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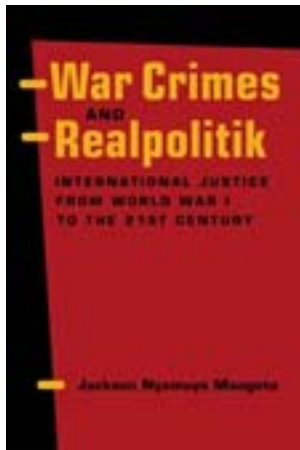
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Politics and International Justice in a World of States

By J. Peter Pham

War Crimes and Realpolitik: International Justice from World War I to the 21st Century by Jackson Nyamuya Maogoto. Boulder: Lynne Rienner Publishers, 2004. 267 pp.

*To dream the impossible dream,
To fight the unbeatable foe,
To bear the unbearable sorrow,
To run where the brave dare not go.*

To right the unrightable wrong...

*This is my quest,
To follow that star—
No matter how hopeless,
No matter how far.*

*To fight for the right
Without question or pause,
To be willing to march
Into hell for a heavenly cause.*

—“*The Impossible Dream (The Quest)*” from *Man of La Mancha*

Drawing upon Sigmund Freud’s Introductory Lectures on Psychoanalysis, Michael Ignatieff has suggested that nations need the power of myths in order to “work through” past traumas in much the same way that individuals do and that “forging myths of unity and identity [can] allow a society to forget its founding crimes, its hidden injuries and divisions, its unhealed wounds” (Ignatieff 1997: 170). Anthony Smith, in fact, has defined common myths and historical memories as constitutive of nationhood alongside a specific named human population, a historic territory, a mass popular culture, a common economy, and common legal rights and duties for all members (see Smith 1991: 43-70). Analogously, the cosmopolitan culture of the international community, while underpinned by the bundle of elements usually denominated as “globalization”—including new information and telecommunications systems, economic arrangements, and political democratization—requires its own myths.

One of the modern myths defining the contemporary global community is that the post-World War II trial of the surviving Nazi leadership by the International Military Tribunal at Nuremberg somehow launched a worldwide revolution in human rights founded on law. Typical of this interpretation of the war crimes trial and its accomplishments was the address that United States Supreme Court Justice Stephen Breyer gave at a ceremony in the Capitol Rotunda in Washington to mark Yom Hashoah, the Day of Remembrance, on April 16, 1996, the year being the fiftieth anniversary of the Nuremberg trial. Endorsing Justice Robert Jackson's description of the proceedings as "the most important trial that could be imagined" (Breyer 1996: 1161), Breyer argued that the convictions secured by his predecessor "compile[d] a record that would not leave...any future generation with the slightest doubt" (Ibid.: 1162), creating a legacy whereby "nations feel that they cannot simply ignore the most barbarous acts of other nations" and those who commit such acts will know that "they will be held accountable and brought to justice under law" (Ibid.: 1163). Finally, according to Breyer, the trial process helps to fulfill the human aspiration to do justice.

Breyer's account accords with that adopted by what amounts to a cottage industry of books in recent years on international criminal justice—including those by Howard Ball (1999), Gary Jonathan Bass (2000), Yves Beigbeder (1999), Richard Goldstone (2000), John Hagan (2003), Virginia Morris (1998), Carol Off (2000), Geoffrey Robertson (1999), William Schabas (2000 and 2001), and Michael Scharf (1997), just to cite some representative titles in English.¹ They depict a progressive historical narrative, reading the past with the benefit of hindsight in order to validate present-day enthusiasm for the permanent International Criminal Court (ICC) that will dispense swift justice by combating war crimes and establishing a new era of global peace through international law. While the scope and depth of these books differ with the varied backgrounds of their authors,² they all share the same sympathy for the cause of international criminal justice and retread the same well-worn trail as they follow the preordained rise of human rights from the enlightenment through Nuremberg to a post-modern world that is witnessing "a kind of millennium shift, from diplomacy to justice as the dominant principle of global relations" (Robertson 1999: 437).

With the exception perhaps of Bass—an assistant professor of politics and international affairs at Princeton University—who attempts to locate the phenomenon of international criminal justice within the context of conventional international relations, the historicist narratives of this corpus fall prey to a simplification that ignores a far more nuanced evolution, one that has had to come to grips with the realities of power and politics. Good faith in human progress alone does not explain why

¹ The books by Bass and Goldstone are the subject of a review essay in a previous issue of this publication; see Sharon Healey, "Searching for Justice in an Unjust World," *Human Rights & Human Welfare* 2, no. 2 (Spring-Summer 2002): 23-30.

² The backgrounds of the authors cited, while sharing certain elements, vary widely. Yves Beigbeder, William Schabas, and Michael Scharf are world-renowned scholars of international law with unique experiences, as well as substantial scientific contributions to the field to their credit. Beigbeder was legal secretary to the French judge at the Nuremberg Tribunal; Schabas is a member of the Sierra Leone Truth and Reconciliation Commission; and Scharf served as attorney-advisor for United Nations affairs in the U.S. State Department. Howard Ball was a civil rights activist in Mississippi in the 1960s, and is now a professor of political science. Gary Jonathan Bass, a former reporter for *The Economist*, is a political scientist. Richard Goldstone, a justice of the Constitutional Court of South Africa, was chief prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda. John Hagan, a criminologist, is professor of sociology and law. Carol Off is a veteran Canadian journalist working for the CBC. Virginia Morris is an attorney in the UN Office of Legal Affairs. Geoffrey Robertson, a barrister and human rights advocate active in the case against former Chilean President Augusto Pinochet, is a judge in the Appellate Chamber of the Special Court for Sierra Leone.

“liberal states so often fail to pursue war crimes tribunals” (Bass 2000: 28), while illiberal ones support them. Nor does it account for why nation-states, presumably self-interested, create institutions like international tribunals that could conceivably turn against them and their interests. And, one might add, even when tribunals have been established, there is no lack of shortcomings that can be tallied, both with regard to the quantity of their work product and quality of their justice—to say nothing of their effect on efforts to negotiate peace and promote societal reconciliation.

In his volume, *War Crimes and Realpolitik: International Justice from World War I to the 21st Century*, Jackson Nyamuya Maogoto, a Kenyan-born lecturer of law at the University of Newcastle in Australia, clearly makes an effort (albeit not always successfully) to avoid the sort of idealistic historicism that exaggerates Nuremberg’s legacy and, consequently, raises expectations—thus far unrealized—concerning the future of the ICC. Instead, he adopts a sober, realistic approach that at least acknowledges the tensions inherent between the demands of justice and the requirements of political expediency:

The law then is in many ways part of the political process; law is made and agreements are given meaning by the total political process—when governments act and other governments react, when courts (national or international) decide cases, when political bodies debate and pass resolutions and nations act in their light. International law, then, is in many aspects an “architecture of political compromise” (10).

The Primacy of Politics: International Justice in the Twentieth Century

Maogoto opens his narrative by trying to locate the development of international criminal justice within the larger context of Western Europe’s gradual attempts to establish an *ius in bello* that would rein in the excesses of the sovereign right of recourse to arms (the *ius ad bellum*). The attempt is overly ambitious—the history of western warfare and the rules of war from the fall of the Roman Empire to the eve of the First World War are reduced to just a dozen pages—and somewhat clumsy, for example, confusing the Latin terms *ad bellum* and *in bello* (16) as well as committing other orthographical and syntactical errors that suggest the author does not command the fluency in Latin that is the key to accessing the medieval and early modern juridical literature. Nonetheless, the point is well made that the entire discourse about the laws of war served to “protect the entire structure of warmaking from more fundamental challenges” and to this end the “politics of sovereignty all too often scuttled attempts to create a formal international enforcement mechanism” (27).

After this important, albeit bumpy, journey into the remote past, Maogoto enters into a narrative that is anything but an idealistic recounting of a linear progress towards an enlightened future of universal justice and peace. The first major effort to bring an international legal prosecution of individuals accused of “war crimes” and “crimes against humanity” came in the aftermath of World War I. Taking aim at the leadership of the defeated German and Ottoman Turkish Empires in general and the exiled Kaiser Wilhelm II in particular, British Prime Minister David Lloyd George, for example, asserted, “Rulers who plunge the world into all this misery ought to be warned for all time that they must pay the penalty sooner or later... There is a sense of justice in the world which will not be satisfied so long as this man is at large” (Bass 2000: 66). At the British leader’s insistence, the victorious allies established an intergovernmental Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties, consisting of the representatives of the five great powers (the U.S., Great Britain, France, Italy, and Japan) and five smaller states (Belgium, Greece,

Poland, Romania, and Serbia). Despite the objections of its chairman, U.S. Secretary of State Robert Lansing, who challenged the ex-post facto nature of its definitions, the Commission's March 29, 1919, final report defined a number of "crimes against the laws of humanity" on the basis of the preamble to the Hague Convention of 1907. Consequently, the Treaty of Versailles concluded between the Allies and Germany on June 28, 1919, provided for the creation of an ad hoc international tribunal to prosecute Wilhelm II for initiating the war (Article 227), while German officers accused of violating the laws and customs of war were to be tried before joint Allied military tribunals or the courts-martial of any Allied power (Articles 228 and 229).

As it happened, the former German emperor was never tried, as the Dutch government—which had given Wilhelm political asylum—rejected requests for his extradition, citing both Holland's traditions of hospitality and the ambiguous political nature of the charge of "supreme offense against international morality and the sanctity of treaties" that the Versailles Treaty leveled against him. Maogoto, whose work goes beyond Bass's by describing the follow-up to Versailles, notes that the treaty provision was, quite possibly, a cynical ploy intended to fail:

It offered a concession to the European masses, who saw the kaiser as an ogre of war, and to the French and Belgian governments, which wanted to humiliate Germany for initiating the war. Additionally the very idea of prosecuting the kaiser troubled many. In particular the British (and obviously some of the Western allies) feared that their heads of state could be exposed to similar risks, thus subverting one of the cardinal tenets of international law: sovereign immunity (54-55).

As for Wilhelm's subordinates, by 1920 the Allies had compiled a list of some 20,000 Germans who were to be investigated for war crimes. However, the Allies were apprehensive about pursuing so many German officials at a time when the Weimar government was so fragile. Eventually it was agreed that rather than set up international tribunals, the German government would undertake to prosecute accused war criminals before the German Supreme Court (the Reichsgericht) in Leipzig. The initial list of 20,000 was reduced to 896. Of these, only 45 were eventually submitted to the German procurator-general. Ultimately, only 12 military officers were prosecuted before the Supreme Court; six were acquitted, while the other six were given light sentences. As Maogoto notes, the Leipzig trials "exemplified the sacrifice of justice on the altars of international and domestic politics" as "the political leaders of the major powers were more concerned with ensuring peace in Europe than pursuing justice" (57).

If the memory of Leipzig is obscured today in the light of Nuremberg, that of Sèvres has been confined to oblivion—not that the Allies did any better with the peace they signed with Turkey in the Parisian suburb on August 10, 1920. In addition to obliging the Turkish government to surrender for trial those accused of violations of the laws and customs of war (Article 226), the Treaty of Sèvres provided for international adjudication of crimes perpetrated by the Ottoman Empire against Armenians during the war. The British proceeded as far as seizing over 100 suspects (including a dozen former ministers), and transferring them to Malta. Whereas Bass's account focused almost exclusively on how "the enormous political difficulties in mounting prosecutions of foreign war criminals can be so great that a tribunal can crumble" (Bass 2000: 106), Maogoto's analysis includes more strategic calculations. As time went by and a final peace with Turkey was delayed, Allied resolve melted away as France and Italy pursued their own interests by seeking an accommodation with Mustapha Kemal's new regime in Ankara. Not surprisingly, as Maogoto observes, "Britain, lacking the support of allies and facing Turkish opposition, eventually sacrificed

the pursuit of justice to political expediency” (62). By 1921, Britain had released all of its prisoners and the Treaty of Sèvres was scrapped in favor of the 1923 Treaty of Lausanne, which contained none of the provisions of its predecessor regarding international criminal prosecutions—although the Turkish government did subsequently try a handful of minor figures in courts-martial.

After the Second World War, the victorious Allies avoided many of the mistakes that had bedeviled the hesitant attempts at criminal prosecutions after the last global conflagration. The defeated Axis countries were occupied by the victors, thus permitting them to pursue retributive justice in a direct manner, which they had not been able to do previously when they had to contend with the less-than-willing German and Turkish authorities. Furthermore, the terms of the “unconditional surrender” of Germany and Japan were not the punitive peace treaties imposed after World War I on the German and Ottoman Empires, making more credible the contention that the prosecution was part of a search for justice rather than a vendetta. The post-World War II trials in Nuremberg and Tokyo had, of course, their flaws. Maogoto evenhandedly notes that they “failed to establish that norms prohibiting aggression were grounded in *lex lata*” and they “construed norms providing for individual criminal responsibility from instruments that made no such mention, seemingly offending the principles of *nullum crimen sine lege* and *nulla poena sine lege*” (107).³ The Tokyo Tribunal in particular was plagued by excessive politicization: the defendants were chosen on the basis of political criteria and the execution of sentences was inconsistent, being entirely at the whim of General Douglas MacArthur, who executed some convicts, granted clemency to others, reduced the sentences of still others, and even released some convicted war criminals on parole immediately after their sentencing.⁴ Maogoto’s account of the International Military Tribunal for the Far East is

³ The Latin comes from the maxim, as formulated by Paul Johann Anselm Ritter von Feuerbach, author of the Bavarian legal code of 1813: *Nullum crimen, nulla poena sine praevia lege poenali*. The maxim stipulates that there can neither be a crime committed nor a punishment meted out without a violation of penal law as it existed at the time the alleged offense was committed. The Rome Statute of the International Criminal Court incorporates this principle in its jurisprudence, even entitling its Article 22 (“A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted”) “*nullum crimen sine lege*,” and its Article 23 (“A person convicted by the Court may be punished only in accordance with this Statute”) “*nulla poena sine lege*.”

⁴ A particularly politicized instance during the war crimes trials in the Pacific theater directed by MacArthur is the prosecution, conviction, and execution of General Tomoyuki Yamashita, the last Japanese commander in the Philippines. Yamashita’s trial occurred under the auspices of U.S. national proceedings, since the Philippines were an American commonwealth at the time. Yamashita had taken command barely a month before Allied forces retook the archipelago. Yet he was held responsible for acts of his subordinates that he had not ordered and of which he was unaware—in at least once case the alleged crimes occurred before Yamashita even arrived to assume command. Yamashita’s petition for *certiorari* was denied by the U.S. Supreme Court over the passionate dissents of Justices Frank Murphy and Wiley Blount Rutledge; see *In re Yamashita* at 327 U.S. 1, 66 S. Ct. 340 (1946). Writing for the majority of the Court, Chief Justice Harlan Fiske Stone extrapolated from the provisions of the Hague Convention IV and other treaties to conclude that commanding officers could be held criminally responsible for failure to exercise “due diligence” over their subordinates even if it would have been impossible to do so. Yamashita’s military defense counsel eventually published the classic study of the case; see A. Frank Reel, *The Case of General Yamashita* (New York: Octagon Books, 1971). This case is of more than historical curiosity as the implications for war crimes prosecutions would be revolutionary if the legal standard used against the Japanese commander—and never, to my knowledge, applied in a juridical proceeding since—were resurrected in the prosecution of cases of command responsibility, including the breakdown of discipline that led to the abuses of Iraqi prisoners at Abu Ghraib in Baghdad. The *Yamashita* decision has been criticized, *inter alia*, by Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd ed. (New York: Basic Books, 2000), 319-322.

noteworthy for being the only one among the recent histories of international criminal justice to recall, albeit only briefly, the searing dissent of one of the tribunal members, Justice Radhabinod Pal of India, from what he regarded as the blatant politicization of the then-novel judicial process.⁵ Despite the shortcomings of the post-World War II tribunals, as Maogoto documents, the trials themselves were a triumph for legalism, given the debates that went on between those who wanted summary executions and those who insisted on judicial proceedings: “the implied promise held forth to the world was that such crimes would be condemned in the future wherever they occurred and that no person would be above the law” (107).

The hopes inspired at Nuremberg—and to a much lesser extent at Tokyo, where MacArthur had political concerns about getting post-war Japan back on its feet as a bulwark against communist expansion in the Far East—gave way to the realities of superpower rivalry in the Cold War. In the absence of international consensus from the usually deadlocked UN Security Council, prosecutions of war crimes and other crimes against humanity that occurred took place before national courts. Although Maogoto regrettably devotes no more than a passing acknowledgement to this phenomenon, this is not to say that the Cold War period was without its import to the development of international law. The period saw the adoption of numerous international human rights instruments—beginning with the Universal Declaration of Human Rights in 1948 and including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights in 1966—on both the global and regional levels. While many of these agreements were promoted for ideological or propaganda purposes during the Cold War, their adoption also gave rise to new processes of state accountability for human rights before the international community. The rules of war were also redefined in the four Geneva Conventions of 1949 and the subsequent Additional Protocols of 1977, shifting, however subtly, emphasis from the interests of states to the rights of individuals and populations. While the idea of universal jurisdiction for war crimes remains hotly contested, much of the polemic has ignored that the principle is already inserted in the Geneva Conventions wherein the contracting states have the duty to either prosecute or extradite themselves, to another contracting state that will prosecute those responsible for breaches of the Conventions.

The Post-Cold War World: Juridical Aspirations and Political Realities

The end of the Cold War unleashed forces that had long been repressed by the standoff between the superpowers. While some were swept up in the euphoria of collapse of the Soviet Empire and the liberation of the peoples of Central and Eastern Europe, others noted the ominous signs of the “coming anarchy”—to recall the title of Robert Kaplan’s influential essay—in the breakup of Yugoslavia and the four brutal wars fought between the peoples of its successor states between 1991

⁵ While the nearly-forgotten figure of Justice Radhabinod Pal (1888-1967) has recently been resurrected and his writings exploited by Japanese nationalists for their own ends, the Indian jurist’s reservations about the conduct of the Tokyo Tribunal—his dissenting opinion running well over 700 hundreds pages—constituted not only proof of at least some independence on the bench as well as salutary caution to future judges. See *International Military Tribunal for The Far East: Dissident Judgement of Justice Pal* (Calcutta: Sanyal, 1953). In preface to the work, Pal called for the establishment of clear international standards lest “when the conduct of the nations is taken into account the law will perhaps be found to be that only a lost cause is a crime” (Pal 1953: 11).

and 1999. Facing mounting pressure from what Robertson has called the “CNN factor,”⁶ the UN Security Council passed Resolution 764 on July 13, 1992, warning that those who committed violations of international humanitarian law in the conflict would be held individually responsible. One month later, Security Council Resolution 771 called upon states and international organizations to communicate to the Council any “substantiated information” they had on war crimes in the former Yugoslavia. This was about as far as the Security Council was prepared to go despite calls from various governments and international organizations for actual prosecutions. However, in a bid to deflect continuing criticism of its inaction, on October 6, 1992 the Security Council unanimously adopted Resolution 780, which established a Commission of Experts to review the information submitted in response to the earlier resolution, as well as any other information that it might obtain from its own investigations. The United Kingdom, convinced that the pursuit of war criminals would undermine prospects for a negotiated peace, sought to limit the Commission to passively analyzing what it was given. The UK eventually gave way under American pressure, albeit only after exacting the price that the Commission be funded from existing UN resources rather than a new appropriation (see Scharf 1997: 41). After looking around for alternative financing—it was eventually jump started by private grants from the Soros Foundation, the Open Society Fund, and the John D. and Catherine T. MacArthur Foundation—the Commission, under the chairmanship of M. Cherif Bassiouni, eventually carried out more than thirty field investigations in Bosnia and Croatia and submitted an 84-page report accompanied by 22 annexes containing 3,300 pages of documentation.

Although Resolution 780 did not mention an international tribunal, it did request the UN Secretary-General’s “recommendations for further appropriate steps.” In the report that he submitted to the Security Council on May 3, 1993, Secretary-General Boutros Boutros-Ghali included the Commission’s draft statute for an international criminal tribunal. On May 25, 1993, the Security Council unanimously adopted Resolution 827, deciding “to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia between January 1, 1991, and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the statute of the International Criminal Tribunal annexed to the report of the Secretary-General.”

Unlike the Nuremberg and Tokyo Tribunals, which were military, the International Criminal Tribunal for the Former Yugoslavia (ICTY) is a criminal court, and was established on behalf of the entire international community under the UN Security Council’s Chapter VII powers, rather than in the name of the victorious occupiers of a defeated nation. It soon became apparent, however, that the ICTY “remained a symbolic gesture without the wherewithal to discharge its mission” (157), as the tribunal’s first chief prosecutor, Justice Richard Goldstone, documents in his memoirs. This was not surprising given that, as Maogoto puts it succinctly:

The ICTY’s creation was simultaneously an act of hope, desperation, and cynicism by an international community lacking a coherent policy to respond to the carnage inflicted in the former Yugoslavia. Its mandate was to help restore international peace and security, but the logical implication of this—the indictment and

⁶ “The collective anger produced by [war crimes and other human rights abuses publicized by 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” (Robertson 1999: 168).

trial of the most senior officials considered to be the primary perpetrators—was also seen as an unacceptable risk to the peace process (160).

Goldstone was not appointed until over a year after the tribunal was established. The first nominee, Bassiouni, was rejected by the UK government, ostensibly on grounds that he lacked the prerequisite practical experience. Ramón Escovar-Salom, attorney-general of Venezuela, was appointed, but resigned a few days after assuming office to accept an appointment as his country's Interior Minister. Eight successive nominees were vetoed by the permanent members of the Security Council; five of the vetoes came from the Russian Federation, raising the question of whether it was trying to sabotage the ICTY. Once installed, Goldstone found that he had to strike a balance between accounting for the political context in which he had to operate and “having politicians dictate to a prosecutor who should or should not be indicted and when the indictments should be issued” (Goldstone 2000: 132). The prosecutor's dilemma was highlighted by the indictments of Bosnian Serb leaders Radovan Karadžić and Ratko Mladić, and, subsequently, Serbian leader Slobodan Milošević. Goldstone recalls being criticized by UN Secretary-General Boutros-Ghali for the timing of the indictments of Karadžić and Mladić in July and November 1995. The Secretary-General thought that not only should he have been consulted, but that the prosecutor should have delayed until a ceasefire had been brokered. Goldstone was particularly taken to task for the second indictment, concerning the atrocities at Srebrenica, which was announced during the Dayton negotiations. The former prosecutor, however, defends himself: “Had the indictment been issued before Dayton, we would doubtless have been accused of trying to influence the outcome of the meeting; had we issued it after the agreement, the allegation would have been that we were pressured to delay it so as not to interfere with the outcome” (Goldstone 2000: 109). Although the ICTY made substantial progress in fulfilling its mandate in later years—including the indictment and eventual handover, on June 28, 2001, of the by-then-deposed Serbian leader Milošević—its “success” only came when the major powers themselves despaired of the endless round of negotiations and new negotiations and co-opted the indictment to undermine the recalcitrant despot.⁷

⁷ Lingering questions persist concerning the politics of the ICTY indictment of Slobodan Milošević, coming as it did on May 22, 1999, 60 days into the 78-day NATO bombing of Serbia that was justified on grounds of “humanitarianism” (to stop alleged Serb atrocities against ethnic Albanians in Kosovo) and security (to prevent the conflict from spreading to neighboring states). Prosecutor Louise Arbour charged the then Yugoslav president, along with four other officials, with war crimes and other crimes against humanity. Of course, Milošević had been implicated in these human rights violations for years: in fact, it was information concerning these abuses compiled by the Commission of Experts that led the UN Security Council to establish the ICTY in 1993 in the first place. Yet for years, as long as Milošević was seen as crucial to the peace process, no indictment was forthcoming. When it finally came, it came at a time when the political resolve of the NATO countries was at a low point following public relations (as well as humanitarian) disasters such as the bombing of the Chinese embassy in Belgrade. The personal situation of the prosecutor, Justice Arbour, also raises a different set of questions. At the time of the indictment, there was speculation that Arbour was being considered for a vacancy on the Supreme Court of Canada, a country that was not only a NATO member, but also a participant in the bombing campaign. As it turns out, the Canadian Federal Cabinet Order in Council confirms that she was appointed to the vacancy on May 26, 1999, although it was not announced until June 11 (see Hagan 2003: 227). As Michael Scharf and William Schabas, neither of whom could be said to be partisans of the former Serb leader, have noted: “Milošević may argue [at his trial] that there is more than a whiff of impropriety when the prosecutor, who is a national of one of the belligerent parties, indicts the president of the other side and is then, literally within days, named to a plum position” (Scharf and Schabas 2002: 103).

On November 8, 1994, the very day that the ICTY handed down its first indictment, the UN Security Council adopted Resolution 995, which established a second international criminal court, the International Criminal Tribunal for Rwanda (ICTR) to try “persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states between January 1, 1994, and December 31, 1994.” On April 6, 1994, the airplane carrying Rwandan President Juvénal Habyarimana and his Burundian counterpart, Cyprien Ntaryamira, was fired upon by unknown assailants as it approached the airport in Kigali. The plane crashed onto the grounds of the presidential palace at 8:30 p.m., killing everyone on board. The crash turned out to be the signal for a carefully planned conspiracy: within less than an hour, the second-in-command of the Rwandan Armed Forces, Colonel Théoneste Bagosora, had seized power and dispatched the Presidential Guard to erect the first road blocks. The soldiers were soon joined by members of the majority Hutu ethnic group’s interahamwe (“those who stand/fight together”) militia. Shortly afterward, armed bands of soldiers and militiamen fanned out across the city, killing moderate Hutu leaders, including Prime Minister Agathe Uwilingiyimana, as well as any members of the minority Tutsi who were unfortunate enough to cross their paths. In one hundred days, between April 6 and July 18, when the mostly Tutsi Rwandan Patriotic Front (RPF)—having won nearly complete control of the country and driven the killers into neighboring Zaire (now the Democratic Republic of Congo)—declared an end to the conflict, some 800,000 individuals had been murdered. Despite the crudity of their armaments—most of the génocidaires were armed with machetes and crude farm implements rather than guns, much less poison gas—the murderers achieved the dubious distinction of having carried out the fastest mass killing in human history: the toll worked out to be 333⅓ deaths per hour, 5½ deaths per minute.

With the UN’s failure to prevent the genocide despite entreaties from the commander of its peacekeeping force for authorization to intervene still casting a pall on the world body,⁸ the ICTR was hastily established with the curious provision that it share a common prosecutor and a common Appellate Chamber with the ICTY.⁹ Consequently, as Maogoto notes:

The ICTR was a sideshow; the prosecutor for both tribunals is resident in The Hague, as are members of the Appeals Chamber. Initially, the international press and the UN were preoccupied with the ICTY and gave perfunctory coverage to the ICTR. Such cynicism undercut the rule of law. Not surprisingly, the ICTR’s first hearing was held against a backdrop of charges of corruption and mismanagement at the tribunal. A subsequent investigative report concluded that the ICTR was dysfunctional in virtually all areas (188).

Although some of the ICTR’s accomplishments have been significant—including the guilty plea entered by Jean Kambanda, interim prime minister of Rwanda during the hundred days of the

⁸ See Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Toronto: Random House, 2003). Dallaire, a brigadier general in the Canadian Forces, commanded the United Nations Assistance Mission in Rwanda (UNAMIR). For a study of the UN’s decision making process and its moral responsibility for the Rwandan genocide, see Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Ithaca, NY: Cornell University Press, 2002).

⁹ The ICTR finally acquired its own chief prosecutor when the Security Council, in Resolution 1503 of August 28, 2003, split the prosecutorial duties of the two tribunals. On September 4, 2003, the council elected Alhaji Hassan B. Jallow, a Gambian jurist then serving on the Special Court for Sierra Leone, as the chief prosecutor of the ICTR.

genocide¹⁰—its relationship with the Rwandan government continues to be troubled. Furthermore, alongside its counterpart—the ICTY—the ICTR is criticized for its rather inefficient administration. A decade into its operation, the tribunal at The Hague now employs 1,238 persons from 84 countries and costs over \$270 million annually. As of April 2004, the ICTR has handed down fifteen judgments, involving some twenty-one accused. During this time, the tribunal, based in Arusha, Tanzania, and staffed by 872 individuals from more than 80 countries, was spending about \$170 million annually, a sum roughly equivalent to the total annual revenues of the Rwandan government.

Maogoto does not discuss the other international tribunal now functioning on African soil, the Special Court for Sierra Leone (SCSL), which was established by agreement between the United Nations and the government of the West African nation pursuant to Security Council Resolution 1315 of August 14, 2000. The resolution authorized the Secretary-General to negotiate an agreement with the government of Sierra Leone to create a special tribunal to try “crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law” that occurred during the country’s decade-long civil war. An agreement was reached on January 16, 2002, and the implementing legislation for the tribunal was passed by the Sierra Leonean parliament on March 19, and signed into law by President Ahmad Tejan Kabbah on March 29.

While copious references were made to the ICTY and the ICTR during the discussions leading to the establishment of the SCSL, there are notable differences between the bodies. The former two tribunals are subsidiary organs of the United Nations, having been established by resolutions of the Security Council. The SCSL, while endorsed by a Security Council resolution, according to UN Under-Secretary-General Hans Corell, “is different from earlier ad hoc courts in the sense that it is not being imposed upon a state. It is being established on the basis of an agreement between the United Nations and Sierra Leone—at the request of the Government of Sierra Leone.”¹¹ As a consequence of the government’s accord with its establishment, the SCSL would differ from the earlier tribunals in that it would sit within Sierra Leone, whose government would, according to the Statute, appoint one of the three judges in the trial chamber, two of the five judges of the appellate chamber, as well as the deputy prosecutor. The UN Secretary-General was empowered to appoint the other judges and the prosecutor. More significantly, the SCSL’s jurisdiction embraces both international crimes and crimes under Sierra Leonean law.

Not surprisingly, the Sierra Leonean tribunal enjoys the support of the U.S. government, which currently is the court’s largest contributor, paying approximately one-third of its \$58 million annual budget. The U.S. State Department nominated David M. Crane, a former Pentagon attorney, to the UN for appointment as prosecutor of the SCSL. Noting the presence of Americans on the prosecutor’s staff and other key positions, some critics have complained that “the Court [is] driven by an American agenda to undercut arguments for the International Criminal Court, which the U.S. has so far opposed on the grounds that the institution will be used for politically motivated trials of American peacekeeping soldiers or servicemen who had seen action in foreign countries” (Gberie

¹⁰ Kambanda’s guilty plea, entered on May 1, 1998, has already acquired a certain status as a precedent in the prosecution of heads of state and government. It was cited by human rights groups in appellate arguments in the Pinochet case. In 1999, it was cited in the ICTY indictment of Milošević.

¹¹ Quoted in *Sierra Leone News* (January 16, 2002).

2003: 643), and thus hinder American freedom of action in using force abroad. Significantly enough, the Statute of the Special Court explicitly precludes the prosecution of international military personnel unless the sending country specifically requests the tribunal's adjudication. While the SCSL's first trials are just beginning, already they have had the effect of shifting the paradigm for war crimes trials—most notably the eventual proceedings against former Iraqi ruler Saddam Hussein and other members of his Ba'athist regime—towards jurisdictions where the sovereign nation-state exercises more direct influence, and away from international assizes. In this respect, Maogoto's comments about the ICTY and the ICTR are even more *à propos* if extended to apply to the SCSL:

The two ad hoc international criminal tribunals are important milestones in the international system. The by-products of international realpolitik, they mark a new pattern in the implementation of international criminal law and a return to the model of Nuremberg (193).

Justice Transcendent through Politics: A New Realpolitik?

On July 1, 2002, a new chapter in the history of international justice began with the entry into force of the Rome Statute of the International Criminal Court, a subject that, given its novelty, is barely touched upon by War Crimes and Realpolitik. As Maogoto succinctly illustrates in his relatively slender volume, international law has certainly evolved over the course of the last century from the legal positivist emphasis on the reciprocal obligations of states to each other to the resurrected natural justice rights of individuals within the international system. Nonetheless much remains unchanged, *pace* Robertson and others who herald a shift “from diplomacy to justice as the dominant principle of global relations” (Robertson 1999: 437) or who, like Richard Falk, lament “the persisting fragmentation of the world in reference to sovereign territorial states and the widespread acceptance of efficiency and competitiveness criteria as the basis for assessing economic performance” (Falk 1999: 409).

While international criminal tribunals may now be a “hard fact” (Maogoto: 240), it is also a hard datum that international justice is a phenomenon that must exist in a real world—the Westphalian state system that was established in the mid-seventeenth century, which has shown remarkable staying power despite all the vicissitudes of time. One of the chief virtues of Maogoto's work is that unlike many others of the genre, he offers less of a morality tale of progress than a chronicle of events with the ebbs and tides of international criminal justice. Tribunals—including the ICC, which is governed by an Assembly of States Parties—are creatures of and must conduct their business in a world of states, each of which is seeking to advance—or at least to safeguard—its interests. For both the jurist and the political scientist, far more productive than trying to conjure up some hypothetical scheme to overcome this constraint of state sovereignty is to return to the questions raised at the beginning of this essay: Why would presumably self-interested states create institutions like international criminal tribunals which have the potential of turning against their interests? And, once created, why would these same states cooperate with and, indeed, submit to, such tribunals when, by and large, they lack the power to enforce their rulings?

Unfortunately, the very notion that there would even be a politics of international justice is directly opposed to the myth that has been cultivated around efforts to bring war criminals and other violators of human rights to trial. The entire enterprise has been cloaked in the guise of oracular objectivity that Justice Breyer implicitly appealed to in his Yom Hashoah address: the almost technical-scientific compilation of a record, adjudication of individual responsibility, and

creation of a legacy. However, in actuality, the development of international criminal justice to date has been more mundane: the creation of state power and interests within the existing international order, one where the “enforcement of obligations in international relations is an uncertain and inconsistent activity even at the best of times” (Jackson 2000: 121). In liberal democracies, the calculation of “the national interest” includes public sentiment. During World War II, for example, the U.S. government’s volte-face in supporting the creation of an international criminal tribunal was triggered in part by public outrage over atrocities committed by the Wehrmacht at Malmédy (see Ball 1999: 47-48). In 1992, images of Bosnians “repackaged in the moral narrative of the Holocaust” (Ignatieff 1997: 136) helped galvanize European public opinion to demand something be done to halt the violence. In the Balkans, however, with governments unwilling to risk their soldiers’ lives by intervening forcefully enough to separate and disarm the combatants, perversely, “law became a euphemism for inaction” (Bass 2000: 215). Tribunals without real coercive powers of enforcement were the calculating statesman’s response to the necessity of giving the impression of “doing something” in the face of public outcry. This perspective, cynical as it may appear, goes a long way towards explaining the often surreal contrast between the idealistic rhetoric accompanying UN Security Council resolutions condemning war crimes and other human rights violations, and the apparent inaction of the major powers in the face of those same abuses. A current example is the Council’s follow-up of a thirty-day deadline to the government of Sudan to “disarm the Janjaweed militias and apprehend and bring to justice Janjaweed leaders and their associates who have incited and carried out human rights and international humanitarian law violations and other atrocities” in Darfur (Resolution 1556, July 30, 2004) with little more than authorization to the Secretary-General to “establish an international commission of inquiry in order immediately to investigate...whether or not acts of genocide have occurred” (Resolution 1564, September 18, 2004).

Likewise understandable—if not necessarily agreeable—are the real political and diplomatic dilemmas that nation states continue to confront in their international relations. In the Sudanese crisis, for example, the United States is caught between its interests, both geopolitical and humanitarian, in salvaging the progress that has been made in recent years in forging a settlement in the African country’s decades-old north-south civil war, and the risk of losing it all by an uncompromising line on the current events in Darfur. Not surprisingly, when Secretary of State Colin Powell finally characterized what was occurring in western Sudan as “genocide,” he hastened to add that “no new action is dictated by this determination”¹²—thus managing to leave both the government in Khartoum and international human rights advocates dissatisfied.

All that being said, it does not mean that international criminal justice cannot transcend the limits of the power politics from which it arises. No phenomenon leaves unchanged the world around it. Robertson has observed that “justice, once there is a procedure for delivery, is prone to have its own momentum” (Robertson 1999: 449), while Beigbeder concludes that international justice, even if it does not necessarily prevail over politics, can “at least play the role of a legal model and moral conscience for the world’s leaders” (Beigbeder 1999: 204).¹³ In short, accountability under law is “ultimately effective when it conforms with the broader policy context which it operates”

¹² The transcript of Powell’s September 9, 2004, testimony before the Foreign Relations Committee of the U.S. Senate, entitled “The Crisis in Darfur,” is available at <http://www.state.gov/secretary/rm/36032.htm>.

¹³ In fact, there is a famous anonymous article complaining about the ICTY’s “complication” of the political process; see Anonymous, “Human Rights in Peace Negotiations,” *Human Rights Quarterly* 18 (1996): 249-258.

(Akhavan 2001: 30). The case of the Sierra Leonean tribunal, for all its flaws, demonstrates not only the influence of politics on its processes and the eventual effect of the court on the political process, but also the need for both politics and law to better account for each other. This more analytical approach would also have the advantage of avoiding some of the pitfalls that the historicist narratives to date have been prone to.

It goes without saying that the motives behind the SCSL's establishment were mixed at best. Sierra Leonean President Kabbah, the internationally-recognized head of state (despite considerable irregularities surrounding his election in 1996) requested the UN Security Council's assistance in creating the court in 2000. Tellingly, the president's letter only mentioned abuses committed by the Revolutionary United Front (RUF) rebels¹⁴ and ignored any abuses carried out by other forces, including those aligned with Kabbah's government, during the decade-long conflict. In the SCSL's eventual Statute, prosecution of war crimes by regional peacekeepers, who likewise backed the Kabbah regime, was expressly withdrawn from the tribunal's jurisdiction and remanded to the national courts of the sending states. The then-U.S. ambassador to the United Nations, Richard Holbrooke, took up Kabbah's request, no doubt in part to salvage American credibility in the wake of Washington's role in brokering the Lomé Peace Agreement the year before, which not only granted a blanket amnesty to the RUF, but gave rebel leader Foday Saybana Sankoh control of Sierra Leone's diamond mines and the "status of vice president" of the country. Other Security Council members, none of whom were eager to expend considerable resources on a conflict they considered peripheral, supported the initiative for a tribunal that, by being jointly administered by both the Sierra Leonean government and the international community, would be less likely to cause political complications of the sort that the ICTY had been perceived as bringing. Nonetheless, even if the tribunal was established for calculated or even base reasons from the point of view of justice, that fact alone does not preclude the court from somehow dispensing justice in its decisions.

The SCSL itself is run by a management committee of representatives of the countries that contribute to its upkeep. Finances, incidentally, are an all-too-poignant reminder that there is no such thing as "pure justice" divorced from political realities: someone has to pay the bills. The voluntary mechanism of international financing for the tribunal puts it on the horns of a dilemma: on one hand, it cannot function without funds; on the other, its dependence upon the goodwill of its donors means that it risks being controlled by them. Not surprisingly, the generosity of the SCSL's largest contributor, the United States, has been directly proportional to U.S. interests in the subregion and the Sierra Leonean government's accommodations thereof.

Nonetheless, despite the subtle and not-so-subtle political influence exerted upon the Special Court, it has exerted its independence and in a sense acted as a constraint on the political process. On June 4, 2003, Liberian President Charles Ghankay Taylor, a former warlord who had backed the RUF in its campaign against the Sierra Leonean government, arrived in Accra, Ghana, for peace talks with rebels who controlled more than half of his country's national territory. The SCSL took advantage of the Liberian ruler's rare foray abroad to unseal a seventeen-count indictment, signed three months earlier, that accused him of bearing "the greatest responsibility" for the Sierra Leonean conflict by providing "financial support, military training, personnel, arms, ammunition and other

¹⁴ An annex to his communication suggested that "the mandate of the court could be designed to be narrow in order to prosecute the most responsible violators and the leadership of the Revolutionary United Front."

support and encouragement to the RUF, led by Foday Saybana Sankoh, in preparation for RUF armed action in the Republic of Sierra Leone, and during the subsequent armed conflict” and conspiring “to obtain access to the mineral wealth of the Republic of Sierra Leone, in particular the diamond wealth.” The clearly embarrassed Ghanaian president, John Kufuor, who had stood personal surety for Taylor’s safe passage to the parley, ignored the arrest request and hastily packed his guest home to Monrovia. Both African leaders and American diplomats who—in the hopes of avoiding the humanitarian catastrophe that a prolonged siege of Taylor inside the Liberian capital would have provoked—had worked hard to set up the peace conference, were quick to criticize the tribunal’s prosecutor for complicating the peace process. In fact, the indictment had the effect of putting the Liberian leader “beyond the pale” as an interlocutor. Only days later, U.S. President Bush joined an international chorus in declaring that “President Taylor needs to step down.” The international community, in fact, shifted its position when faced with the fait accompli of Taylor’s indictment: Taylor was no longer a suitable negotiating partner. A West African peacekeeping force landed in Monrovia two months to the day after the indictment was announced—supported at least morally by the presence offshore of a 2,300-strong task force of U.S. Marines—and Taylor agreed to resign the presidency and accept political asylum in Nigeria. While the SCSL has not been pleased with the former despot’s comfortable exile, its indictment did help to create the conditions that eased him out.¹⁵

Finally, the manner of Taylor’s departure from the scene raises an important consideration about the relationship between politics and international justice. Given his ties to financiers of international terror as well as his contributions to regional insecurity, the world—to say nothing of the long-suffering Liberian people—would have been immensely better off if the Liberian president had been removed from office earlier. However, the likelihood of that happening peacefully was diminished almost in proportion with the ever-increasing probability that he would be hauled before one or more international tribunals after giving up power. Thus the paradox that many advocates of international criminal prosecution are rather reluctant to admit: the vigorous pursuit of some of the worse offenders against human rights may both heal past injuries and may even serve as to deter future ones, but it does nothing about abuses in the present. It is naïve to believe that the most serious war criminals of the world will be deterred by the formal legal requirements of international humanitarian law. Rather their conduct may be more influenced by considerations of how they might avoid prosecution once their power is spent than how it is legally constrained during their heyday.

In the discussions that I had with high-level representatives of the Taylor regime while serving as an international diplomat in Liberia and Sierra Leone, it was clearly spelled out by my interlocutors that nothing short of immunity from prosecution for their misdeeds and assurances for their

¹⁵ On May 31, 2004, the Appeals Chamber of the SCSL addressed a motion from counsel for the absent Taylor that sought the dismissal of the indictment on the grounds that the defendant enjoyed absolute immunity from criminal proceedings under customary international law as the sitting head of state at the time of his indictment (the motion was filed before Taylor’s resignation from the Liberian presidency). They ruled unanimously against the former Liberian ruler. The decision is an historic advance of the evolving body of jurisprudence that incumbent as well as former heads of state and other high-ranking officials are subject to the jurisdiction of international criminal courts. The text of the ruling in the matter of *Prosecutor v. Charles Ghankay Taylor*, Case Number SCSL-2003-01-I, is available at www.scs-l.org/SCSL-03-01-I-059.pdf.

personal safety in exchange for their permanent removal from Liberian politics and agreement to go into exile would be acceptable to Taylor and his inner circle. Last year, before the indictment was announced, the International Crisis Group, an independent, multinational group of elder statesmen and policy analysts, even elaborated a detailed plan for such a peaceful transition that was, unfortunately, ignored in favor of a regime of poorly-enforced UN sanctions and a dogmatic refusal to engage in dialogue that would seemingly “reward” Taylor’s malfeasance.

Admittedly, any explicit “amnesty” deal would have been controversial. Human rights advocates would have correctly questioned the precedence of granting immunity to someone with Taylor’s appalling record of abusing human rights at home and complicity in violations of international humanitarian law abroad. Just the thought of such a tyrant retiring with impunity to a comfortable exile offends against the contemporary world’s moral sensibilities. On the other hand, leaving a “thug” like Taylor no options to withdraw only encouraged him to fight it out to the bitter end, exacting a toll of hundreds, if not thousands. Justice can only be so blind.

In the final analysis, one is left not so much with an overall theory of the relationship between politics and international criminal justice, as with the intuition that the latter cannot be understood without the former and that a certain tension between the competing demands of the two is perhaps not only necessary, but healthy. Realists will point to the destabilizing and even brutal consequences of an uncompromising demand for justice and agree with Raymond Aron’s pragmatic argument that such a pursuit is “fraught with dangers:”

Would statesmen yield before having exhausted every means of resistance, if they knew that in the enemy’s eyes they are criminals and will be treated as such in case of defeat? It is perhaps immoral, but it is most often wise, to spare the leaders of an enemy state, for otherwise these men will sacrifice the lives and wealth and possessions of their fellow citizens or their subjects in the vain hope of saving themselves... In such a circumstance it is easier for the moralist to blame these maneuvers than for the politician to find a substitute for them (Aron 2003: 115-116).

Up to a certain point, Aron’s argument is validated by the Liberian experience, to cite this one example. In the immediate aftermath of the publication of Taylor’s indictment, peace talks broke down and the conflict resumed. Nearly six weeks of fighting around the capital of Monrovia—amid a population that had swelled to over 1.3 million people because of refugees from the countryside—left over one thousand civilian dead, thousands more wounded, and hundreds of thousands starving as humanitarian organizations were unable to bring in supplies. On the other hand, liberal idealists are correct in noting that the reliance on this calculus alone undervalues the potential long-term benefits of prosecuting the former warlord, including breaking the cycle of ethnic-linked violence that he had exploited by putting the blame on specific individuals, and establishing the truth that alone can serve as a sure basis for reconstructing the war torn society that Taylor left as his legacy.

Its limitations notwithstanding, Jackson Maogoto’s survey of the historical tensions between the demands of justice and the interests of political actors is a salutary injection of principled realism into a discourse otherwise overcome by often clichéd idealism and insipid historicism. Certainly it is to be anticipated that now that the first wave of books, flushed as they were with euphoria, have capitalized on the interest in the quickly evolving realm of human rights and international criminal justice, a second generation of studies likely will take a more sober approach in their analyses. In any event, suffice it to say that the realist perspective on the relationship between global politics and

justice does not preclude hopeful optimism about the transformative power of international justice in world where only a short while ago it was thought to be an impossible dream.

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