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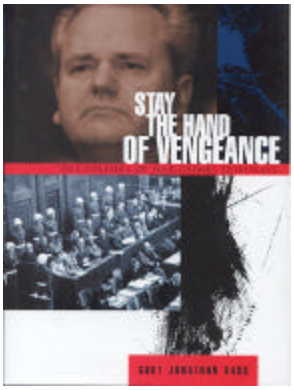

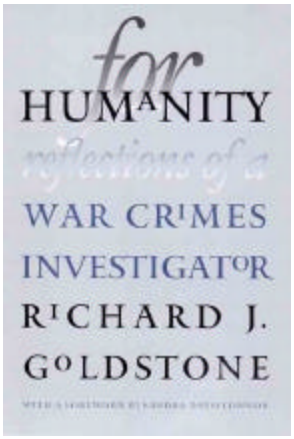

Searching for Justice in an Unjust World

By Sharon Healey

A review of Stay the Hand of Vengeance by Jonathan Gary Bass. Princeton: Princeton University Press, 2000. 368pp.

and

For Humanity: Reflections of a War Crimes Prosecutor by Richard Goldstone. New Haven, CT: Yale University Press, 2000. 152pp.

The growth of the international human rights movement over the last 50 years has not been accompanied by a decrease in wars of astonishing brutality. The enduring debate over what should be done with those who carry out or order the rapes, tortures and murders of innocent civilians has fueled heated exchanges among academics, human rights activists and politicians. Must there be justice in order to realize peace, or are there times when we must swallow injustice in the name of peace? The books by Gary Jonathan Bass and Richard Goldstone under review attempt to address some of these issues from different perspectives. Bass's Stay the Hand of Vengeance is a historical account of prior attempts to create war tribunals and an analysis of their relative successes and failures. Goldstone's For Humanity, Reflections of a War Crimes Prosecutor is, in turn, a personal account of his transition from a young activist opposing apartheid to a private attorney with a lucrative transaction practice, to chair of the "Goldstone Commission," charged with investigating violence and intimidation by South African officials during that country's transition to democracy. His autobiographical account also includes his two-year position as chief prosecutor of the International Tribunal for the Former Yugoslavia (ICTY).

Both authors conclude that international trials are the best method for dealing with war criminals. Bass's book, however, offers a more tempered endorsement and is particularly illustrative of the way in which a lack of political will and the subordination of justice to a country's own self interests can severely thwart the tribunal process. He provides detailed explorations of the aborted treason trials of the Bonopartists in 1815; the attempts to try German war criminals after World War I and the Young Turks who perpetrated the Armenian Genocide; the Nuremberg trials of German

war criminals after World War II; and the Ad Hoc Tribunal set up by the United Nations Security Council to try those who committed war crimes in the former Yugoslavia. These experiences hold significant lessons for future efforts, as well as indications of the way in which the personalities of world leaders and their advisors effect decisions on meting out justice.

Bass's chapters on the Leipzig trials that were established in the wake of World War I to try Kaiser Wilhelm II and other German leaders for war crimes and aggression should dissuade anyone who believes that true justice can be achieved by trying war criminals in their own domestic national courts—an alternative advocated by opponents to the International Criminal Court (ICC).[1] Initial efforts at establishing an international tribunal ended with a watered-down compromise permitting Germany to try the accused before its own Supreme Court at Leipzig. Of the seven suspected war criminals named by Britain, three escaped, one was acquitted and the remaining three received jail sentences of only a few months. This situation led an allied commission to conclude that "in almost all cases the court has given no satisfaction in that certain accused have been acquitted when they should have been condemned, and that even in those cases where the accused have been judged guilty, the penalty applied should not be sufficient." (81).

Bass's chapter on Constantinople, which chronicles efforts to try the Itthadists for abuses against British prisoners of war and the massacre of approximately one million Armenians, also demonstrates the difficulties of relying on domestic courts to dispense justice. The Ottoman's decision to target particular men for arrest was inspired by motives of political vengeance, and all elements of due process degenerated as Turkey spiraled toward civil war. The Turks in British custody who were accused of the Armenian massacres were released in a prisoner swap after Turkish nationalists took a handful of British soldiers prisoner. This highlights Bass's proposition that liberal states will abandon their quest for justice if it is likely their own soldiers will be put at risk.

Although much of the story in Bass' chapter on Nuremberg has been previously told, the debate between two of Roosevelt's senior cabinet members—Secretary of War Henry Stimson and Secretary of the Treasury Henry Morgenthau Jr.—over what to do with Germany and its Nazi leaders highlights the competing ideologies of idealism and realism. Morgenthau favored summary execution of high-ranking members of the German military and political leadership, and the transformation of Germany from an industrial to pastoral landscape. This appalled Stimson, who instead pressed for war crimes trials in order to focus on the individual criminal culpability of German leadership, rather than mete out a blanket punishment on the German people. Morgenthau's plan, which was initially backed by President Roosevelt, was prematurely leaked to the public, who attacked it with revulsion. Roosevelt was then forced to backtrack and throw in his support for the trials that Stimson had advocated.

[1] See, e.g. Guy Roberts, "Critical Essay: Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court," *American University International Law Review* 17:35 (2001).

Bass also recounts the fascinating interplay between Robert Jackson, the U.S. prosecutor at Nuremberg who envisioned the court as "an independent agency responsible only before the law"(199), and his Soviet counterpart, who saw the tribunal as a punitive rather an adjudicating mechanism for dealing with the accused. For the Soviets, the indictments were essentially statements of fact, all the accused were guilty, and the only issue was the degree of punishment. Given their opinion that all of the accused were guilty, the Soviets voted against the three acquittals that were eventually granted, and saw no need to present copious amounts of evidence in relation to the charges.

Although Bass characterizes Nuremberg as "legalism's greatest moment of glory" (203), he fails to note that in the end the Nuremberg trials—like their Leipzig and Constantinople predecessors—sacrificed true justice in favor of political expediency. For example, all of the Nazis who had been convicted in the American Nuremberg trials were released by 1958. The Cold War was underway and the continued incarceration of the military and civilian leadership was viewed as an impediment to the U.S.'s ability to strengthen its relationship with the Federal Republic of Germany. Indeed, one German who had been charged by the American military tribunal pleaded for his release on the grounds that he had been offered employment with an American company. Some of those released as part of this political solution had participated in the mass executions of Jews. They were originally sentenced to death, but subsequently had their death sentences commuted to life in prison. They were eventually released after serving only ten years in prison.[2]

In his chapter on the War Crimes Tribunal for former Yugoslavia, Bass explores the politics surrounding the creation of the Tribunal and the clash of positions of the various actors involved, demonstrating how representatives of some of the countries that had voted for its creation lacked the political will to support the Tribunal's mandate. France and Britain saw the Tribunal as an impediment to the peace-making process: no country was willing to risk its own soldiers in order to capture war criminals indicted by the Tribunal, or even to prevent the slaughter of civilians in the so-called safe-havens. The United States initially refused to send troops into Bosnia, and Britain and France—who were leading the UN Protection Force (UNPROFOR)—refused to permit air strikes in Bosnia where the lives of troops might be put in jeopardy. This allowed Bosnian Serb leaders Ratko Mladic and Radovan Karadzic to continue their massacres with impunity. When NATO troops finally arrived on the ground in October 1996, their mandate specifically excluded arresting war criminals, and as a result, the criminals traveled about freely.

The Tribunal was also hamstrung in its ability to prosecute war criminals by an insufficient budget (initially only $563,300), and more significantly by the lack of a prosecutor. As a result, two important investigations undertaken by the Commission of Experts[3] floundered. The Commission had been in the middle of significant investigations into mass graves discovered in the town of Vukovar and the use of rape as a weapon of war when it was suddenly ordered to close down and

[2] For an in depth examination of the negotiations leading to the release of war criminals convicted in the allied war crimes trials, see Peter Maguire, Law and War: An American Story, Chapter 6, "The War Criminals and the Restoration of West German Sovereignty" (New York: Columbia University Press, 2000).

[3] The Commission of Experts was established by the Security Council in October 1992 to collect evidence of war crimes committed in the former Yugoslavia. It was initially chaired by Dutch law professor Frits Kalshoven, and later by University of DePaul law professor Cherif Bassiouni.

turn its investigations over to the prosecutor's office. Unfortunately, there was no prosecutor in place to follow up on the Commission's work. A score of names were suggested and rejected before the Security Council finally agreed to Ramon Escolar Salom, Venezuela's attorney general. Escobar spent only a few days in office, committing only one significant act (naming Australian war crimes investigator Graham Blewett as deputy prosecutor) before resigning to become Venezuela's interior minister. The Tribunal would spend 19 months without a prosecutor before South African Judge Richard Goldstone was finally appointed in July 1994.

After minutely dissecting the troubles of the War Crimes Tribunal for Yugoslavia, Bass concludes that the ICTY and the International Criminal Tribunal for Rwanda (ICTR) that was established a year later "stand largely as testaments to the failure of America and the West" (975). Yet the latter tribunal receives scant mention in Bass's book, and he fails to discuss the many accomplishments achieved by the tribunals and the advancement of the rule of law over their Nuremberg predecessor, which Bass exults as a "famous victory" for legalism, the likes of which have not been seen since.

The passage of time seems to have diminished past criticisms of the Nuremberg Tribunal, while the advances in humanitarian law that occurred as a result of the Tribunal have been exalted. When the Tribunal was created, it was widely condemned as subverting the rule of law rather than enhancing it by violating the principle of *nullum crimen sine lege* (no crime without law). As one scholar of that time period wrote, "the London Agreement and Charter attached thereto [governing the Nuremberg Tribunal] constituted a unilateral act of the Allied Powers committed without regard to the long established practice of states or the generally accepted rules of international law."[4] The charge of crimes against peace, alternately referred to as waging a war of aggression, was particularly problematic, yet it received far more attention than the charge of crimes against humanity, which dealt with the extermination of the Jewish population. The Nuremberg defendants argued that "no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders," and therefore the charge constituted the application of ex post facto law.[5]

The Nuremberg Tribunal was also criticized as applying "victors' justice," since no member of the allied forces faced criminal responsibility for war crimes, including the American fire bombing of cities like Dresden, the failure of American submarines to pick up survivors in the Pacific (a crime that German U-Boat commander Karl Donitz was convicted of), and numerous atrocities committed by the Russians, including the massacre of Polish soldiers in the Katyn Forest. To a large extent, the ICTY and ICTR have avoided these criticisms as participants from all sides of the war face possible indictment for the commission of war crimes and crimes against humanity. The Ad Hoc Tribunals have also strengthened the tenants of international humanitarian law. The controversial charge of "crimes against peace" is omitted from the statutes of both tribunals, while

[4] F.B. Schick, "The Nuremberg Trial and the International Law of the Future," *American Journal of International Law* 41:770 (1947).

[5] See 24-42 Trial of the Major War Criminals before the International Military Tribunal (1947) at 219 (documents in evidence at Nuremberg.

the charge of crimes against humanity has evolved from its original Nuremberg codification so that it now applies to crimes committed outside of war, as well as crimes committed by non-state actors.[6]

The Ad Hoc Tribunals have also thrust the issue of war-time rape and sexual abuse to the forefront of international law. While the laws and customs of war for centuries have prohibited rape in the course of armed conflict, prior to the Ad Hoc Tribunals it had rarely been prosecuted as a war crime. No Germans were prosecuted for rape under the Nuremberg Tribunal nor the subsequent military tribunals set up by the Allies in their respective zones of occupation. Rape was only a factor in one of the prosecutions before the Far East Tribunal,[7] and it goes without saying that no member of the Allied forces was ever charged for the mass rapes that occurred in the waning days of the war. By conservative estimates, 900,000 women were raped with impunity by members of the Red Army as it advanced on Berlin at the end of World War II. Media reports of mass rapes and other violent crimes against women in the former Yugoslavia turned the spotlight on the need to recognize and prosecute gender-based crimes as violations of humanitarian law. The Ad Hoc Tribunal for the former Yugoslavia has issued a number of indictments alleging gender violence and sexual abuse. The judgments resulting from some of these indictments have confirmed that rape is a crime against humanity, as well as a grave breach of the Geneva Conventions.[8] The *Akayesu* decision of the International Criminal Tribunal for Rwanda resulted in the historic finding that rape can be a form of genocide. Bass's scant mention of the latter tribunal is troubling, given his over-arching thesis that only western liberal states believing in the universality of human rights and with well established judicial systems will opt for the legalistic approach of putting war criminals on trial (20 et seq.).

Although the Arusha Tribunal was the creation of the Western-dominated Security Council, it was set up at the behest of what remained of the government of Rwanda. Rwanda's subsequent objections to the Tribunal were not based on the practice of trying war criminals pursuant to the rule of law. Rather, the Rwandan government had three primary objections to the Tribunal as established: 1) trials would be held in another country (Arusha, Tanzania); 2) the temporal jurisdiction of the Tribunal was limited to the events of 1994 (whereas genocide planning took place in 1992-3), and 3) the tribunal was not empowered to impose the death penalty. Because the statutes of both Ad Hoc Tribunals do not permit imposition of the death penalty on the grounds that it violates various international human rights conventions, they created an anomaly as the Rwandan government has executed a number of lesser war criminals while the Tribunal was sentencing the political and military masterminds of the genocide to life sentences or less. Although Bass's proposition that only liberal western states are interested in trying war criminals is historically accurate, the positivist approach to dealing with those who violate the laws of war seems to be

[6] The statute for the Nuremberg Tribunal required a nexus between the alleged crime against humanity and the war, so that crimes occurring prior to or outside of the armed conflict itself could not be included under this provision. Additionally, under the Nuremberg Tribunal, crimes against humanity included only those violations committed by a state actor, or in furtherance of a state policy. Under the statute of the ICTR and ICC, crimes against humanity are now defined as certain specified acts, including murder, extermination, torture, rape, disappearance and sexual slavery, when committed as part of a "widespread or systematic attack directed at any civilian population, without knowledge of the attack."

[7] General Iwane Matsui, who was in charge of the Japanese forces that perpetrated the "Rape of Nanking," was convicted for having failed to discharge his duty to control his troops from rampaging through Nanking.

[8] Under the Geneva Conventions, only crimes that constitute grave breaches are subject to universal jurisdiction.

catching on globally. The countries that have ratified the Rome statute for the International Criminal Court include countries from all the geographic regions of the world, although there is a paucity of ratifications from Asian states.

In the final chapter of his autobiographical book, For Humanity, Reflections of a War Crimes Investigator, Richard Goldstone makes a stirring and reasoned plea in support of the establishment of the ICC, whose statute entered into force on July 1, 2002. As Goldstone points out, a permanent international criminal court will be much less costly than ad hoc tribunals, which essentially must be established from scratch. The ICC will also alleviate the criticisms of partiality or prejudice that arise with arbitrary decisions to prosecute international crimes committed in some wars but not others of arguably equal brutality, such as wars in Iraq, East Timor, or Nigeria. Additionally, Goldstone notes that the ICC, which was established by treaty rather than Security Council resolution, will not face the criticism of "victor's justice" levied by those who see the Western-dominated Security Council as a NATO tool. He also points out that such a tribunal could never be established with regard to atrocities that may be committed by the permanent members.[9] Goldstone argues that criminal prosecutions will place blame squarely on the shoulders of the individuals who have committed heinous crimes in course of war, rather than leveling a collective guilt on a nations' people. Additionally, an international tribunal may have the resources and political will to justly bring to trial those most responsible for atrocities, whereas a domestic legal system may not. Bass cites the case of Rwanda, where the Revolutionary Patriotic Front is holding 130,000 genocide suspects in appalling conditions and with little prospect for fair trials, while the court system itself is sorely lacking in both resources and manpower. He notes that in April 1997, there were only 16 defense attorneys for 100,000 defendants.

In his argument in favor of the International Criminal Tribunal, Goldstone refers to the Pinochet case from 1999 as an example of how a country's lack of political will can allow someone who committed atrocious human rights violations to remain free. Although Chile argued against Great Britain's attempts to have Pinochet extradited to Spain on the grounds that he should be tried before Chile's own domestic courts, an amnesty granted to him as a prelude to Chile's transition back to democracy prevented a Chilean domestic court from trying the former dictator.[10] The ICC provides a legal forum to try those who have committed grave human rights abuses when their own country is either unable or unwilling to do so, but there are a number of hurdles for the ICC's international prosecutors. For example, how should a prosecutor deal with persons who have

[9] One vocal opponent of the Ad Hoc Tribunal for the former Yugoslavia is former U.S. Attorney General Ramsey Clark. He has charged that the Tribunal is a political weapon initiated by the U.S. through the Security Council in order to justify Western influence in the Balkans. He argues that the Tribunal's partiality is evidenced by the fact that there has been no effort to charge NATO members with war crimes in connection with its bombing campaign against Serbia. He favors the establishment of the ICC as an authentically independent International War Crimes Tribunal.

[10] In 2000, Pinochet was indeed stripped of his immunity and tried in a Chilean court on several charges of kidnapping that occurred after the 1973 coup that brought him to power. The charges were dismissed on a due-process technicality. An appeal attempt for a retrial failed when a judge declared Pinochet unable to stand trial due to his age and poor health.

committed atrocities under international law, but have been given amnesties? Would the principle of sovereignty require the ICC to respect such amnesties? Goldstone argues that the ICC must take into consideration the reasons amnesties were granted. He suggests that an international prosecutor should forgo prosecutions where the legislature passed conditional amnesty laws in order to enable a transition to peaceful democracy (as in the case of South Africa) but should not respect self-amnesties, such as the kind granted to Pinochet. But this is a complicated issue. For example, it remains to be seen how the ICC would treat unconditional amnesties such as those granted to Guatemalan military officers, or amnesties that are mandated by a law that was endorsed through a referendum by a majority of voters, as was the case in Uruguay. This is just one of the gray areas that the international prosecutors must wrestle with.[11]

Although Bass spends much of his epilogue pointing out the weaknesses and historical contradictions of major idealist arguments in support of war crimes trials, he supports these trials as the least awful alternative, arguing, "a great advantage of international legalism is that it institutionalizes and moderates desire for revenge"(304). If the international community does not punish war criminals, it might pave the way for victims to take justice into their own hands and engage in vigilantism. While noting that the track record of war crimes tribunals to date has not been impressive overall, Bass argues that the legalistic approach is both practically and morally superior to other more realist alternatives such as apathy or vengeance.

Both Goldstone and U.S. Supreme Court Judge Sandra Day O'Connor, who penned the forward to his book, note that international criminal tribunals are but one avenue to transition from conflict or dictatorship to a peaceful democracy. Yet neither Bass nor Goldstone devotes much time to critiquing truth commissions (the main alternative to prosecutions for countries attempting to establish a record of human rights abuses following civil or international wars) or dictatorships. In contrast to international criminal tribunals, truth commissions investigate the pattern and practice of human rights violations and submit reports detaining their findings, but generally do not have the power to impose criminal fines or sentences. In most cases they do not identify those accessed of committing human rights abuses by name.[12] Truth Commissions should not be viewed as a blanket

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[11] International law imposes a duty upon states to punish human rights abuses committed in their territory or jurisdiction, and thus amnesties violate a number of human rights conventions. See e.g., Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Hunan Rights Violations of a Prior Regime," *Yale Law Journal* 100:2537 (1991). The Inter-American Commission on Human Rights found that Uruguay's 1986 amnesty law violated the provisions of the American Convention on Human Rights.

[12] The Truth Commission convened to investigate and report serious acts of violence committed during El Salvador's bloody twelve-year war with the FMLN is a noted exception. The Commission identified some forty-odd officials, including the minister of defense and the president of the Supreme Court. In the introductory chapter to its report, the El Salvador commission explained its rationale by stating: It could be argued that, since the Commission's investigation methodology does not meet the normal requirements of due process, the report should not name the people whom the Commission considers to be implicated in specific acts of violence. The Commission believes that it had no alternative but to do so. In the peace agreements, the Parties made it quite clear that it was necessary that the "complete truth be made known," and that was why the Commission was established. Now, the whole truth cannot be told without naming names. After all, the Commission was not asked to write an academic report on El Salvador: it was asked to describe exceptionally important acts of violence and to recommend measures to prevent the repetition of such acts. This task cannot be performed in the abstract, suppressing information...where there is reliable testimony available, especially when the persons identified occupy senior positions and perform official functions directly related to violations or the cover-up of violations. Not to name names would be to reinforce the very impunity to which the Parties instructed the

replacement for judicial criminal prosecutions, but may serve as an information-gathering precursor to trials—as in the case of the reports of the Commission of Experts for former Yugoslavia—or serve as a venue for publicizing the truth when criminal trials are not possible or practical. For example, Truth Commissions might be the only alternative where amnesties have been negotiated as a prelude to ending hostilities or the regime of the dictator (as in Chile), or where a country's judicial system is corrupt or has been so weakened by conflict that it cannot effectively function nor guarantee sufficient measures of due process to the accused (as in the case of Guatemala). I would argue that Rwanda falls into this latter category, where a severe shortage of prosecutors and defense attorneys and inadequately trained judges have made it difficult to ensure fair trials and thousands of accused remain locked up without having been formally charged or provided access to counsel.[13]

Although it is too early to ascertain how the International Criminal Court will co-exist with future truth commissions, a number of questions pertaining to information sharing will need to be addressed.[14] Whether a country chooses criminal prosecutions or a truth commission, history seems hold that there can be no true peace without some measure of accountability. In both Rwanda and Yugoslavia, unpunished atrocities committed by one side against the other from decades past were used as tools of incitement in the most recent conflicts. As the books by both Goldstone and Bass demonstrate, war crimes tribunals or a permanent international criminal court will not stop evil people from committing genocide, massacres, or using rape as a weapon of warfare. However, with sufficient political will, they can provide a forum for airing the truth of what occurred and a mechanism for holding human rights violators accountable, as well as a deterring reminder of the consequences for those who might wish to travel in their footsteps.

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Commission to put an end. Michael P. Scharf, "Justice in Cataclysm Criminal Trials in the Wake of Mass Violence: The Case for a Permanent International Truth Commission," *Duke Journal of Comparative and International Law* 7:375 (Spring 1997), citing Report of the Commission on the Truth for El Salvador: From Madness to Hope, U.N. SCOR, 48th Sess., Annexes, U.N. Doc. S/25500 (1993) at 25.

[13] For a critique of the International Criminal Tribunal for Rwanda and the domestic justice system in addressing the 1994 genocide, see Christina M. Carroll, "An Assessment of the Role and Effectiveness of the International Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994," *Boston University International Law Journal* 163 (2000).

[14] Some of these questions are raised in Priscilla B, Hayner, Unspeakable Truths: Confronting State Terror and Accountability, (New York: Routledge, 2001), chapter 13.