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BOOK REVIEWS

An International Criminal Court

Reviewed by William M. Beaney

An International Criminal Court: A Step Toward World Peace—A Documentary History and Analysis, by Benjamin B. Ferencz (two volumes 1980). Oceana Publications, Inc., Dobbs Ferry, New York 10522. ISBN 0 379 20389 8. Volume I, *Half a Century of Hope*: pages xx, 538; \$37.50. Volume II, *The Beginning of Wisdom*: pages x, 674; \$37.50.

Those skeptical about the reality of international law, and the American legal profession includes an abundance of such people, will scoff at the idea of an international criminal court ever coming into existence. They insist that until there is an effective world government, capable of enforcing an accepted body of international norms, it is futile to talk of international crimes and international courts. They would add that the prospects of a world government, even for limited purposes, are more remote today than they were at the end of World War II.

The optimists, who are found in substantial numbers in the academic world, reject such a negative view. They stress the advances made under the auspices of the United Nations in declaring that human rights deserve protection. They point to the many governmental actions adversely affecting human rights which now are proscribed through the U.N. Charter, the Universal Declaration on Human Rights, and numerous conventions drawn up in the recent past. It is a fact, they assert, that many nations, unfortunately not always the most powerful, are showing a greater willingness to accept supra-national norms in an effort to create and maintain a more peaceful world. The European region in particular, excluding the Soviet Union, has taken significant steps in the adoption of supra-national norms.

This two volume work by Benjamin B. Ferencz, one-time Chief Prosecutor for the United States in the cases against the German extermination squads at the Nuremberg trials, provides data of comfort to both the skeptics and the optimists. In tracing the fitful progress of the idea of an international criminal court over the past century, he tends to treat all

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positive proposals enthusiastically and to accept with sadness the many disappointments and failures. He is consistently an optimist because, in his judgment, there is growing world-wide recognition of the pressing need for such an institution as an essential means for removing many of the sources of tension and conflict between nations.

The justification for establishing an international criminal court was stated succinctly by a committee at the 1926 conference of the International Law Association:

[T]he trial of the nationals of one State by the Courts of another, however fair and impartial in fact it may be, is invariably regarded with suspicion. Further, experience has shown that the trial of war crimes by National Courts, whether of the victor or vanquished, has almost invariably proved unsatisfactory.¹

Over a half-century later, these observations are still valid, and the course of events has increased the urgency that solutions be found. The growing use of terrorism to advance political objectives, the taking of innocent hostages for either political or personal reasons, and the growth, however grudgingly, in the acceptance of supra-national norms for the protection of human rights, increasingly demonstrate the inadequacy of purely national law in dealing with certain types of individual and group behavior.

Surprisingly, in spite of the substantial bulk of these two volumes, it is not easy for the reader to grasp the variety of factors which have doomed efforts to establish an international court with a specific body of law to apply. In part this is the result of Mr. Ferencz's keying a rather lean text (190 pages) with forty-five largely unedited documents of varying length. As a result the reader has little background as he reads the various proposals advanced from time to time by scholars and committees, but the defects of these proposals are usually disposed of by Mr. Ferencz in extremely terse fashion. Perhaps his ambitions were too limited insofar as he seems content to describe in chronological order various conferences, starting with the Hague Conference of 1899, and various reports issued under auspices of the League of Nations, and the successor United Nations, up to 1980. Perhaps it is unrealistic to expect the author to apply an elaborate analytical scheme to what undoubtedly have been rather complex diplomatic relationships, but the reader has a right to expect some enlightenment as to why the efforts of so many people of good will have come to naught.

It is also inadequate to paint the antagonists in simple black and white terms, with the noble idealists always frustrated by the wretched realists. Many people who believe in the need for positive steps toward a more peaceful world find it difficult to support the idea of an international criminal court unless and until there is a high degree of consensus as to the appropriate criminal law norms. No nation state will accept the

1. 1 B. FERENCZ, *AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS* 255 (2 vols. 1980).

concept of an international criminal court unless it is given important jurisdictional tasks not effectively handled by domestic criminal courts. It is also true that in addition to difficulties in formulating norms appropriate to the acts and behavior to be dealt with, there are serious philosophical and realistic concerns with the way the norms may be applied by an international tribunal, for the nations of the world are far from united on jurisprudential values. This can be seen with respect to three of the substantive areas which have been the subject of frequent discussions and proposals: laws against terrorist acts, laws prohibiting the taking of hostages, and legal norms outlawing the planning and waging of aggressive war. Even brief discussion reveals sharply divergent approaches by nations to each of these normative areas, arising from their position vis-à-vis other national power centers and their views concerning the legitimacy of the current international order.

Given past patterns of colonial relationships, a Third World Nation may well feel that its present world position reflects past injustices and deprivations produced by one or more of the major powers, or that the current policies of other nations are grossly unfair. Terrorist acts against a nation perceived as having an evil past or current policy thus appear to the terrorists as responsive to principles of justice. Groups seeking a separate national identity similarly regard the end as justifying violent means, as with the PLO or the IRA. Thus the various explanations and rationalizations of terrorism suggest the difficulty of reaching an international consensus on suitable norms, and explain the failure to reach agreement on one or more conventions dealing with terrorism.

In contrast is the International Convention Against the Taking of Hostages, adopted by the United Nations General Assembly in December 1979.² By recognizing a right of asylum and the exemption of political offenses from the coverage of a statute, the potential impact of the convention is greatly weakened; yet, it is likely as a result of the convention that there will be more situations in the future when nations will be willing to extradite hostage-takers. And, it is probably true that if an international court came into being, many nations which normally would be unwilling to extradite might yield a prisoner to international prosecution and trial.

Where a government is the offender, as in the case of South Africa under the 1973 apartheid convention,³ or in the case of the German government after Hitler's rise to power, a wholly different set of difficulties

2. International Convention Against the Taking of Hostages, adopted Dec. 17, 1979, G.A. Res. 34/146, 34 U.N. GAOR, Supp. (No. 34) 245, U.N. Doc. A/34/46 (1979), reprinted in 18 INT'L LEGAL MAT. 1457 (1979). See also Rosenstock, *International Convention Against the Taking of Hostages: Another International Community Step Against Terrorism*, 9 DEN. J. INT'L L. & POL'Y 169 (1980).

3. International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, G.A. Res 3068, 28 U.N. GAOR, Supp. (No. 30) 75, U.N. Doc. A/9030 (1974), entered into force July 18, 1976, reprinted in 13 INT'L LEGAL MAT. 50 (1974).

arises only a few of which can be mentioned here. An obvious and frustrating impediment where states or their leaders are the offenders is the inevitable refusal of the accused parties to subject themselves voluntarily to the jurisdiction of an international criminal court. In the absence of coercive measures imposed by the other states party to the basic agreement or covenant, is there any value in creating norms applicable to states, such as the proscription of apartheid or of aggressive acts of a war-like nature?

While Austinian sanctions may not be available as in the case of domestic criminal law, trade and other economic sanctions can be imposed on the errant state. Limits on the travel of its officials and citizens are possible. Penalties on multinational corporations that do business with the violator is another route. Deprivation of the violator's privileges in the United Nations is another sanction. Finally, the issuance by an international tribunal of findings, even in a case where the violator chooses not to appear, may at least have a moral effect on the international community. While the likelihood of the great powers submitting, or being asked to submit, to the jurisdiction of an international tribunal may seem chimerical, it is possible that even the great powers would welcome the availability of such a court in certain instances, such as the Iraq-Iran war, the Lebanon crisis, or where a ruler runs amok, as in Uganda under Amin. But, if one examines the uses of military force by the super-powers,⁴ it becomes depressingly clear that nations can defend even the most dramatic forms of aggressive action in the name of self-defense, and that to the victor of the next war there will be ample evidence available to justify the conviction of the loser's leadership.

By focusing on an international court, with all its connotations, Mr. Ferencz, it is submitted, is misplacing his emphasis. The need for the present is the definition of norms that will meet with wide agreement. The model is the world's experience with piracy and other offenses on the high seas which have become embodied in international norms that are systematically and sympathetically enforced. Similarly, by emphasizing the centrality of human rights through the Convention on Apartheid and other existing human rights instruments, and posing wherever possible the rights of individuals against the power of each and every government, it will be possible gradually to weaken the tendency of nations to interpose their national interest as a rationale for failing to take appropriate action. The fate of the International Court of Justice should remind us of the prematurity of setting up an institution to deal with political actions and behavior before there has been effective international agreement on norms.

4. For the experiences of the United States and the Soviet Union respectively, see B. BLECHMEN & S. KAPLAN, *FORCE WITHOUT WAR* (1978), and S. KAPLAN, *DIPLOMACY OF POWER* (1981).

Soviet Law After Stalin

Reviewed by Eugene D. Fryer

Soviet Law After Stalin, parts I-III. Part I, *The Citizen and the State in Contemporary Soviet Law*, edited by Donald D. Barry, George Ginsburgs, and Peter B. Maggs (1977). Part II, *Social Engineering Through Law*, edited by Barry, Ginsburgs, and Maggs (1978). Part III, *Soviet Institutions and the Administration of Law*, edited by Barry, Ginsburgs, Maggs, and F.J.M. Feldbrugge (1979). No. 20 in the series *Law in Eastern Europe* (F.J.M. Feldbrugge, general editor). Sijthoff & Noordhoff International Publishers, Alphen aan den Rijn, The Netherlands; available in the U.S. from Sijthoff & Noordhoff, 20010 Century Blvd., Germantown, Maryland 20767. Part I: ISBN 90 286 0567 3; pages xv, 303; \$43.00 (cloth). Part II: ISBN 90 286 0318 2; pages xiv, 335; \$48.00 (cloth). Part III: ISBN 90 286 0679 3; pages xiv, 414; \$57.50 (cloth).

PART I

This collection of ten scholarly articles surveys major areas of Soviet civil and criminal law against one agreed common index. Each author attempts to determine for his area of research how much of the law is normative and how much is prerogative. For this purpose, the notion of law encompasses more than the writ, more than statutory and constitutional enactments. Law more nearly refers to the law process: law articulation or rule making, law or rule interpretation, and law or rule enforcement. This flexible focus upon rule as well as law permits treatment of administrative law where appropriate as the normative parity of statutory or constitutional law. This latter analytical facility is understandable and profitable in its application to the Soviet legal system, where official discretion makes formal western distinctions between administrative rules, on the one hand, and statutory and constitutional law, on the other, less than descriptive.

The contents of Part I are: *Soviet Housing Law: The Norms and their Application*, by Donald Barry; *Soviet Corrective Labor Law*, by F.J.M. Feldbrugge; *A Propos the Application of Corrective Labor Law in the USSR*, by Valery Chalidze; *Soviet Court Reform: 1956-1958*, by George Ginsburgs; *The Right to Counsel in Ordinary Criminal Cases in the USSR*, by Yurii Luryi; *Whom the State has Joined: Conjugal Ties in Soviet Law*, by Peter Juviler; *The Legal Status of Collective Farm Mem-*

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bers, by Peter Maggs; *Due Process of Law and Civil Rights Cases in the Soviet Union*, by Christopher Osakwe; *Criminal Law Protection of Socialist Property in the USSR*, by Stanislaw Pomorski; and *Soviet Law of Job Security Since Stalin: Controlling the Individual Employee's Choice in A Non-Market Economy*, by Zigurds Zile.

Except for Chalidze and Luryi, both recent Soviet emigrants, all contributors are Western European or American. Luryi, an experienced former trial lawyer, avoids the value based condemnations characteristic to Chalidze (see the latter's several recent lay polemics on the Soviet legal system). This in no way detracts from the real contribution made to this volume by Chalidze, whose article clearly is offered for its anecdotal insights. Chalidze's authority flows from his former status as one of the front-standing dissidents, or "constitutionalists" who sought during the 1960's and 70's to bind Soviet authority to the supposed equitable spirit of Soviet law. A bias of more obscure origin is apparent in Juviler's lament over Soviet non-delivery of equal rights to women. His superbly annotated paper critiques as victimization the non-availability under Soviet law of non-consensual paternity adjudication and support in favor of mothers out of wedlock. Juviler falls into the snare of mirror imaging, however, when his critique turns to equal rights pique. Maggs, Osakwe and Pomorski best deliver on the job of divining the normative and the prerogative with dispassion, a notable achievement since the latter two authors deal most directly with the draconian sanctions which underpin party control. These two aptly state the conclusion shared by the other contributors that in matters mundane both Soviet law and the legal process operate with fair predictability and near normativeness. As party interests are impinged upon, however, even at the local level, the writ of law bends to party prerogative and legal lacunae are plugged by self-serving discretionary party definition.

PART II

In Part II, the analysts shift their focus from the relation between the citizen and the state, examined in Part I, to the state instigated social process by which Soviet authority seeks to achieve certain programmatic results.

The contents of this survey are: *A Constitution for "Developed Socialism,"* by John Hazard; *The New Constitution of the USSR From Draft to Law: An Analysis of the Changes Adopted*, by Luryi; *Human Rights in the New Soviet Constitution*, by Chalidze; *The Soviet Union, "Jus Commercii," and International Law: The Case of the Most-Favored-Nation Clause*, by Ginsburgs; *Improving the Legal Mechanisms for Economic Change*, by Maggs; *Automobilization and Soviet Law: Reflections on Certain Aspects of Soviet Automobile Law*, by Osakwe; *Consumer Product Quality in Soviet Law: The Tried and the Changing*, by Zile; *Law and the Delinquent Family: Reproduction and Upbringing*, by Juviler; *Administrative Justice and Judicial Review in Soviet Administrative Law*, by Barry; *Procuratorial Supervision of Economic Violations in the USSR*, by Gordon Smith; *Crimes Against the Central Planner:*

“Ochkoutiratel’stvo”, by Pomorski; and *Legal Policy Under Khrushchev and Brezhnev: Continuity and Change*, by Robert Sharlet.

In their effort objectively to deal in tangibles and to serve empirical scholarship, the contributors, save Hazard and Pomorski, fail to treat adequately the role of self-serving Party ideology in Soviet-style social engineering. The general tendency in this volume is to describe the current unsatisfactory state of affairs within respective special areas of examination, to make a case for the indispensability of rationalization in a complexifying social system, and then to urge (for whose ears?) pursuit of the social engineering necessary for the realization of these rational goals.

Hazard and Pomorski add the reasonable and unavoidable perspective of social engineering as a tool for preserving the status quo to the party’s benefit. They account for the irrationalities in the Soviet social and legal systems, recognize the merit and sustainability of the tried and reasonably proven Soviet muddle-through approach to system maintenance, and attempt not to prescribe brave new courses for Soviet social engineering through law. Instead, they weigh the risk-benefit calculus inherent in continued status quo maintenance. Hazard, for example, explains the “need” for a “new” constitution in terms of symbolism. The 1977 Brezhnev Constitution is assessed in view of the systemic desirability of a definite formal signal that the Stalin period has ended. Law of a constitutional magnitude, where toothless as here, provides a low risk signal of this sort, not to mention a physical object subject to veneration—all this without the potential risks inherent in the volatile sort of social signals given at the de-Stalinizing Twentieth Party Congress. Pomorski’s view, cynical but founded, is that individual legal anomie is so significant in the Soviet Union that neither symbolic engineering nor affirmative bureaucratic measures to cause real change will have much actual impact. Therefore, he reasons, as might Hazard: cannot social engineering through law serve merely to keep the social genie in the jug?

I am inclined in reviewing this volume to recognize a measure of merit in the rationalist approach. As a concession to Marxist-Leninist base-superstructure teachings, it is not unreasonable, and Soviet theorists admit as much, that the legal superstructure and the social base can have a push-pull relationship. Whether the push-pull is characterized by thrust or by stasis, the executive direction of the phenomenon is engineering indeed. To recognize, for example, that the physically uncontrovertable phenomena of automobilization and of juvenile delinquency require executive attention, as do Osakwe and Juviler respectively, is to identify a target demanding the attention of executives, be they either dynamic or static.

PART III

This final volume of the three part series examines the institutional framework within which Soviet law is administered. As did Parts I and II, this volume views law in the broadest sense to include administrative regulation and administration of popular, or peoples’ law, although this lat-

ter area is inadequately treated. Further, law is taken to mean the process as well as the substance of social regulation, this process being viewed in both its formal sense, as when the formal legal structure and its official actors are examined, and its informal or *sub judice* aspect, as in the case of party influence.

The contents of this volume are exhaustive of the formal and informal Soviet legal establishment and its actors, except for the omission of separate treatment of, for example, the Comrades' Courts and Peoples' Patrols. The scope of Part III includes *The Development of Soviet Administrative Procedure*, by Barry; *The Individual in Soviet Administrative Procedure*, by Henn-Jüri Uibopuu; *The Reform of Soviet Military Justice: 1953-1958*, by Ginsburgs; *Are Military Courts Necessary?*, by René Beermann; *Some Trends in Soviet Criminal Justice*, by Juviler; *Further Trends in Soviet Criminal Justice*, by Friedrich-Christian Schroeder; *Characteristics of Soviet Tax and Budgetary Law*, by Maggs; *On the Status of the CPSU and Higher State Agencies in Soviet Financial Law*, by Dietrich Loeber; *Administration of Socialist Property in the USSR: New Trends and Institutions*, by Pomorski; *Comments on the Administration of Socialist Property in the USSR*, by Leonid Polsky; *Procuratorial Campaigns Against Crime*, by Smith; *Jurisconsults in the Soviet Economy*, by Luryi; *Soviet Advokatura Twenty-five Years after Stalin*, by Zile; *Some Reflections on the Soviet Advokatura: Its Situation and Prospects*, by William Butler; *Humble Guardians of Routines (Notaries and ZAGS)*, by Hazard; *Soviet Trade Union Organizations in Legal and Historical Perspectives*, by Osakwe; *The Communist Party and the Administration of Justice in the USSR*, by Sharlet; *The Relationship of the CPSU to the Ministry of Justice*, by Boris Meissner; and "Does Soviet Law Make Sense?" *Rationality and Functionality in Soviet Law: An Epilogue*, by Feldbrugge.

The "Administered Society" paradigm springs to mind upon a reading of these analyses. Centrally prescribed and unchangable structures administer a similarly derived substantive law according to a similarly established process. The actors in this process, both institutional and individual, perform in conformity with definite job descriptions as well as with less tangible but just as fully understandable "rules of the game."

This is the reason for the undertreatment in this volume of the various popular forms of Soviet law such as Comrades' Courts, Peoples' Patrols, local inspection commissions, juvenile commissions, and popular forms which are integrated into the formal system, such as lay assessors and social organization representatives in Peoples' Courts. The tacit basis for their exclusion perhaps is their relative functional inefficacy, their doctrinal mootness. The scholars represented in this volume unfortunately fail to bring into print this obviously felt need. These popular forms were touted by Soviet authority as recently as the 1977 public discussion of the draft constitution, as evidence of the progressive withering of state and law in accordance with the projections of scientific Marxism-Leninism. In reality they operate under a short, tight leash, closely super-

vised by the formal institutionalized legal system, which in turn is under close scrutiny and control by the party.

As Sharlet points out, and here we feel the warming verity of the social sciences amid the legal congeries, the party state exists to serve and perpetrate party rule and party privilege. Antithetical to this are popular forms of law which rise above ritual. Also antithetical to party interests is the organization of lawyers into an independent, nationwide bar, a coalescence which has not been permitted under Soviet rule. Others, namely Barry and Gorgone, elsewhere have attempted to make the case for the existence of a *sub rosa* national bar. But Lurji, with actual experience in the perils of lawyering beyond the party threshold, maintains that interest group solidarity among Soviet lawyers is pure illusion. Similarly, to find within the formal legal structure any effective form of equitably inclined concert to mitigate party monopoly is folly. Hazard points out that so long as the Soviet legal system lurches along without the benefit of independent judicial review, the party must remain supreme.

