
The Politics of International Criminal Justice

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Ball, Howard, *Prosecuting War Crimes and Genocide: The Twentieth-Century Experience*. Lawrence: University Press of Kansas, 1999. Pp. 288. \$35.00.

Bass, Gary Jonathan, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*. Princeton: Princeton University Press, 2000. Pp. 368. €50.69.

Beigbeder, Yves, *Judging War Criminals: The Politics of International Justice*. New York: St Martin's Press, 1999. Pp. xvii, 230. \$65.00.

Hazan, Pierre, *La justice face à la guerre: de Nuremberg à la Haye*. Paris: Stock, 2000. Pp. 286. €17.38.

Robertson, Geoffrey, *Crimes Against Humanity: The Struggle for Global Justice*. New York: The New Press, 1999. Pp. xxxiv, 454. €23.18.

Scharf, Michael P., *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg*. Durham: Carolina Academic Press, 1997. Pp. xvii, 340. \$28.00.

1 Introduction

For many decades, the study of international criminal tribunals was the jealous preserve, the mascot almost, of international lawyers. Throughout the Cold War, it was lawyers who kept the discipline of international criminal law alive, when the more worldly inclined would have dismissed it as a quaint irrelevance. When prospects for international criminal justice boomed, international lawyers were also the prime force behind the promotion and study of the newly created international criminal tribunals. Lawyers of course might not be too surprised to find that international criminal justice was operating in an environment that was imbued with politics, but nor could they be relied on to make that case fully (be it to argue the power of norms) except in the most general of terms.

It would have been difficult, conversely, to find a single book-length treatment of the issue from an international relations perspective as an academic discipline, let alone from its realist mainstream. Political scientists seemed remarkably oblivious to

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the potentially paradigm-challenging qualities of international criminal justice, were it to prove the durable phenomenon that lawyers occasionally announced it to be.¹ The reduction of the entire enterprise to a more or less arbitrary exercise of power-legitimization seemed to be the discipline's best try at the question.

One explanation for this may lie in professional trajectories. For the international lawyer's predominantly normative endeavour, project and reality often mix: international criminal justice also exists as a field of inquiry because it needs to exist to sustain the profession's progressist narratives. For the political scientist who would devote his attention to the world 'as it is', by contrast, legal phenomena only become interesting when they can make at least a pretence at influencing world events. But, because international criminal justice seemed ornamental at best, it could be safely relegated to the periphery of some discrete subdiscipline, for example under the catch-all expression of 'transitional justice', somewhere at the intersection of public policy, history and ethical theory. It is only by the time the International Criminal Tribunal for the Former Yugoslavia (ICTY) survived Dayton and that the lawyers' narrative seemed to be at least partially vindicated that pressure has increased for political scientists to account for the phenomenon, if only to debunk some of its wildest claims. The Pinochet case, the transfer of Milosevic to The Hague Tribunal, and the entry into force of the ICC Statute have only brought a tinge of urgency to the whole issue.

Somewhere on the fault-lines of law and politics, therefore, a number of books have emerged that seek to tackle the (surely not revolutionary) intuition that there just may be more to international criminal justice than the unfolding of law's master-plan — although perhaps also something less than the exercise of brute force. All come with a certain amount of hype² that will be familiar to those who are acquainted with the occasionally brash youthfulness of the discipline, and claim in one way or another to be the first to 'weave together history, philosophy, international law, and politics into a comprehensive and engrossing account of the increasingly significant movement for world human rights'.³ All seem almost designed to have reviewers gasp

¹ The few attempts that were made remained somewhat succinct and were characteristically published in journals with a strong legal component. Cohen, 'Application of the Realist and Liberal Perspectives to the Implementation of War Crimes Trials: Case Studies of Nuremberg and Bosnia', 2 *UCLA Journal of International Law and Foreign Affairs* (1997) 113. To this reviewer's knowledge, at least one political science PhD dissertation has been written on the issue (Eric K. Leonard, 'International Relations Theory and the International Criminal Court: Understanding Global Justice' (PhD dissertation, University of Delaware, 2001)), although it remains unpublished to this day.

² The most overblown probably comes with the description in the *Observer* of Robertson's *Crimes Against Humanity* as 'a book to stop another Holocaust' (Michael Foot, 'Liberty, Fraternity, Statuary', *Observer*, 15 August 1999, Review section, 11; after suggesting that Trafalgar Square be renamed Thomas Paine Square, the review ends with the following comment: 'But why not a Geoffrey Robertson triumphal arch, millions will be reading his book in the century to come if we are serious in our intention to stop those massacres'), although others can claim similarly eulogistic back-cover claims. According to William Schulz, Ball's book 'should become the definitive text for understanding the world's greatest crimes and how to stop them'. It seemed to this reviewer that all the books fell somewhat short of these descriptions.

³ *Crimes Against Humanity*, front flap. The front flap of *Stay the Hand of Vengeance* also claims that Bass 'offers an unprecedented look at behind international war crimes tribunals'.

at their wonderful timeliness, complete with last minute addenda and epilogues. Together, they form part of a burgeoning subgenre which has at its core an interrogation about the Law's behaviour 'at the limit'. They set out to explore this grey zone where the only way Law seems to be able to bend power is at the cost of becoming something very much like it.

Michael Scharf had initiated the process by publishing *Balkan Justice*, a detailed account of the trial of Dusko Tadic, a Bosnian Serb camp guard, the first to occur before the ICTY. The book was a timely rendering of a story that at the time remained relatively unknown, although in retrospect it could have been little more than a first sketch. Yves Beigbeder's *The Politics of International Justice* was published in 1999 in the aftermath of the Rome Conference. It is a dense book that manages to cover a lot of ground. Its author, who is better known for his publications on the WHO and UN reform, admits to being a newcomer to the study of international criminal justice, although, judging by some of the repetition that so characterizes the field, one might think this was not a weakness. With *Prosecuting War Crimes and Genocide*, Howard Ball has published what is a fairly comprehensive history of war crimes in the twentieth century, and one combined with a vigorous defence of the ICC. Geoffrey Robertson's *Crimes Against Humanity* is certainly the most ardent of the books reviewed. Prefaced by Kenneth Roth, the Director of Human Rights Watch, the book is a kind of passionate plea for all things human rights-ish. Pierre Hazan's *La Justice face à la guerre* is the only book in French of the series reviewed, and one that is backed by the author's extensive first-hand experience of Rwanda and Bosnia, and buttressed by many interviews with key participants. Finally, Bass's monograph, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, brings what is probably the most theoretically sophisticated — although not necessarily the most convincing — account of international criminal justice in a world of states, backed by important archival work.

The books are of course quite different in their format, approach, sensitivity and scope. The authors themselves come from a variety of backgrounds and approaches. Only Michael Scharf and Yves Beigbeder are specialists in international law; Geoffrey Robertson is a barrister and human rights activist (Howard Ball was also a civil rights defender); Pierre Hazan and Gary Jonathan Bass are journalists; the latter and Howard Ball are also professors of political science, respectively at Stanford and Vermont Universities; Michael Scharf adds his experience as Attorney-Adviser for United Nations Affairs at the Department of State. Some of the books are clearly more sophisticated than others. Where Hazan is subtle and shows intellectual depth, Robertson just seems to get carried away, Bass tries to make too many claims at the same time and Beigbeder and Ball seem a trifle bland.

Despite these differences, however, it is remarkable how all tell essentially the same story in different ways, or perhaps slightly different stories about essentially the same phenomenon. All are broadly sympathetic to the cause of international criminal justice (both Robertson's and Beigbeder's books are prefaced by respected personalities within the human rights community), and mildly optimistic about its chances of success. All, at the same time, are willing to test the law's claims against a few hard facts of international life.

Even those written by lawyers, for example, share the essential characteristic that they principally adopt an ‘external’ point of view on the law, one that does not take international criminal lawyers’ claims at face value, and makes a serious effort at contextualizing norms in their setting. All the more reason, one might think, for international lawyers to take good notice. It should be clear, at any rate, that international criminal lawyers cannot, as they have sometimes been wont to do, simply retreat into denial when confronted with the issue of power, or otherwise risk harming the project of international criminal justice.

This review essay cannot possibly do justice to all the episodes surveyed by the books or the wealth of analyses that they have produced. It will therefore focus on what is arguably their central theme, namely, their attempt to deal generally with the issue of the *nature of international criminal justice*, particularly as seen through the creation and operation of the ICTY. More specifically, I will be looking at how the authors understand the formation of international criminal justice as a *phenomenon anchored in power yet simultaneously capable of transcending it*. Behind these questions, it is argued, lies nothing less than the issue of the very possibility of a fully functioning international criminal justice system in the age of globalization, and, behind that, some familiar questions about the relations of law and power.

2 Wherefrom It Comes

One of the more interesting methodological issues confronting anyone wanting to write about international criminal justice is to determine where the phenomenon begins and where it ends. Indeed, rather than the specific treatment of a number of well-rehearsed common themes, it is what one decides to include under that general heading that can distinguish authors. In this respect, Beigbeder’s title — ‘the politics of international justice’ — is misleading and claims too much for a book that deals strictly with the international criminal tribunal/truth commission *problématique* and does not even mention the International Court of Justice (although it is in itself revealing of how much international criminal justice has come to be identified with international justice *tout court*).

The conventional wisdom for a long time was that international criminal justice was essentially a problem of ‘justice and war’. Pierre Hazan’s title and treatment suggests adherence to that view by describing international criminal law as essentially about ‘*la justice face à la guerre*’. Similarly, Bass is essentially concerned with the question of how wars are terminated. But is this essentially what international criminal tribunals are about, and is there not a chance of mistaking the nature of the problem with the context in which it arose?

Beigbeder’s work has the merit of moving beyond the narrow confines of international humanitarian law strictly so-called, although his treatment of crimes against humanity and genocide as coming under that heading is confusing. Ball similarly seems to subscribe to the prevailing taxonomy of referring to genocide as

a war crime, as if genocide could not be committed in circumstances that had nothing to do with war. But why not do away with the war crimes vignette altogether when it comes to crimes against humanity?

Geoffrey Robertson's principal contribution in what is otherwise a sometimes overly ambitious and even tediously repetitive book, is precisely to replace the rise of international criminal justice as the purported zenith of the much larger human rights discourse and movement. The author begins his narrative not with the usual Leipzig or Nuremberg trials, but anchors it firmly in an account of the emergence of the modern concept of rights in the Enlightenment. International humanitarian law and the humanitarian movement beyond it are reduced to their proper value as an old impulse which went through a renewed lease of life in the context of the interstate world or, as Yves Beigbeder puts it, a 'specialized part of the international human rights regime' (p. 25).

None of the authors reviewed pays much attention to or seems much perturbed by the paradox that the apex of the human rights movement comes in the form of a tribunal that is not a human rights tribunal properly so-called; nor has there been much notice of the historical irony that the international human rights movement, which started among other things as a challenge of the state's penal excesses, should end up legitimizing a huge system of criminal repression.

But this reviewer would agree that, if one is to understand international criminal justice at all, it makes sense at least initially to understand it through the lens of those who see human rights as providing a blueprint for the overthrow of the traditional interstate world. Assuming that is the goal, however, then it is difficult to underestimate how inauspicious to international criminal justice the international system initially is. Although none of the books display much interest for the kind of systemic concepts that lawyers are fond of (such as sovereignty, or 'legal order'), none is short of arguments to show the depth of reluctance emanating from the inter-state world. Beigbeder reminds us, for example, that states have often been unwilling to try their own enemies, and instances abound of dubious complicity between former arch-foes to interfere with the judicial process, as when the Americans protected both Emperor Hirohito and those responsible for the infamous Unit 731 from prosecutions. Different authors provide different theories of how international criminal justice can nonetheless be seen to have taken a hold within that environment.

A Summoning History

For all our authors, History seems a *passage obligé* in tracing the fortunes of international criminal justice, one that provides the story with both the veneer of age and the character of an epic struggle. Almost all take us through what is by now a fairly familiar routine, from Kaiser Wilhelm (occasionally Napoleon) onwards, to Nuremberg, the Cold War interlude, and the revival of the international criminal justice project in the 1990s, through Armenia, Cambodia, South Africa and countless others. Most authors readily recognize that there has been no dearth of shortcomings

associated with the international criminal tribunals from the use of retroactive law to the excessive use of vague criminal concepts such as conspiracy.

In fact, there seems to be all the more willingness to recognize these shortcomings precisely because they are seen as reasons to improve international criminal justice, not to do without it. Hence, in due course, a finalized and well-functioning international criminal law system will redeem the project, and show it to have been directed in the right direction from its inception. After all, as Beigbeder puts it, for all its shortcomings, did Nuremberg not make 'a significant contribution to international criminal law and justice' and provide 'an essential historical, legal and judiciary basis for the later creation' (p. 49) of the *ad hoc* tribunals?

The risk is of course to fall prey to some kind of historicist narrative that reads the past, with the benefit of hindsight, as a validation of the present. One such example is Yves Beigbeder's reading of the Russel and Sartre tribunals as, essentially, informal predecessors to the current move to international criminal justice (pp. 137–145). The relationship of so-called NGO tribunals and those officially created by the international community is an eminently interesting question that has received insufficient attention, but Beigbeder's treatment seems a bit short. There was a radical potency, not to mention an organizational informality, in such happenings as the Vietnam Tribunal and successor events organized by the Lellio Basso foundation, that seem totally absent in the huge technocratic structures that the 1990s tribunals have become. In fact, the continuation and even the multiplication of NGO tribunals in parallel to the international community's efforts to formalize international criminal justice suggests that the former may continue to have a role in articulating the marginal and repressed voice in international law, long after institutionalized international criminal justice has become a permanent feature of the international stage. Beigbeder's suggestion that the NGO tribunals should 'choose their targets more carefully' (p. 145) seems unnecessarily dismissive, and to miss the point that their potency lies precisely in their capacity not to simply emulate 'real' tribunals.

Of all the books reviewed, it is Robertson's which finds the most martial intonations to describe the imminent rise of human rights sanctioned by international criminal tribunals as the emerging paradigm of international relations and law. Global justice is a struggle that pits human rights, overwhelmingly associated with justice, against the hypocrisy of sovereignty, 'the traditional enemy of the human rights movement'. It is a struggle, with a 'beginning' (natural rights) and a culmination (the ICC). The Holocaust is the 'revelation' that changed things 'for ever' (p. xiv); Nuremberg 'stands as a colossus in the development of international human rights law'; the UN's 'finest historical moment' (p. 34) came with the adoption of the Universal Declaration of Human Rights and the Genocide Convention, a 'talismanic barricade' against 'the onward march of tyrants and tanks and torturers' (p. 437); the 'shameless hypocrisy' of the power blocs is the only thing that delayed the 'momentous day' when crimes against humanity would be deterred by the 'simple expedient of punishing their perpetrators' (p. xvi); the trial of Tadic 'the foot soldier' (p. 333) may end up being viewed by history 'as a deeply symbolic moment: the first sign of a seismic shift, from diplomacy to legality, in the conduct of world affairs' (p. 207); with the trial of

Pinochet, finally, 'one of the most wicked men left in the world', the 'age of impunity may be drawing to a close', and one may be witnessing 'a kind of millennium shift, from diplomacy to justice as the dominant principle of global relations' (p. 437).

Robertson does not minimize the obstacles that confront international criminal justice, and concedes willingly that 'the evolution of international law is never a linear process' (p. xvi) but, if tone is any indication, he has a way of dwarfing these under the bullish evidence of his moral beliefs ('diplomacy is the antithesis of justice') that leaves little doubt as to where he thinks the wind of History is blowing. Globalization provides the indispensable background against which international criminal justice can flourish. Without a hint of that author's reservations, Robertson basically subscribes to Robert Hazan's view of international criminal tribunals as the '*versant judiciaire de la globalisation*' (p. 20).

In the process, one cannot help feeling that one is being robbed of the finer subtext in that particular narrative. Surely, international criminal justice also tells another story, one that is at least more ambiguous, more fraught with power. Particularly central to that story must be the question of why states create international criminal tribunals at all. After all, this has got to be the single most important question: why would states ever bother to create institutions that might end up turning against them or at least be invoked against them as precedents towards a purported moralization of the international order?

The conventional explanation from a realist perspective since Nuremberg, put simply, is that states create international criminal tribunals to legitimize their goals and because they think or know they can control them. Norms do not have a hold on power — it is power that dictates the norms. But the creation of the ICTY and the ICTR in a very different context do raise a question: surely these were not cases of victors' justice in the more blatant sense understood at Nuremberg and Tokyo? Something is simply not quite well explained by the dominant theory.

B Liberal States Do It Better

Bass's is the first book-length attempt, and the only one in the books reviewed here, to try to fit into contemporary international relations theory a phenomenon that otherwise remains curiously unaccounted for. His work is interesting precisely because it seeks to run against some of the all-too-obvious realist shortcuts, by changing paradigm altogether. In a sense, Bass develops Robertson's concept of international criminal justice as rooted in human rights, but, where Robertson had mostly his belief in progress to offer, Bass seeks to anchor the growth of international criminal justice firmly in liberal internationalist theory.

As is well known, liberal theory has known something of a striking revival in international relations in the past decade. Ambitious programmes have been announced to marry it with the study of international law.⁴ One might surmise that international criminal justice was of course not disapproved of by liberal theory, but

⁴ Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda', 87 *AJIL* (1993) 205.

nor was it endorsed in any systematically coherent fashion. Bass's merit is to try to make the case of how the emergence of international criminal justice can be seen as the product of those polities that are most associated with the promotion of the human rights movement, namely, liberal states.

Liberal states are said to be prone to a particular belief that the author, loosely following Judith Shklar, describes as 'legalism'. In short, faced with the choice between summary executions and the creation of international criminal tribunals, liberal states will tend to go for the latter option. Here, therefore, is one more thing that liberal states do that others do not, on what seems at times an ever-extending list.

1 *Liberal Illiberalism*

Bass's presentation is not highly sophisticated from an IR-theoretical point of view⁵ and the book sometimes appears as if a theoretical introduction and conclusion were heaped on what was a lot of — otherwise good — journalism. But nor does he necessarily claim to be a theorist, and his *exposé* serves as a good introduction to what the argument might be.

Fitting the creation of international criminal tribunals into liberal theory, however, turns out to be by no means an unqualifiedly straightforward exercise. To begin with, it is not clear that only liberal states support prosecuting war crimes. In order to meet that challenge, Bass is led to distinguish between bona fide, 'serious' war crimes tribunals and illiberal states' support of 'show trial(s) only as a way of pursuing a Carthaginian peace' (p. 28). Like Robertson he makes a big case of international criminal tribunals' 'distinctive legalism' as being the 'antithesis' of show trials. Emphasis on show trials, from the Jacobinist Fouquier Trinville to the Stalinian Andrei Vyshinsky, described by Robertson as 'monster lawyers', acts as a useful reminder of how injustice can spring from a perverted pursuit of justice (pp. 17–20).

But this does not explain why one of the characteristics of all ad hoc international criminal tribunals is that they have been supported by both liberal and illiberal states. It also seems to neglect the extent to which — although Nuremberg probably looked extremely different from what a victorious Hitlerite court might have been — the characteristic of even those trials that had the dominant support of liberal states is that they displayed strong elements of both liberalism and illiberalism. Blaming international criminal tribunals' occasional illiberal lapses on the fact that they counted illiberal states among their supporters would simply risk misrepresenting historical reality, since it was Churchill, after all, who initially sided with Stalin in wanting the whole Nazi clique to be summarily executed.

Nor is it clear, of all things, that liberal states have supported the creation of international criminal tribunals for liberal reasons, and at times Bass seems to simply over-emphasize the impact of political culture. The description of the 'best hope' for the ICTY as lying in a 'handful of angry and legalistic senior Western officials,

⁵ There are many parts of the theory that remain obscure. For example, whether the author is concerned with a liberal variant of foreign policy analysis, or whether he is interested in the more structural implications of the liberal peace debate, and, if the latter, by what mechanism structural characteristics are transformed into policy outcomes.

foremost among them Madeleine Albright' (p. 208), a claim that Michael Scharf also seems to share, rings particularly hollow in light of Pierre Hazan's descriptions of a series of eminently political *volte-faces* by this Secretary of State.

This suggests that, although there may be certain predispositions to international criminal justice in liberal states, it is something other than that predisposition that serves as the trigger to establish international criminal tribunals. This is implicitly recognized by Bass when he adds a first major qualifier to his sweeping hypothesis, which is that liberal states only support international criminal tribunals in certain circumstances. Indeed, apparently the key to the mystery is not to know why liberal states do support international criminal tribunals but why they do so little: 'Liberals', we are told, 'need to ask why liberal States so often fail to pursue war crimes tribunals' (p. 28).

In order to answer that question, the author suggests a number of variables. States, it is argued, are more likely to push for international justice if crimes have been committed against their own citizens, or if their soldiers' lives are not at risk. Somewhat less importantly, states are more likely to resort to international criminal justice if public opinion, rather than elites, is outraged, and if non-state pressure groups are involved. Apart from the fact that these variables seem rather unremarkable, it is their status within the author's overarching theory that is not quite clear to the present reviewer.

2 A Case of a Glass Half-Full/Half-Empty?

There are basically two ways one can look at the issue. On the one hand, one can see the variables as not truly limitations to liberal theory at all, but merely a way of saying that some liberal states are not liberal enough or are not liberal in the right way, because they let some 'other interest' get in the way of their presumably true liberal nature. This kind of nuance is conveyed by Bass's idea that legalism itself is 'a concept that seems only to spring from a particular kind of liberal domestic polity' (p. 7). If that were the case, however, then there is a sense in which the theory would never be disproved. One could merely say that liberal states who did not support international criminal tribunals were simply not up to their own credentials, and that if only liberal states were fully liberal then liberal theory would explain their behaviour.

On the other hand, one can see the variables as opening the way to what liberal theory was precisely supposed to exclude, or at least mitigate. What are these factors that run counter to liberal states' otherwise natural propensity to create international criminal tribunals, if not a form of realist interest? Bass may be right, but he is ambiguous. Even if protecting soldiers was the main factor in war crimes policy, this seems to this reviewer as simply a negative way of saying that some political interest remarkably short of liberal benevolence is an indispensable ingredient in creating international criminal tribunals. Certainly protecting one's soldiers is not the monopoly of liberal states, and although there may be ways in which liberal states are more sensitive to sacrifice, how and why is never quite made clear. The same applies to the concept of proximity as a trigger for the support of international criminal tribunals: surely that is another way of saying that states could not care less about

conflicts that do not concern them, a statement hardly difficult to reconcile with realist clichés.

Hence, Bass's concessions about the limits of liberal theory lead to a classic half-full/half-empty glass type of problem. If liberalism is just a predisposition and it is crucially the conjunction of that predisposition and a realist interest that makes the creation of international criminal justice likely, then Bass seems to have heaped up so many qualifiers on his hypothesis that it no longer stands. If all that liberalism allows to predict, moreover, is that if and when liberal states do create international criminal tribunals they create liberal ones, then liberalism has not explained much, because it mistakes the importance of form for that of substance: legalism could only be said to be a determinant variable if it affected the decision to create tribunals *per se*. If liberal states were truly liberal in their foreign policy, then they would be principled in their creation of international criminal tribunals. Interest serves as the revelator of what would otherwise remain a desperately invisible ink. In terms of sheer causality, liberalism hardly works wonders.

Towards the end of *Stay the Hand of Vengeance*, when Bass announces that the 'story of the politics of war crimes tribunals is really the story of the constant tension between liberal ideals and crude self-interest' (p. 276), one is already well on the way to a substantially fudged conclusion, and left wondering why the after-thought did not make its way earlier into the discussion. And by the time Bass takes the final step of concluding that 'for the most part, the selfish impulses have won out', one is left wondering: if liberalism is such a pierced net (and, one might think, the author knew it all along), why bother in the first place? There is thus an obvious tension running through Bass's book between conspicuously electing liberalism as a paradigm and immediately underlining its 'sharp limits' (p. 28) as if the explanatory power of liberalism always needed further variables to stick (perhaps, the critic might say, because liberalism in practice is not quite the way it appears in theory).

In the end, this criticism would not seem worth belabouring much, if the author himself did not make such a point of formulating his research in international liberalism's phraseology. As it stands, Bass makes his argument sound more faddish than it deserves. This is all the more regrettable since liberalism does indeed seem to have something useful to contribute to our understanding, provided it abandons some of its more hegemonic-sounding claims, and can find its place in an overall theory of interest formation.

C *Bringing the 'Real' Back In*

Perhaps Bass's framework would be more illuminating with a shift of emphasis. It is interest after all that dictates whether states support international criminal tribunals or not. Interest, however, does not exist in the void but is shaped by — although it does not thereby become merged with — political culture. This might be particularly true of liberal polities, perhaps because liberal polities impose sharp constraints on what can and cannot be said publicly.

Such a reversal of perspective may not seem that distant from Bass's carefully

treaded path, but by taking interest as its starting point it has the merit of taking it seriously. Indeed, the point about whether liberal states support international criminal justice more or less or differently than non-liberal ones, is in the end more about liberal states — rich with apologetic and promotional undertones, one might think — than about international criminal justice itself. And although Bass invokes the usual warning that he is not interested in normativizing, a theory that says that only liberal states are likely to create rule-of-law war crimes trials is not exactly norm-free either.

1 Interest is Not What It Seems

What interest, therefore, albeit liberally qualified, is at the origin of support for international criminal tribunals? As an explanation of interest, Bass's does not strike one as being as good as it could have been, perhaps because it is not really what the author was interested in in the first place. The point about the fear of loss of soldiers' lives, which Bass repeatedly describes as 'perhaps the single biggest impediment to the creation of robust institutions of international justice' (p. 28), in particular seemed to this reviewer to be grossly overdone. It is simply not unequivocally true that 'states have been amazingly consistent in their refusal to pay for international justice in the lives of their own soldiers' (p. 277). Bass seems to underestimate the extent to which this is often simply an argument that is used for public opinion. As it turns out, by the time arrest operations were launched in the former Yugoslavia, hardly any Western casualties were sustained. One of the principal British negotiators at Dayton, Pauline Neville-Jones, confided as much to Pierre Hazan by recognizing that the allied pessimism had turned out to be unfounded (p. 123). Bass fails to explain why states suddenly decided to reverse their policy, which must surely depend on something more than evolving risk-assessment.

In fact, this would seem to be a typical example where liberal theory's homogenizing tendencies claim too much. It is only too obvious from reading Bass's book, despite his archival work at the Foreign Office and the Quai d'Orsay, that he has the contemporary United States — elevated for the purpose of his demonstration as the archetype of liberal polities — in mind. But it can be doubted whether, for the purposes of understanding international criminal justice, there is such a thing as a meaningful category of 'the liberal polity'. The fear of losing soldiers in the course of arrest operations may be a valid description of the mood of US public opinion then in the throes of the Somalia syndrome and obsessed with the failed arrest of Aideded. But the British or the French who suffered dozens of casualties as a result of a fatally flawed peacekeeping effort in the former Yugoslavia might have been inclined to lose a few more in well-targeted arrest operations. Indeed, these countries' initial failure to conduct arrests had precious little to do with fear of losing military lives, as shown by the fact that it persisted even after the disbanding of UNPROFOR and by the time the security situation had favourably evolved.

If anything, and in a more structural way, fear of losing soldiers may paradoxically be precisely one of the main reasons to create international criminal tribunals. This is a point made almost compulsively by all authors and one which Bass himself (somewhat confusingly) recognizes when he underlines that, with the creation of the

ICTY, '[l]aw became a euphemism for inaction' (p. 215). If it is true that the ICTY was created in part to avoid committing troops to a large-scale peace enforcement mission, that makes an unwillingness to contribute the lives of one's soldiers a factor contributing overall to the creation of international criminal tribunals, not the contrary.

As it happens, there were probably much deeper reasons for failure to support international criminal justice than the prospect of losing a few commandos in an arrest operation. These had considerably more to do with deeper misgivings — US, British and French — about the whole concept of international criminal justice and the risks it imposed on already fragile peace processes, concerns that were rooted in century-old state habits. Even for the less realist-minded, arrest operations could be seen to potentially conflict with peace-building initiatives and a fragile post-conflict reconstruction. As Michael Scharf notes, for example, the fear was that in dispatching troops one 'would fuel the conflict by handing the two sides more scores to settle when NATO was scheduled to depart' (p. 225). Bass recognizes this in passing but it somehow never makes it to his theoretical framework.

2 Instrumental Liberalism

Why, conversely, did states finally come round to supporting international criminal tribunals? This is where liberal theory gets its real chance, though through a slightly unexpected route. The context is one of utter failure, all peacekeeping efforts in Bosnia having been sterile. The one turning point that all authors identify is the 1992 media reports of concentration-type camps in Bosnia. By touching at the very heart of European memory, these caused a kind of knee-jerk effect in public opinion by reactivating the 'religious imagery of the victim' (Hazan, p. 76).

How these fed into political processes and outcomes, however, is what is at issue. Robertson seizes repeatedly on what he calls the 'CNN factor', although without the caution that has elsewhere become customary. His is a fairly simple world where it is 'the collective anger produced by [the knowledge of war crimes thanks to CNN] and its application to the conduct of one side in a foreign war which serves ... to tilt international opinion towards intervention on behalf of the opposing side' (p. 168). Thus CNN ends up serving as a 'recruiting officer for the human rights movement' (p. xix), and mechanically leads to 'demands by people around the globe to do something to stop the violence' (Ball, p. 140).

It may well be true that, as Ball points out, as early as the Second World War, the United States's turnabout decision to support the creation of an international criminal tribunal was triggered by publicity surrounding atrocities committed by the German Army at Malmédy (pp. 47–48).

The decision to create the Commission of Experts on the Former Yugoslavia and the ICTY itself, however, was, predictably, somewhat more perverse than the virtuous media's and leaders' 'principled beliefs' line suggests. Many continued to think that an international criminal tribunal would complicate the search for a settlement. An older-generation European statesman like Mitterand remained stubbornly unconvinced of the merits of a solution that probably ran against his better diplomatic instincts.

The outcry from public opinion, however, did make it necessary to give the

impression that something was being done about the crisis. This was true of Europe which was too weak and divided to propose anything of substance, and it was above all true of the United States which had not yet committed troops on the ground and was in search of alternative policy options. Here paradoxically lay liberal cosmopolitanism's chance: in the shallowness of the West's empathy for the plight of the populations of the former Yugoslavia and Rwanda.

The profound osmosis between the rhetorics of international criminal law and politics is made clear by almost all of the books reviewed. Roland Dumas, then France's foreign minister and one of the early backers of the ICTY, is remarkably frank about this in his interviews with Pierre Hazan: himself sceptical about the idea, he decided to back it in front of Mitterand as a kind of insurance policy against the risk of being accused of complicity by 'posterity'.

At the same time, the transformation of the Yugoslav crisis from a principally political problem into an ethical one in the eyes of public opinion set off a bizarre and frantic race for historical legitimacy between France and the United States. Each of these states seemed to calculate that, if an international criminal tribunal were to be created at all, it would be in their interest to be associated with the aura of reviving the idea, while not pushing it so far ahead that it would get out of hand. Michael Scharf provides a first-hand account of how he was recalled in Washington after the French had 'pull[ed] the rug under us [i.e. the State Department] and [stolen] our thunder' (p. 52). By the time the creation of the ICTY became inevitable, even Mitterand would seek to portray himself as one of its promoters.

3 *Densifying the Equation*

This puts the decision to create international criminal tribunals somewhere between liberal ingenuity and realist interest, in a way that has perhaps become surprisingly characteristic of our age. On the one hand, there are undeniably elements of domestic liberalism spilling over into the international, at the considerable (but discreet) annoyance of diplomats such as Vance and Owen involved in the negotiations. Most authors show how diplomatic discourse is gradually distorted by the rhetoric of morality, soon to be followed by that of international criminal law. Each time they uttered statements raising the moral stakes of the war, leaders found themselves more or less unwittingly pushed a little further in the direction of international criminal justice.

On the other hand, precisely for these reasons, one is dealing, if not with neo-realist orthodoxy, at least with a venerable tradition of political manipulateness, since the tribunals were created merely, in the words of Pierre Hazan, as an '*anxiolytique*' for public opinion rather than as long-term commitments to international criminal justice. From the outset, an element of Machiavellian deceit was superimposed on a demand for justice. Public opinion had what it craved, and the 'innocence and virtue' of the West (Hazan) was at least symbolically reaffirmed. The ICTY was created 'as if to stop the world laughing at its impotence, as a substitute for effective military action to stop the war' (Robertson, p. 286) or as a 'post facto substitute for an effective, timely, military intervention by the UN Security Council' (Beigbeder, p. 171). Ball quotes

Holbrooke's description of the ICTY as 'little more than a public relations device' (p. 141) to the same effect.

As might be speculated where there are decisions which an elite is ostentatiously pressed to make that it does not profoundly approve of, the immediate price for international criminal justice was that the idea was little more than a figleaf for political and military decisions not taken. One need look no further than the Kalshoven/Bassiouni commission, a kind of dress rehearsal for the difficulties that the ICTY would encounter, to understand the duplicity and delay involved in the tribunal's creation. The surreal contrast between the idealist rhetoric surrounding the creation of the ICTY, and the indifference of the international community towards the continuing massacres in Bosnia could hardly have been greater than in 1993.

That, however, is in a sense the easy part of the story, and on this most authors agree. Indeed, classical liberal theory coexists happily with interest, and may even emphasize how the pursuit of individual (in this case states') interest can lead to collectively beneficial outcomes. There is little doubt, furthermore, that one can be a die-hard supporter of international criminal tribunals and still recognize that they may well have been created for all the wrong reasons from the point of view of justice. In fact, few lawyers would claim that the cradle of international criminal tribunals was not surrounded by a great deal of calculation. *That* would still be compatible with a triumph of liberal progress, if international criminal tribunals then somehow went on to mete out justice to the guilty.

Rather, the really interesting question is whether from that inauspicious cradle international criminal tribunals could rise to the challenge that awaited them and become real forces for justice. Bass hints strongly at this in his introduction and even refers explicitly to liberal institutionalism as a distinct theoretical trend, but does not follow it up systematically afterwards. It is Pierre Hazan, above all, who raises the question of whether '[u]n tribunal, créé par la volonté du Conseil de sécurité, peut-il s'autonomiser de toute tutelle politique et se retourner contre ses pères fondateurs' (p. 13).

4 The Liberal Institutional Thesis, or How the 'Petit Juge' Took on the Leviathans

This, of course, is the stuff that liberal success stories are made of: 'politicians' create institutions in the belief that they can manipulate them, only to find that, with justice turning a blind eye, law then follows its own inflexible course. It is also the story that those involved in the work of international criminal tribunals understandably like to believe and to tell about themselves. In the pure tradition of individual will making a difference against the forces of evil, accounts of tribunal employees risking their lives in quasi-covert missions in Kosovo give the requisite anecdotal dimension that truly gripping struggles are made of.

D *Pulling the Strings? The Effect of Political Processes on the Tribunals*

That the Security Council had created the Tribunal without any intention of letting it do its work would soon become apparent, and it is difficult to imagine more dismal beginnings for the ICTY than those that awaited it in late 1993 when it convened for the first time. The minimal constraint imposed by liberal ideology had probably allowed the Tribunal to escape the worst: an early American suggestion that it be supervised by an administrative council composed of the members of the Security Council was simply more than public opinion would have been ready to stomach. The ICTY might be a subsidiary organ of the Security Council, but it could not simply be merged with it, or the bluff would be exposed.

Beyond that, however, the Security Council obtained almost everything short of outright suzerainty, notably by controlling all key nominations. Indeed, it is surprising how little changed with the creation of the Tribunal and how its politics went on to closely mimic internally those that had led to its creation: nominal support on the one hand, and complete absence of real cooperation on the other. For most of its early years, the Tribunal would be a toy in the hands of the great powers: allowed to do its work when for the most part that suited political designs, but suddenly reined in whenever it showed signs of threatening the status quo.

1 The Ways and Means of Influence

Influence, of course, is a tricky process to measure, and it is important to avoid seeing the hand of Washington, Paris or London lurking behind every Tribunal decision. Not every delay in indicting key suspects, was attributable to outside pressure. Various prosecutors have been quick to point out that prosecuting work has its own professional constraints so that prosecutors, who are also gambling some of their professional credibility, are naturally conservative in making accusations they will then have to defend in court. Lawyers with practical experience of criminal trials may therefore be more inclined than Pierre Hazan to give the Prosecutor's office the benefit of the doubt when it claims that at least for a while the odds of securing a conviction of Karadzic were simply not strong enough to launch an indictment.

With the benefit of hindsight, the Prosecutor's office's slowness can be seen as the product of a slow encircling strategy focusing little by little on those primarily responsible, rather than merely a process of subjugation to the political. This is of course not to neglect the possibility that, every now and then, the Security Council chooses a Prosecutor who does not have to be — even if that were conceivable — 'told what to do', simply because he happens more or less implicitly to share some of the Security Council's strategic options (after all, this is what handpicking is about). Goldstone comes out in Pierre Hazan's book as a good example of a lawyer who, while

of doubtless professional probity, was not totally ‘unreceptive’ to political exigencies and who was not overly thrilled by the idea of indicting Karadzic and Milosevic.⁶

By the same token, it is quite clear from the experience of the Tribunal that there was no shortage of outside intervention either. The days when General MacArthur purported to rule the Tokyo Tribunal by decree are remote and, apart from one Russian ambassadorial request to freeze indictments, instances of known direct interference have been rare. But the ways and means of influence are multifaceted. At the most blatant, there are the discreet ‘corridor’ pressures, the ‘expressions of concern’ dropped more or less casually by more or less authorized diplomats at key junctions of unfolding crises. Lord Owen has explained to Pierre Hazan how he would steer clear of anything which might look like a direct instruction, but would make sure to explain the negotiating process to the Prosecutor ‘with great care’. There are also cases of simple bureaucratic obstructionism: the lost archives, the delays in answering requests, and endless appetite for red-tape. The UN Secretariat stands out in all the books as one at least initially more concerned with responsiveness to evolving Security Council priorities than with providing vigorous support to a new institution that depended entirely on it for its logistics.

Finally, there is the fundamental and often avoided question of money, no less the lifeblood of justice as it is of war. Michael Scharf paints a vivid picture of what a dismal financial state the Tribunal was in its early months and even years (pp. 79–84). There is of course no such thing as complete independence, if only because the Tribunal has to receive its budget from some source. The voluntary contribution/regular UN budget dilemma illustrates what is in some ways an insoluble quandary: on the one hand the risk of a tribunal that fails to work because of lack of money, on the other a tribunal that risks being controlled by it. As it happens, the Tribunal got a taste of both as its financial balance sheet closely followed its political popularity with major funders. It is hard to believe that in the beginning the Tribunal lacked everything from computers to translators and was literally asphyxiated by the lack of funds. This made the ICTY vulnerable to a hegemonic takeover bid: the United States, for one, initially offered 20 personnel for the Prosecutor, threatened to withdraw them during Dayton, and topped up the Tribunal’s budget with an extra US\$1 million during the Kosovo crisis.

2 *A Legacy of Legal Pugnacity*

If the Tribunal achieved anything from there, it did so thanks to the activism of its judges and, at least since the nomination of Louise Arbour, its Prosecutor. One is reminded that it is Antonio Cassese himself who broke a deadlock over the choice of a prosecutor by headhunting Goldstone (*‘habemus papam!’*) — hardly a banal professional occupation for an international judge. Paradoxically, the scrupulous efforts to exclude judges that were somehow culturally or religiously ‘connoted’ would lead

⁶ Although, perhaps unsurprisingly, in his own memoirs, Goldstone makes exactly the opposite case, namely, that he was largely ‘innocent’ of the political ramifications of his work. See R.J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (2000).

to the choice of magistrates so 'independent' that they would in due course become unpredictable.

In the complex game of internal tribunal politics, the judges would even go as far as to exercise a discreet oversight of the Prosecutor's strategy. Hazan has some particularly gripping lines to describe the muttered incident that led the bench to rebel against Goldstone's perceived shyness by threatening to issue a public statement euphemistically 'expressing [its] worries' about his strategy.

And then there was what must by all accounts be the most potent political tool of all: direct appeal to public opinion. If the Tribunal was created thanks to pressure by civil society, then, it seems, so would its flame/fortune be rekindled. Recourse to public opinion is of course a delicate tool: used too often it risks being blunted by apathy. But in the right context, it has proven to have the potential to make a difference.

Some of the Tribunal's representatives have certainly proved remarkably deft at public relations. When the UN blamed its financial crisis for its proposal to cut the ICTY's budget in the aftermath of Dayton, for example, the judges wrote a collective letter to Boutros Boutros-Ghali which contained barely hidden threats to make the matter public. When rumours emerged that Milosevic might have been granted amnesty by Holbrooke in exchange for a cease-fire, Louise Arbour equally threatened to bring the issue to the press. She would later convoke the world media to witness the Serb refusal to allow her to enter Kosovo. If worst came to worst, leading members of the Tribunal could always put the threat of their resignation in the scale.

E Loosening the Strings? The Effect of the Tribunal on Political Processes

One might say that the effect of the Tribunal on political processes and particularly the sensitive question of peace-settlements, has been inversely proportional to the effect of political processes on the Tribunal. The Tribunal could be dismissed with a sneer in the early days by its own creators. Worse than attempts at manipulation designed to stifle its independence, it was often the utter neglect with which the Allies treated the Tribunal that could keep it at arm's length from the peace process.

1 Justice's Political Responsibilities

In this context, both the Prosecutor and the judges came to see it as part of their responsibility to promote a certain idea of international criminal justice versus what they saw as scheming and ultimately self-defeating attempts to negotiate with the devil. This might appear slightly odd in some domestic contexts, and there was nothing obvious about judges so identifying with the cause they worked for that they would choose to also act as political helmsmen to the Tribunal.

Nothing could be more remote from the reality of the Tribunal, however, than the image of sitting-back, law-applying judges. Paradoxically, it was only at the cost of transforming themselves into crusading diplomats that the judges could one day hope

to normalize their work. Of course, it is part of the judges' and prosecutors' role that they would back off indignantly from any claim that they were involved in anything as unbecoming as 'politics'. But there was in fact much less legal ingenuity — what Bass described, perhaps a little severely, as the lawyers' 'way of washing their hands of responsibility for the political consequences of their own legal proceedings' (p. 6) — than catches the eye.

Both Goldstone and Cassese, for example, sought to impress on negotiators that they thought amnesties were not an option. It has even been suggested that some indictments were timed to coincide with Dayton. According to Hazan, Cassese at one point argued for the reimposition of sanctions against Bosnian Serbs, and Arbour relentlessly fought states' inertia in complying with their obligation to arrest suspected war criminals. At times the Tribunal even went so far as to develop a sort of para-diplomacy of its own, as when a former senior employee of the Prosecutor's office soon to return to the Tribunal made a visit to Karadzic to try and negotiate a surrender. The Tribunal's senior representatives seem to have assimilated well the lesson that just because one is dealing with law does not mean one should not take cognizance of politics.

2 *Constraining Politics?*

The indictments eventually had their effect on the negotiating process, although again perhaps not in the straightforward ways that had sometimes been predicted. As Bass points out, contrary to the oft-heard claim that legal rigidity would prevent negotiating with indictees, it was a lawyer himself in the person of Goldstone who obliged by pointing out to the Americans that, since Mladic and Karadzic were innocent until proven guilty, he saw no obstacle in principle why the Americans should not negotiate with them.

By the time the Tribunal had put itself on a steady course, it would become ever easier for it to capitalize on its reputational assets. If it came down to that, threatening to publicize NATO's lack of cooperation (particularly by making public secret indictments on which NATO had failed to act) seemed an effective way of steering states into action. One minor way in which the Prosecutor could unblock the *status quo*, for example, was by playing on state rivalries. Although generally united in their lukewarmness about the Tribunal, even minor differences could be exploited. Louise Arbour, for example, effectively stung Gallic pride at a time when cooperation from Paris was at an all-time low, by pointing out how much better the British SAS had been at arresting key suspects. Divide to rule: it is difficult to think how much more political than that lawyers can get.

With the indictment of Milosevic, the Tribunal did end up imposing 'its' solutions on the international community, signalling a point of no-return in the larger political process. Although official declarations that this complicated the peace process are hard to come by for obvious reason,⁷ it is clear that not all involved were pleased. The

⁷ Hence the anonymity of one of the most famous articles on the issue. Anonymous, 'Human Rights in Peace Negotiations', 18 *Human Rights Quarterly* (1996) 249.

irony, of course, is that the international community was in the end obliged to commit the resources it had for so long carefully avoided committing to the former Yugoslavia, precisely by the institution it had devised to escape its responsibilities.

3 Where to It Goes

For those who fear that international criminal justice and international military intervention are but two faces of the same coin, reading Robertson's book will not dispel such fears. Indeed, *Crimes Against Humanity* should be compulsory reading for anyone interested in how far an unsophisticated concept of sovereignty can lead. From his defence of the universality of rights ('likely to be sought by intelligent beings everywhere', p. 439), to his praise of state partitioning (lest minority rights be denied), *Crimes Against Humanity* is riddled with all the clichés that simultaneously buttress and undermine the human rights programme.

The author's simplistic view of sovereignty as 'affording protection to rulers who loot or otherwise misappropriate vast sums of public money' and thus a 'complete impasse to securing economic and social rights', leads him quite logically to one of the most landslide advocacies of an interventionist agenda in recent years. Apart from the henceforth classic defence of intervention in order to protect the 'democratic entitlement', there is little doubt for Robertson that failure by a government to fulfil its citizens' economic and social rights amounting to an 'abject failure' to 'feed and clothe' its citizens 'should be liable to international intervention' (although the nature of that intervention is not specified).

Indeed, in a move that seems to ignore the bulk of international criminal lawyers' efforts over the past decade to emphasize the need to repress individuals rather than collectivities, Robertson hails that '[t]he commission of crimes against humanity provides an indisputable warrant for punishment of violator States' (p. 454). But perhaps the author is at his most iconoclastic and worrying when he repeatedly argues that, confronted with Grenada's 'fratricidal maniacs' (note: a dozen people were killed), the American invasion of that island state could have better been justified on humanitarian grounds than for security purposes.

From thereon, and quite logically, Robertson is led to argue that 'human rights might have a healthier future if it parted company with the United Nations', and if the UN were replaced by a 'coalition of the willing comprising only countries which are prepared to guarantee fundamental freedoms through representative government' (p. 447). It is then only a small step to endorsing the fashionable notion that there might be 'virtuous' dogs of war, 'not as a soldier of fortune but as a well-insured employee of a multinational corporation directed by decorated officers who have taken early retirement from a national army in order to do some real fighting' (p. 202) (the 'real' presumably points to some neglected heroic machismo).

At no point does Robertson seem dimly aware of sovereignty's emancipatory potential, its role as a framework for the polity's organization, or its status as a bulwark against imperialism. In so doing, he arguably misses the only interesting and

serious question which is not how to do away with sovereignty, but how to control its worst excesses while protecting it from destruction, a question that seems crucially ill-suited to the broad-brush of legal black-and-whiteness.

Of course, Robertson is also against anything that might affect rights, so that he can easily be simultaneously in favour of military intervention in Kosovo and against collateral damage in describing what he calls ‘the Guernica paradox’ (bombing for humanity). But the failure to even contemplate, let alone come to grips with, the possibility that ‘collateral damage’ might be inherent to the original project seemed to this reviewer to be fundamentally disappointing. In the end, Robertson ends up confirming his own well-taken point that ‘today, human rights is much in fashion, which makes it the subject of a certain amount of humbug’ (p. xx).

This is not to say that more cautious assessments of the potential of international criminal justice are not available, and indeed many are forthcoming in the books reviewed. Beigbeder’s conclusion that international justice should ‘if not prevail over politics, at least play the role of a legal model and moral conscience for the world’s leaders’ (p. 204) comes closest to the kind of guarded half-truth that is, in the end, the staple of the discipline’s attempts at not being caught on the wrong side of the international system’s evolution. But it is also noteworthy that the author who seems most enthusiastic about the prospects of international criminal justice and speaks his mind most clearly (Robertson) also happens to be the one whose views are the least sophisticated, and who would take international criminal justice in the direction where it is least welcome.

4 Conclusion

By taking (more or less) seriously the overarching presence of politics above the workings of international criminal justice and following that hypothesis through, the books reviewed in this essay tread the terrain of what is generally the ‘repressed’ part of the legal narrative. Indeed, the mere suggestion that there is a ‘politics’ of international criminal justice already runs counter to the larger part of international criminal justice’s own efforts at self-presentation, as a principally technical-instrumental-oriented enterprise. The move is a welcome and long-overdue one that has the potential to renew interdisciplinary dialogue and raises a number of questions much in need of being raised.

If international criminal tribunals have acquired much of the independence that the books reviewed claim they have, then the question deserves to be asked again with the benefit of hindsight: why would states have created institutions that they cannot control and which might even turn against them? Is this a vindication of liberal theory either in its purposive (liberal states willingly dish out bits of their sovereignty for the higher collective good) or providential (liberal states dish out bits of their sovereignty for reasons of liberally constructed interest, but in doing so end up creating a globally optimal result) variants? Or is the argument substantially complicated by factors that are not clearly amenable to liberalism’s categories?

Arguments can be found both ways, but it would seem that at the very least a thorough mix of liberal legalism and realist interest is what characterizes the emergence and consolidation of international criminal justice towards the end of the twentieth century. Indeed, all attempts at prioritizing one over the other seem destined to fail, as the excluded paradigm comes back to haunt the dominant account. Even after they have been thoroughly hybridized, however, these traditionally state-centred paradigms may miss the more central point that international criminal tribunals are also more generally about the fundamental disruption of many categories of both international law and international relations: the emergence of an ubiquitous civil society, the rise of the media, or the reduction of the political to the management of emotions.

There would even seem to be a case for treating the emergence of international criminal justice as a test case of the importance of the conjectural, the stochastic, in international relations. International relations theory, because of its interest-driven and purpose-oriented concept of action, is prone to radically discount the importance of chance and mistakes as determinants of state behaviour. But the history of international criminal justice seems to be littered with instances of misunderstandings or miscalculations, from the typographical error in a telegram sent to Robert Lansing confusing 'inhuman treatment of Americans by Turks' with that of Armenians (Bass), to Under-Secretary of State Eagleburger's bizarre outburst urging the creation of an international criminal tribunal long before this became US policy (Hazan, pp. 60–62; Bass, pp. 213–214). It is unlikely, for example, that NATO members at the Security Council anticipated that by loosely granting the ICTY jurisdiction over the whole Yugoslav territory, they would expose themselves a few years later to the Tribunal's jurisdiction. Russia and China's evolving attitudes towards the Tribunal as it shifted its attention from Croatia and Bosnia to Kosovo, show that they had not foreseen much of the Tribunal's potential for development.

Especially in circumstances of radical change with limited visibility and perhaps just a little *fin de siècle* ebriety, then, states may perhaps sometimes simply miss the odd curve in their conduct of foreign affairs. These mistakes may in due course trigger chain processes which are very much unintended and whose distant results they could not possibly foresee. This is what might be called the 'liberal trap' theory, and it is one which, under various guises, finds several defenders in the books reviewed. Hazan, for example, sees 'the emergence of justice in international relations' as resulting from a 'chaotic process, which escaped at the last moment the proponents of *realpolitik*' (p. 185).

From a purely interest-oriented point of view, the creation of international criminal tribunals was not a bad bet: appease public opinion while not committing precious political and military resources to what promised to be an intractable problem. But the growth of international criminal tribunals into something that is respectably independent, as the theory goes, is simply something that the sovereign demiurge did not see coming.

The theory's particular way of merging interest and the common good will surely prove irresistible to many readers, while it will appear almost too good to be true for

others. It nonetheless remains one of the most curious lessons of the books reviewed that if liberal states do end up engendering a liberal world based on international criminal justice, they may well have done so largely by accident, despite their better opinion and occasionally for profoundly illiberal or at least a-liberal reasons.

Beyond the question of how the international order ever stumbled into international criminal justice in the first place, one of the other interesting claims to surface from these books is the one made particularly by Robertson and Hazan on the essential irreversibility of international criminal justice under the conditions of a liberal order. Robertson repeatedly points to the 'optimistic fact' that '[j]ustice, once there is a procedure for delivery, is prone to have its own momentum' (p. 449). This is perhaps the crucial argument in sustaining a progressist narrative in that it projects the image of a potentially endless and linear improvement.

The argument works particularly well in the context of the ICTY to explain the potency of threats by the Prosecutor to disclose instances of insufficient cooperation by states. Again, one reason why such threats of disclosure work at all is that a war crimes policy is something that is very difficult to step back from in full view of public opinion. As Bass puts it, Albright's increasingly vocal stands in favour of the Tribunal 'would make it harder for America to retreat from her pledges without embarrassment' (p. 264). By the time Louise Arbour put governments before the *fait accompli* of Milosevic's indictment, those who had rhetorically supported the creation of the Tribunal 'could hardly back out' (Hazan, p. 234).

What remains to be seen, however, is how far international criminal justice's 'own momentum' will take it, and in particular whether it can endlessly bootstrap its way up to ever higher levels of norm enforcement. Here, there would seem to be a permanent risk of mistaking cause and consequence, under the spell of a mechanistic understanding of causality. In the dominant narrative, efforts by international criminal tribunals to impose a concept of the rule of law on the international order are systematically interpreted as the reason *why* states eventually seem to behave in ways that conform with that rule of law. The reasoning, however, might more realistically be inverted. It is states' prior decisions to give leeway to international criminal tribunals and to be moderately receptive to their demands which allows judges to voice discontent about perceived failures of compliance.

Even when they have seemed to assail power politics, moreover, the judges have tended to do so in a way that can almost never be accused of being self-destructively oblivious to politics, so that it is never clear whether the Tribunal is determining political events or merely following and rubber-stamping them. The Karadzic/Mladic indictments are ambiguous in this respect. They tended to occur more or less at the time when the latter had ceased to be considered serious interlocutors by the State Department. Hence, in a way they fitted neatly into diplomatic calculus by opening the way for Dayton and what became known as the 'Milosevic strategy'. Milosevic's indictment may have taken justice one step further, but here again it is clear that at least some diplomats at the time thought that Milosevic would have to go sooner or later. Louise Arbour's decision not to even seriously investigate allegations of NATO wrongdoing in Kosovo, conversely, whether it reflects a *bona fide* assessment of the

relative lack of gravity of the offences involved, or a deeper willingness not to upset the Tribunal's promoters — stands as a painful reminder of the precariousness of international criminal justice's niche in international politics.

Most importantly, it may well be that states only grant any leeway to tribunals when the stakes are low, so that the successes of the ICTY and the ICTR also reflect the relative de-rating of these issue-areas on the international exchequer. The debate is not merely theoretical: which option one chooses has fairly dramatic consequences for how one interprets the legacy of the ad hoc international criminal tribunals and, beyond that, the prospects for the ICC. If it is true that the international criminal tribunals somehow 'prove' the feasibility of an independent international criminal justice system, as is the popular *topos*, then one would seem to have ample reason to be at least moderately optimistic about the Rome Statute. If, on the contrary, the work of the ad hoc tribunals merely goes to show that international criminal justice operates successfully only in conditions of low political intensity, then the ICC looks likely to accumulate improbable odds against itself.

This is an important point for another reason. Many authors see the emergence of an ICC as a remedy to the selectivity associated with ad hoc tribunals. Hence, for most, the biggest problem is associated with the reluctance of powerful states (foremost among which is the United States) to join the ICC. None, however, considers the possibility that the ICC may eventually simply displace the problem of selectivity, transferring it from the 'external' one of tribunal creation to the 'internal' one of caseload selection. This is perhaps ultimately the most disappointing let-down, coming from those who sought to tackle the politics of international criminal justice: that they should fail to adequately highlight, behind the apparent move towards ever-greater resolution of problems, the profound elements of continuity that are likely to run between the ad hoc tribunals and the permanent ICC.

When one has reviewed the authors' varying shades of arguments, what remains common to all is a certain style. Story-telling is the genre that comes most naturally to the authors as they set out to provide modernity with the kind of narratives on which it thrives. Clearly, the saga of international criminal justice with its (occasionally) intense courtroom drama and its (occasionally) larger-than-life characters, against the background of a thundering and bloody history, lends itself well to all forms of literary romanticization. None of the authors, at any rate, can incur the criticism of not having been fascinated by their topic.

Notwithstanding this, it is at times as if some of the authors were overwhelmed by their material and lost track of their overall argument (when they have one) in a sea of anecdotes. Indeed, for some such as Ball, it is as if distilled story-telling were all there was to history, and as if that story itself were not in much need of being at least partially deconstructed.

In ultimate analysis, therefore, one is still probably left without an overall theory of international criminal justice that is readable without being reductive, normative without being self-indulgent, and critical without being cynical. Bass has the ambition but, in hesitating between two genres (the work of political science and the historian's vulgarization), falls short of a comprehensive explanation; Hazan probably

comes closest, but his investigative focus sometimes leads him to shun theoretical ambition.

That the accumulation of behind-the-scenes stories, however well they may reflect on the authors' connections, does not make up for a rigorous theoretical framework should be obvious. Perhaps a more analytical or synthetic approach would have avoided some of the pitfalls of the kind of ingenuous historicism that story-telling only too often leads to. Now that a salvo of books has capitalized on the relative 'novelty' of the topic, it is hoped that the next generation of studies on international criminal justice will take our understanding a step further.

It is a phenomenon often remarked in courtrooms — not least those of international criminal tribunals — that different witnesses can tell the same story in different ways: nothing could be truer of that particular story. Yet the books reviewed also display a remarkable level of consensus on the fundamentals of international criminal justice. Hazan's enigmatic conclusion that 'all justice is born from ambiguity' (p. 236) seems to manage to capture the fugitive realm of the possible. If nothing else, this worthy collection will be testimony to a pre-11 September mood of historical optimism.