social structures that facilitated genocide. The compulsory prosecutions necessary in a retributive response requires the government to punishment and possibly execute such a substantial part of the society that it would be indistinguishable from a continuation of the civil war. To accept the limitations of Nuremberg does not signify an inability to respond. The world community must recognize the limitations of their current approaches and innovate in reaction to new circumstances.

The Rwandan gacaca engage in the same kind political balancing of Nuremberg, despite the refusal of popular memory to acknowledge such politicization’s presence in Germany. Gacaca provide a space for reconciliation and recognition of culturally situated actors, which was absent at Nuremberg. The entirety of contemporary Rwanda survived the genocide and few escaped the life-altering impacts of it. The ICTR cannot address the social rupture that now plagues the nation, it cannot provide, as Nuremberg did for Germany, a break from the past. Rwanda must redefine its nation differently and through a process more germane to the people involved. In Rwanda, a retributive trial cannot reinstate humanness or dignity, as becomes possible through forgiveness and social reconciliation. The viability and efficacy of the gacaca to attain such social conditions remain undecided. Sixteen years separated Eichmann and Nuremberg. However, the move toward socially reflective institutions and the recognition afforded the community, have an impact on
the respect toward the institution and the hope for success. Nuremberg lacked precedent or guidance; it addressed itself toward impossible circumstances and succeeded in altering world instincts. Perhaps the greatest legacy Nuremberg can contribute is a respect for innovation and an appreciation for responses to derive legitimacy from their situations, not from external demands.

The gacaca remain phenomena for continued observation and future analysis, but there are current lessons they can provide. Gacaca inform our conception of judicial legitimacy. The ostensible signs of legitimacy should be a populace that trusts and respects the institution, and an institution that in turn, respects and recognizes the population. Such institutional respect facilitates the rehumanization and reinstatement of dignity denied by genocide. The restoration of dignity should remain the central goal of a response to genocide, but the model used can change. Nuremberg’s legitimacy as a German transitional measure and the gacaca’s legitimacy as a Rwandan genocide response depend on evaluating the extent to which they accomplish a bi-directionality of recognition between themselves and the affected societies. The failures of recognition indicated by Tokyo, Eichmann and the ICTR demonstrate the fragile balance and the tenuous situation such responses face. Nevertheless, maintaining the primacy of mutual recognition for legitimacy provides an analytic framework that updates the Nuremberg Principles and embraces the Rwandan innovations.
## APPENDIX A: NUREMBERG DEFENDANTS, ROLES, CHARGES, VERDICTS AND SENTENCES
(In Alphabetical Order)

<table>
<thead>
<tr>
<th>Name</th>
<th>Role/Position</th>
<th>Conspiracy</th>
<th>Aggressive War</th>
<th>War Crimes</th>
<th>Crimes Against Humanity</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Martin Bormann</td>
<td>Party Secretary (Tried in absentia)</td>
<td>Innocent</td>
<td>N/A</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Death by Hanging</td>
</tr>
<tr>
<td>Karl Dönitz</td>
<td>Leader of the Kriegsmarine, President of the Reich</td>
<td>Innocent</td>
<td>Guilty</td>
<td>Guilty</td>
<td>N/A</td>
<td>10 Years Imprisonment</td>
</tr>
<tr>
<td>Hans Frank</td>
<td>Governor General of Poland</td>
<td>Innocent</td>
<td>N/A</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Death by Hanging</td>
</tr>
<tr>
<td>Wilhelm Frick</td>
<td>Minister of the Interior</td>
<td>Innocent</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Death by Hanging</td>
</tr>
<tr>
<td>Hans Fritzsche</td>
<td>Head of the News Division of Nazi Propaganda</td>
<td>Innocent</td>
<td>N/A</td>
<td>Innocent</td>
<td>Innocent</td>
<td>Acquitted</td>
</tr>
<tr>
<td>Walther Funk</td>
<td>Minister of Economics, Head of the Reichsbank</td>
<td>Innocent</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Life Imprisonment</td>
</tr>
<tr>
<td>Hermann Göring</td>
<td>Reichsmarschall, Commander of the Luftwaffe</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Death by Hanging*</td>
</tr>
<tr>
<td>Rudolf Hess</td>
<td>Party Secretary</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Innocent</td>
<td>Innocent</td>
<td>Life Imprisonment</td>
</tr>
<tr>
<td>Alfred Jodl</td>
<td>Wehrmacht Generaloberst</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Death by Hanging</td>
</tr>
<tr>
<td>Ernst Kaltenbrunner</td>
<td>Chief of RSHA, Commander of many Einsatzgruppen</td>
<td>Innocent</td>
<td>N/A</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Death by Hanging</td>
</tr>
<tr>
<td>Wilhelm Keitel</td>
<td>Head of Oberkommando der Wehrmacht</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Death by Hanging</td>
</tr>
<tr>
<td>Gustav Krupp von Bohlen und Halbach</td>
<td>Nazi Industrialist</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>Dismissed as medically unfit for trial</td>
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<tr>
<td>Robert Ley</td>
<td>Head of the German Labor Front</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>Committed suicide previous to trial</td>
</tr>
<tr>
<td>Konstantin von Neurath</td>
<td>Minister of Foreign Affairs, Protector of Bohemia and Moravia</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Guilty</td>
<td>15 Years Imprisonment</td>
</tr>
<tr>
<td>Franz von Papen</td>
<td>Chancellor of Germany in 1932 and Vice-Chancellor in 1933, Ambassador to Turkey</td>
<td>Innocent</td>
<td>Innocent</td>
<td>N/A</td>
<td>N/A</td>
<td>Acquitted</td>
</tr>
<tr>
<td>Name</td>
<td>Title</td>
<td>Verdict</td>
<td>Verdict</td>
<td>Verdict</td>
<td>Verdict</td>
<td>Verdict</td>
</tr>
<tr>
<td>-----------------------------</td>
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<td>---------</td>
</tr>
<tr>
<td>Erich Raeder</td>
<td>Leader of the Kriegsmarine</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Guilty</td>
<td>N/A</td>
<td>Life Imprisonment</td>
</tr>
<tr>
<td>Joachim von Ribbentrop</td>
<td>Minister of Foreign Affairs</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Death by Hanging</td>
</tr>
<tr>
<td>Alfred Rosenberg</td>
<td>Racial Theory Ideologist, Protector of Eastern Occupied Territories</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Death by Hanging</td>
</tr>
<tr>
<td>Fritz Sauckel</td>
<td>Plenipotentiary of the Nazi Slave Labor Program</td>
<td>Innocent</td>
<td>Innocent</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Death by Hanging</td>
</tr>
<tr>
<td>Hjalmar Schacht</td>
<td>Pre-war president of the Reichsbank</td>
<td>Innocent</td>
<td>Innocent</td>
<td>N/A</td>
<td>N/A</td>
<td>Acquitted</td>
</tr>
<tr>
<td>Baldur von Schirach</td>
<td>Head of the Hitlerjugend, Gauleiter of Vienna</td>
<td>Innocent</td>
<td>N/A</td>
<td>N/A</td>
<td>Guilty</td>
<td>20 Years Imprisonment</td>
</tr>
<tr>
<td>Arthur Seyss-Inquart</td>
<td>Gauleiter of Holland, key to the Anschluss</td>
<td>Innocent</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Guilty</td>
<td>Death by Hanging</td>
</tr>
<tr>
<td>Albert Speer</td>
<td>Nazi Architect, Minister of Armaments</td>
<td>Innocent</td>
<td>Innocent</td>
<td>Guilty</td>
<td>Guilty</td>
<td>20 Years Imprisonment</td>
</tr>
<tr>
<td>Julius Streicher</td>
<td>Publisher of Der Stümer, Gauleiter of Franconia</td>
<td>Innocent</td>
<td>N/A</td>
<td>N/A</td>
<td>Guilty</td>
<td>Death by Hanging</td>
</tr>
</tbody>
</table>

*Hermann Göering committed suicide in his cell while awaiting execution.

**APPENDIX B: ORGANIZATIONS, VERDICTS**

<table>
<thead>
<tr>
<th>Organization</th>
<th>Verdict</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Leadership Corps of the Nazi Party</td>
<td>Guilty</td>
</tr>
<tr>
<td>The SS</td>
<td>Guilty</td>
</tr>
<tr>
<td>The SA</td>
<td>Innocent</td>
</tr>
<tr>
<td>The Reich Cabinet</td>
<td>Innocent</td>
</tr>
<tr>
<td>General Staff and High Command</td>
<td>Innocent</td>
</tr>
<tr>
<td>The Gestapo and SD</td>
<td>Guilty</td>
</tr>
</tbody>
</table>
## APPENDIX C: TOKYO DEFENDANTS, ROLES AND SENTENCES  
(In Alphabetical Order)

<table>
<thead>
<tr>
<th>Name</th>
<th>Role/Position</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Muto Akira</td>
<td>Commander of the Philippines Expeditionary Force</td>
<td>Death by Hanging</td>
</tr>
<tr>
<td>Kimura Heitaro</td>
<td>Commander of Burma Expeditionary Force</td>
<td>Death by Hanging</td>
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<td>Tojo Hideki</td>
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<tr>
<td>Oshima Hiroshi</td>
<td>Ambassador to Germany</td>
<td>Life Imprisonment</td>
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<td>Matsui Iwane</td>
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<td>Minami Jiro</td>
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<td>Doihara Kenji</td>
<td>Spy and Air Force Commander</td>
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<td>Sato Kenryo</td>
<td>Chief of the Military Affairs Bureau</td>
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<tr>
<td>Hiranuma Kiichiro</td>
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<td>Hashimoto Kingoro</td>
<td>Instigator of the Second Sino-Japanese War</td>
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<td>Kido Kōichi</td>
<td>Lord Keeper of the Privy Seal</td>
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<td>Hirota Koki</td>
<td>Foreign Minister</td>
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<td>Koiso Kuniaki</td>
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<td>Shigemitsu Mamoru</td>
<td>Foreign Minister</td>
<td>7 Years Imprisonment</td>
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<td>Hoshino Naoki</td>
<td>Chief Cabinet Secretary</td>
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<td>Kaya Okinori</td>
<td>Opium Dealer to the Chinese</td>
<td>Life Imprisonment</td>
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<td>Name</td>
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<td>Fleet Admiral</td>
<td>Died in Prison During the Trial</td>
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<td>President of the Cabinet Planning Board</td>
<td>Life Imprisonment</td>
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Selected Bibliography:


