ABSTRACT: International war crimes trials are normative pursuits par excellence; they are understandably deeply emotional affairs, as a result of the horrors and injustices that lead to their establishment. Since these trials emerge from political decisions, the fundamental challenge in international criminal law has been to try to conduct judicial proceedings uncontaminated by passion and politics. Contemporary legalism, inspired by democratic peace theory, argues that liberal polities are more likely to establish international war crimes tribunals than illiberal polities, and posits that these liberal courts are more likely to be driven by a commitment to due process. I argue that reliance on legalism (as a political theory) is misplaced: not only have illiberal states participated in the establishment of war crimes courts, but legalist claims obscure the fact that many proceedings have been marred by significant due process deficiencies. The U.S.—as the archetypically liberal legalist state—has not accepted to be held to the norms and institutional constraints emerging from institutions of international criminal justice that it has shaped and promoted. I begin to develop an approach that I call Kantian realism, which holds that states should only establish norms and institutions that they would willingly decree upon themselves.

KEYWORDS: Legalism, liberalism, war crimes, Nuremberg, International Criminal Tribunal for Rwanda, Kantian realism

To persons of a more skeptical turn of mind, honest criticism is not a form of destruction. On the contrary, it is the natural form of intellectual discourse, seen as a shared enterprise of argument and counter-argument (Shklar, 1964: 222).

…in our view it is at any rate useful that you should not destroy a principle that is for the general good of all men—namely that in the case of all who fall into danger there should be such a thing as fair play and to profit by arguments that fall short of a mathematical accuracy. And this is a principle which affects you as much as anybody, since your own fall would be visited by the most terrible vengeance and would be an example to the world (Thucydides, 1972: 402).
Introduction

International criminal law—and in particular the prosecution of war crimes—is an endeavor as complex, controversial, and multifaceted as it is a repository of virtue, vengeance, triumph, self-congratulation, and activism. War crimes trials, and more so in the case of prosecutions for crimes against humanity and genocide, are normative pursuits par excellence; they are understandably passionate and deeply emotional affairs, due in large part to the horrors and deep injustices that lead to their establishment. They are also inherently political matters, arising as they do in the international sphere, and to a large extent, the challenges of international criminal law have consisted in attempts to conduct judicial proceedings uncontaminated by passion and politics. Robert Jackson’s celebrated Nuremberg opening statement, announcing that four nations, flushed with victory, had determined that they would stay the hand of vengeance (IMT, 1947: 98), and his promise that “[Americans] are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us” (Jackson, 1945, 330), led to the hope that international justice could, in fact, be achieved. Jackson’s insistence that “we must not use the forms of judicial proceedings to carry out or rationalize previously settled political or military policy” (Jackson, 1945b: 15) expressed the idea that proceedings would have to be fair, and suggested the “judicial form” could be subject to abuses that the United States would consciously eschew.

Gary Jonathan Bass’s (2000) obviously owes a debt to the spirit of Robert Jackson oratory, and constitutes a rare attempt to formulate an international relations theory to explain the establishment of international war crimes tribunals. Relying on case studies describing the attempts to prosecute Napoleon and actors involved in the First World War, the establishment of the Nuremberg trials, and the post cold-war creation of the international ad hoc tribunals for the former Yugoslavia and Rwanda, he takes inspiration in democratic peace theory, arguing that liberal polities are more likely to establish international war crimes tribunals than illiberal polities. Furthermore, Bass asserts, these liberal courts are more likely to be driven by a commitment to due process, and a universal view that such a conception of procedural justice is applicable everywhere, than do illiberal polities establishing egregious show trials.

In this essay I critique key aspects of Bass’s theory and argue that: first, reliance on legalism (as a political theory) does not support his claims; second, illiberal states have established war crimes courts; third, war crimes trials are marred by important due process deficiencies; fourth, the U.S.—as the archetypically liberal legalist state—has not accepted to be held to the norms and institutional constraints emerging from institutions of international criminal justice that it has shaped and promoted, nor does it demonstrate legalist respect for international and domestic due process norms in the judicial treatment of suspects in the “global war on terrorism”; and fifth, “liberal due process theory” is indefensible on its own terms, as well as on the terms of a Kantian realist approach that I begin to sketch out here.
Bass explicitly anchors his conception of what I will call “liberal due process theory” on Judith Shklar’s Legalism (1964) (Bass, 2000: 18, 20), yet he acknowledges pragmatic concerns, citing a “self-serving case for a more legalist world” (Bass, 2000, 282). Legalism, he argues, is the province of liberal democracies, as these polities not only embrace due process at home, but also consider their values universal. This differs in some important respects from the cosmopolitan position in that it presents as universal values the American ones, rather than arguing in favor of a universal set of values as applicable to all, including to the U.S. (Pogge, 1992: 48). Hence, in Bass’s view, ideals of legalism radiate outward, as, for instance, his claim that there is no reason that the American Declaration of Independence, encompassing universal values as it does, ought not apply to Bosnians (Bass, 2000: 22). It should not be necessary to demonstrate the immensity of Bass’s claim; in particular the suggestion that the Declaration of Independence would have greater reach than it does; however, it seems in the interests of this critique to point out that the “we” in the “we find these truths to be self-evident” referred to the representatives of the colonies/ “united states” of America. As for the claim that all men being created equal did not limit itself to Americans (and could thus extend to Bosnians), this occludes the fact that the statement did not even evidently apply to all Americans, certainly not to slaves, whose state of servitude, humiliation, and structural inequality remained despite the universalist tone of the Declaration.

Shklar’s (1964), in contrast, is a critical work, and argues that the formalist legal ethos constitutes an ideology that denies “both the political provenance and the [political] import of judicial decisions” (Shklar, 1986: ix); the argument is not that legalism is a normatively superior ideology (and it is critical to note that this is how she characterizes it), but that it is employed in instances of “extraordinary politics (national defeat, regime change, democratic imposition)” (Bhuta, 2005: 245). Shklar points out that legalism can be employed by illiberal regimes, for illiberal reasons, citing the Nazi legal elites’ desire for more formal legal processes at the judges’ trial at Nuremberg (Shklar, 1964: 209). Shklar is sympathetic to Judge Pal’s reasoned dissent in the Tokyo judgment (Shklar, 1964: 182-188). It is not clear that Shklar makes or is interested in the case that Bass advances, namely that of a virtuous feature of liberal polities, legalism, that is drawn from universal values that are universally good (Bass, 2000: 20-23); in fact, her point of criticism is that legalism—because it is an ideology—denies the political nature of such trials (Shklar, 1964: 112). Shklar is concerned with evaluating what type of politics is at play, and not whether politics underpin such extraordinary legal processes. She does not, as does Bass, claim that “political trials cut against the liberal grain” (Bass, 2000: 21), and in distinguishing domestic trials in the U.S. from Soviet trials she does not make the claim (as Bass would have it) that legalism is what separates the two (Bass, 2000: 29): Shklar’s contention is far more sophisticated; she argues that some political trials “may actually serve liberal ends, when they promote legalistic values in such a way as to con-
tribute to constitutional politics and to a decent legal system” (Shklar, 1964: 145). This allows for the possibility that some political trials do not promote legalistic values, and that these legalistic values may not be deployed in such a way as to contribute to a decent legal system. Nor does Shklar deny the existence of political trials in the U.S. (the Dennis case involving First Amendment rights of American Communist Party members, and the trial of the Rosenbergs are cited) (Shklar, 1964: 211-212, 214-218). And while it is true that Shklar does not object to political trials that might promote a “decent constitutional system,” this is not the same as saying that only liberal polities can do such things, or that all political trials conducted by liberal polities will achieve such results. Her criticism of the Tokyo trials, in fact, indicates a contrary view. Nor is it the same as asserting that only liberal democracies pursue war crime tribunals, because this form of justice meshes with their basic ideal of due process (Bass, 2000: 21, 24).

Some evidence provided by Bass to support the liberal/illiberal distinction with regard to war crimes trials is problematic. Bass cites, for example, the fact that the Soviet judge was the only one to dissent from the Nuremberg judgment (Bass, 2000: 19), and claims that the Soviets wanted a show trial. Yet there is evidence to support that Americans, British, and Soviet leaders all, at least initially, were at the very least equivocal in their support for a war crimes tribunal; all three had at one time or another in the aftermath of the war, advocated executions without trial (Bass, 2000: 157-160, 184-187). But there is an additional, and specific problem related to the example of Soviet dissent at the IMT to support the liberal/illiberal distinction; Bass disregards dissents by three judges at the Tokyo trials, all of whom were representatives of democracies: France, the Netherlands, and India. These dissents were critical of Emperor Hirohito’s immunity from prosecution, and in the case of India’s judge Pal, challenged the IMTFE as an imperial project altogether (Totani, 2008; Simpson, 2009: 608). Shklar devotes a great deal of attention to this trial, and emphasizes that the American Prosecutor, Joseph Kennan, had framed the trial as a contest between positive law and natural law, clearly an ideological battle.1 “At best,” Shklar writes, “[Keenan] looked for no more than the moral vindication of America’s pursuit of the war in terms of the justice of its cause as defined by natural law—a convenient identification of American national interests with the laws of nature” (Shklar, 1964, 184). But Shklar goes further still, arguing that only when “war ceases to be the sole available means for bringing about social and political change can individuals be held criminally responsible for having broken the peace,” and that “precisely because law is a conservative force, a legalistic approach to war and peace is bound to yield a static conception of peace that has nothing to offer a world without a common interest in peace, which isolates members that have more to gain by war than to lose by it” (Shklar, 1964: 184). This is something less than a ringing endorsement of legalism.

1 (Shklar, 1964:184): “As such, whatever judgment was passed on the accused, it was a political trial in the most simple sense—a contest between rival ideologies.” Interestingly, the “ideological” battle between positivism and natural law was one that raged between liberal democratic legal scholars, most famously between H.L.A. Hart and Lon Fuller. See Hart (1958); the enduring nature of the debate is evidenced by a recent publications such as (Nadler, 2008).
It is essential to note, as well, that in the case of the contemporary *ad hoc* courts, the ICTY, and ICTR, there are aspects regarding their creation that make the legalism and due process claims dubious. The ICTY’s creation by the Security Council of the U.N. was unprecedented; while the Nuremberg trials were the jurisdictional result of surrender and occupation, the ICTY was created pursuant to the Security Council’s jurisdiction, set out in Chapter VII of the U.N. Charter, over threats to international peace and security, as well as its power to establish “subsidiary organs,” pursuant to Article 29, required to carry out its functions. Though it had never been imagined, over the course of the cold war, that the Security Council’s functions included adjudication of genocide—in fact, the Genocide Convention grants that power to the International Court of Justice—following the political activism Bass details, in particular by U.S. officials, the Security Council determined that its exclusive power to act upon threats to international peace and security demanded the establishment of a criminal court for the former Yugoslavia. But this created some difficulties, as it was not obvious to everyone, including Secretary General Boutros Boutros-Ghali, what, in fact, the Security Council’s legal jurisdiction to establish a criminal court really was. The questions of legitimacy, political expediency, and interests aside, Boutros-Ghali was nonetheless obliged to take great pains to explain the nature of the legality of the Security Council’s decision to establish the ICTY. In his report Boutros-Ghali (1993) explains that “in the normal course of events,” the establishment of a criminal tribunal would proceed by the conclusion of a treaty by state parties (Boutros-Ghali, 1993: par. 19), or with the participation of the General Assembly, as “the most representative organ of the United Nations.” Both approaches, wrote Boutros-Ghali, “would not be reconcilable with the urgency expressed by the Security Council” (Boutros-Ghali, 1993: par. 21). At the time of this writing, and 20 years later, trials are still ongoing. Urgency, did not, however, entirely obviate the requirements of some jurisdictional anchor for the creation of the ICTY. Hence, the Secretary-General’s Report declares that the establishment of a criminal tribunal for the former Yugoslavia would have the (jurisdictionally doubtful) aim of putting an end to crimes, and would “contribute to the restoration and maintenance of peace” (Boutros-Ghali, 1993: par. 26) Nowhere does Boutros-Ghali’s report mention due process, though he states that the court will be independent of the Security Council—a claim the annual reporting procedure and the “completion strategy” heavily belies. The point is that the ICTY was never conceived of, and could not be, for strictly jurisdictional reasons, a due process body. It had to be a “subsidiary organ” of the Security Council for the restoration and maintenance of peace and security, as this was the only power vested in the Security Council that could justify the ICTY’s creation. In contrast to Nuremberg, then, the ICTY and ICTR conduct due process-like trials only because expectations and the minimal legitimacy required for the bodies’ survival command it. Nothing in contem-

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2 Act of Military Surrender Signed at Rheims at 0241 on the 7th day of May, 1945, 59 Stat. 1957; Executive Agreement Series 502.
porary *ad hoc* constituent documents require it, nor, as I later argue, is due process actually fully or consistently satisfied by these courts, that were, from their inception, established by stretching peacekeeping powers to their outer limits, and some would argue well beyond that. The ICTY and ICTR were never formally about legalism; they were established as a result of political decisions, following political failures.

One could be forgiven for wondering whether Bass was influenced as much by Anne-Marie Slaughter’s work unifying liberal international relations theory and international law (Slaughter 1995; see also Mégret 2002) as by Judith Shklar’s political theory, and though there is no reference to Slaughter in his book, Bass’s approach seems to hew more closely to Slaughter’s than it does to Shklar’s critique of legalism. Thus, it is worth quoting Slaughter’s (1995) disclaimer regarding the manner in which her argument might be received:

> The very idea of a division between liberal and non-liberal States may prove distasteful to many. It is likely to recall 19th century distinctions between ‘civilized’ and ‘uncivilized’ States, rewrapped in the rhetoric of Western political values and institutions. Such distinctions summon images of an exclusive club created by the powerful to justify their dominion over the weak. Whether a liberal/non-liberal distinction is used or abused for similar purposes depends on the normative system developed to govern a world of liberal and non-liberal States (Slaughter, 1995: 506).

In light of the reality of international trials, and of the “normative system developed” to govern the conduct of individuals, selectively, thus far, by international *ad hoc* courts and the International Criminal Court, and given Bass’s distinction between liberal and non-liberal states regarding the creation of such bodies, the time is perhaps ripe to evaluate whether in this instance the 19th century distinctions have not in fact been “rewrapped in the rhetoric of Western political values.”

Much will depend on the facts asserted by Bass, and whether, specifically the type of due process valued by liberal polities (termed “legalism” by Bass) is actually guaranteed by *ad hoc* tribunals. It will also depend on how accurate is his claim that only liberal states establish war crimes tribunals. A great deal, too, will hinge, in evaluating whether first, Bass has formulated a correct theory, and second, if it does not abuse the liberal/non-liberal distinction in the manner described by Slaughter, on liberal legalist states’ attitudes towards international law themselves. In other words, do the states in question (and which states?) themselves respect international norms regarding the conduct of war, do they respect legalist principles in domestic trials related to armed conflict, and finally, do they accept to be held by international legalist norms and tribunals? In other words, if the liberal states described by Bass as being the only ones who have ever “established war crimes trials” as a result of their strong democratic, and in particular legalistic, values fail to themselves respect international legal norms, or accept to be held accountable to international criminal institutions, it would seem that Slaughter’s “abuse” of the liberal/illiberal distinction will be made out.
**Only liberal states establish war crimes trials**

In order to establish a liberal legalist variant of democratic peace theory, it is necessary that empirical evidence supporting the former be as compelling as it is in the case of the latter. In this section, I argue that Bass does not succeed in making his case that it is “only liberal states, with legalistic beliefs, that support *bona fide* war crimes tribunals” (Bass, 2000: 28), because, among other reasons, it is evident that illiberal states have done so, and continue to do so Mégret, 2002: 1268).

Given Soviet participation in Nuremberg, Bass must attempt to undermine it by enumerating instances where various Soviet representatives expressed the desire to proceed with executions, or show trials, or with the rhetorical flourish that juxtaposes the U.S. having sent Robert Jackson to act as Nuremberg Prosecutor, to the claim: “Stalin sent Vishinsky [sic]” (Bass, 2002: 1039). The difficulty for Bass here is that Roman Rudenko, and not Vyshinskii, was “sent by Stalin” to be the Soviet prosecutor at the IMT (Hirsch, 2008).

Bass presents instances where American and British representatives expressed the preference for executing Nazi detainees (Bass, 2000: 157-160, 184-187). This would mean that *both liberal and illiberal states entertain the idea of executions* without trial, but that *both liberal and illiberal states* finally agreed to establish a legalistic war crimes tribunal instead. The net result in favor of “liberal due process theory” yields very little. Bass suggests that illiberal states participate in war crimes tribunals for cynical reasons (Bass, 2000: 28), but, to the extent that evidence of various actors’ inner states of mind is not always easy to access, the idea that illiberal states participate in war crimes trials—but without full enthusiasm—falls somewhat short of the claim that *only* liberal states do. Furthermore, there is evidence of illiberal reasons for liberal states to establish tribunals (Mégret, 2002: 1282; Hirsch, 2008: 729-730). Research, supported by recently available archival sources from the former Soviet Union, shows that all the four major Nuremberg powers had political aims they expected to accomplish through the trials. But it was the U.S., however, that sought to “pursue its postwar agenda” (Hirsch, 2008: 730) at the expense of the Soviet Union. Furthermore, the Soviet prosecution team was mid-way into making its case against the Nazi defendants when Winston Churchill gave his “Iron Curtain Speech” in Fulton, Missouri. Churchill’s proclamation that “Communist parties or fifth columns” constituted “a growing challenge and peril to Christian civilization,’”4 as well as his call for Anglo-American resistance to Soviet aggression and tyranny (Hirsch, 2008: 720; Churchill, 1974) made headlines (such as “Unite to Stop the Russians!”), in American newspapers circulating in Nuremberg. Soviet officials reported observing “unconcealed hope” on the faces of defendants (Hirsch, 2008: 720). If the Soviet Union was ever cynical in its support for the Nuremberg trials, as Bass asserts, it was surely not alone, and perhaps it was not the worst.

The Soviet Union did not only participate nominally in the Nuremberg trials; the Soviet Union was instrumental in the drafting of several IMT offenses, such as crimes against

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4 What this represents midway through the prosecution of the Nazis at Nuremberg is striking, and shows a callous disregard for the destruction of the European Jews.
peace and conspiracy (Hirsch, 2008: 706-707). Soviet compilation of evidence of offenses and the extent of that particular contribution to the Nuremberg trials has also been well documented (Hirsch, 2008: 702; Sorokina, 2005; and Ginsburgs, 1995).

Another illiberal anomaly concerns tsarist Russia. Bass appears to express surprise that “of all people” the man who came up with the phrase “crimes against humanity” as a basis for international tribunals was Tsar Nicholas II’s foreign minister Sergei Sazonov, in 1915 (Bass, 2000: 166; Sanborn, 2005).\(^5\) Joshua Sanborn writes: “throughout the war, tsarist officials and public figures both in and out of the Duma busily gathered testimony from escaped POWs, civilian victims, and others in tandem with the efforts of their western allies.” Russia, Sanborn adds, “did not participate in the postwar tribunals because the Bolsheviks who came to power in 1917 ridiculed “bourgeois” norms of justice and were in any case shut out of the Versailles process” (Sanborn, 2005: 5030). Unless “il-liberal” is refined to exclude Tsarist Russia, (or Tsarist Russia considered “liberal”) this anomaly further erodes Bass’s sweeping claim.

Bass shows that domestic Soviet trials were illiberal. This is not any sort of revelation, but more importantly for his theory, it shows that illiberal nations can in fact hold domestic trials quite at odds with legalistic and liberal standards, yet also participate in war crimes trials. This undermines the idea of “due process without borders” (Bass, 2000: 20)\(^6\) or that legalism is what accounts for the solely liberal attempts to establish war trials. Illiberal nations, even when they do not observe liberal and legalistic notions of due process at home, do participate in war crimes trials, including those that provide procedural safeguards unknown to their own judicial systems.\(^7\) That this happens is not explained and not even fully acknowledged.

Another difficulty arises in Bass’s conception of “due process”. Due process is less a liberal notion than it is one that emerged specifically from the Anglo-American common law model. France, for instance, as a civil law nation, does not hold adversarial trials; evidence is not first led by the prosecution, then by the defense, and rights to cross-examine,\(^7\)

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\(^5\) See Sanborn (2005: 530): “This tidbit of information surprises Bass; I am not surprised at all. Indeed, I would venture to guess that had the war miraculously ended in German and Ottoman defeat in 1915, the tsarist government would have eagerly participated in tribunals.”

\(^6\) Here, it is worth mentioning Bass’s reference to Edmund Burke’s support of “universal, or at least not strictly domestic rights,” in the form of a quote regarding Hastings, in Parliament, and the claim that criminal acts of bribery and fraud are the same the world over. The cause of Burke is philosophically unfortunate, as he was best known not for his claims of universal crimes (as opposed to rights, as Bass mistakenly writes), but for his rejection of the concept of the “inalienable rights of man,” pronounced by the French Revolution. Burke (2001: 183) wrote: “Your subjects have inherited this freedom,” claiming their franchises not on abstract principles “as the rights of men,” but as the rights of Englishmen, and as a patrimony derived from their forefathers.” See also Burke’s defense of prejudice, and Hannah Arendt (1958: 299).

\(^7\) U.S. Prosecutor at Nuremberg and associate justice of the U.S. Supreme Court, Robert Jackson, took great pains to emphasize similarities in conceptions of justice—and not procedure—between the Soviet legal system and the Anglo-American common law, and pointed out that this, too, could be said of French procedure. “We, western peoples, particularly in the United States, are likely to exaggerate the difference between our legal philosophy and that of the Soviet. The machinery of justice appears much more unlike than the rules applied. Under different forms, again and again, one finds the same concept of right and wrong and of fair dealing.” (Jackson, 1946: 320).
and against self-incrimination are unknown in civil law systems. Many procedural and
evidentiary standards differ wildly from the common law model (Hobson, 2004: 163).
Legalism, as defined by Bass, tends to encompass only legal systems of the Anglo-Amer-
ican origin, and thus another anomaly presents itself in the case of France, a liberal polity,
which does not observe a due process type legalism, and yet did participate in the estab-
ishment of a war crimes trial carried out in accordance with procedures at variance with
its own criminal justice system.

The question is then whether France participated because it is liberal, or because lib-
eral nations practice—and promote, beyond their borders, according to Bass—due process?
Since France does not observe this type of due process, could it be argued that liberal polities,
regardless of whether or not they adopt legalist standards domestically, are less adverse than
illiberal ones to war crimes trials? There is no evidence to suggest that this is the case, and
illiberal participation has already undermined this portion of the liberal due process theory.
That liberal polities without Anglo-American due process traditions have and do participate
in war crimes tribunals renders the due process portion of the argument superfluous.

What is left is the fact that liberal and illiberal nations both participated in establishing
war crimes tribunals; that illiberal states that conduct trials without due process domesti-
cally as well as liberal states unfamiliar with Anglo-American due process, participate in
war crimes trials; that representatives of both liberal and illiberal nations considered exe-
cuting accused persons before agreeing to try them, and that judges from both liberal and
illiberal states dissented before the post World War II military tribunals.

Liberal legalism does not appear to be a factor determining whether or not (legalist)
war crimes trials are established, but an interesting question remains: does liberal legalism
positively influence due process in war crimes trial proceedings?

The question of due process in war crimes trials

Bass is quick to emphasize Soviet negation of due process, in particular the presump-
tion of innocence—arguably the cornerstone of Western due process—quoting Vyasheslav
Molotov as stating “The guilty ones will be tried” (Bass, 2000: 16). That is indeed a chill-
ing formulation, but viewed alongside Bass’s own statement (there are many, many other
like this) that his book “chronicles the principled belief that war criminals must be put
on trial” (Bass, 2000: 20), this may speak less to a strictly illiberal (or Soviet) inability to
comprehend the fundamentals of due process than to the fact that the presumption of guilt
is widely shared, including, apparently, by Bass himself. The meaning of Bass’s phrase
“War criminals must be put on trial” does not differ in essence from Molotov’s “The guilty
ones will be tried.” A criminal has been convicted, and is therefore guilty. The contempo-
rary ad hoc Security Council tribunals similarly, in their long form titles, suggest guilt: the
International Tribunal for the Prosecution of Persons Responsible for Serious Violations
of International Humanitarian Law Committed in the Territory of the Former Yugoslavia
since 1991,\(^8\) and the International Criminal Tribunal for the Prosecution of 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 Violations Committed on the Territory of Neighboring States Between 1\(^{st}\) January and 31 December 1994,\(^9\) raise the question “If we know these persons are responsible, why do we have to bother prosecuting them?”\(^{10}\) More importantly, however, these titles show a prevalent sentiment—evidently shared by liberal legalists—that does not seem to warrant self-conscious correction. In other words, Molotov’s statement hardly establishes anything about who does and does not employ care when formulating views about the guilt of defendants, and much less does it explain why.

At the International Criminal Tribunal for Rwanda (upon which I will focus primarily), trials deal with historic events that, as the Tribunal’s long-form name suggests, are often believed to already be understood. As David Paccioco points out, the court is then placed in a double bind: if decisions do not conform to expectations, it loses legitimacy; if it allows expectations to influence outcomes, it degrades the law (Paciocco, 204: 101). The idea, defended by Bass, that war crimes tribunals establish accurate historical records (Bass, 2000: 302-304), is hardly assured: courtrooms (and in particular the common law model of a two-party adversarial trial) are not designed for dispassionate historical research and analysis, as trials seek to establish whether sufficient relevant evidence exists to find an individual accused guilty of a given offence beyond reasonable doubt. Extending historical inquiries beyond the accused is not only irrelevant (and not commonly deemed admissible in the Anglo-American system), but it is often prejudicial increasing expectations with respect to outcomes. As Paccioco puts it, “history and justice cannot be written at the same time, and with the same pen, without distorting both” (Paciocco, 204: 101).

Other due process deficiencies plague contemporary ad hoc bodies—and were arguably not absent from Nuremberg (Mégret, 2002: 1268)—such as the admission of hearsay evidence, without any indicia of reliability or necessity (Paciocco, 204: 123); varied practices among Trial Chambers, which at one point led to one chamber forbidding objections, and another encouraging them;\(^{11}\) expert witnesses permitted to testify without pre-hearing determining their expertise;\(^{12}\) systematic lack of prosecutorial disclosure of evidence; aggressive

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9 S/RES/955 (1994)
10 See the Statement of Larry Hammond, University of Texas Law Professor, before the House of Representatives International Relations Committee, February 28, 2002, quoted in (Paciocco, 2004: 103): “From the beginning...the ICTY was established to carry out a specific political purpose: to restore peace...There may be nothing wrong with this purpose, but it is not one that should guide a court that exists to assure fair trials. There is no hint of any presumption of innocence, or the possibility that persons brought before the Tribunal might not be “responsible for serious violations” of law...[T]here exists an always present pressure to gain convictions.”
11 This I draw from my own experience. In 1997, Trial Chamber I—led by a former Senegalese prosecutor trained in the civil law tradition—did not allow objections, while Trial Chamber II—led by a Tanzanian judge—frequently invited baffled French defense attorneys to formulate objections. See Prosecutor v. Rutaganda, ICTR 96-3-T; Prosecutor v. Kayishema and Ruzindana, ICTR 95-I-T.
12 In Rutaganda (ICTR 96-3-T), see notice of appeal.
cross-examinations from the bench; judges’ statements to the media, mid-trial, commenting on evidence, and expressing the desire that new charges be brought;¹³ concealed evidence by the Prosecutor;¹⁴ the obligation for defendants to make submissions on sentence the day of closing arguments, that is before the verdict, when they are still presumed innocent; ex parte communications to trial chambers by former and current representatives of the U.S. government;¹⁵ a defendant learning the existence of the offense of rape as genocide on the day of his life sentence;¹⁶ the public execution of a defense witness by the Rwandan authorities in a soccer stadium, and the trial chamber’s refusal to arrange his testimony, though he was a crucial witness also for the Prosecution (Peskin, 2008: 177); delayed hearings of motions and delayed decisions by the trial bench, leading to non-disclosure of evidence before the end of the prosecution’s case, or to the disappearance of sixteen alibi witnesses, lost after the Tingi-Tingi refugee camp where they had been located was overrun by rebel forces in Zaire, as the chamber delayed for three weeks before hearing an “extremely urgent motion” for taking evidence by teleconference;¹⁷ mistranslations, such as “witnesses in Lybia” instead of

¹³ Judge Navanathem Pillay made these statements to Jan Goodwin (1997). See, too, (Amann, 1999) regarding interest group initiatives about the filing of rape charges in Akayesu.

¹⁴ Regarding concealed evidence of a Prosecution investigation into the shooting down of the Rwandan President’s plane, and the Australian Prosecution investigator’s recounting of Louise Arbour’s termination of the investigation, see (McKenzie, 2007).

¹⁵ Michael Scharf has forcefully argued in several venues that the self-representation afforded to Slobodan Milosevic was both a mistake, and would imperil future trials of “rogue leaders” and thwart objectives of “reconciliation.” Scharf developed a memo delivered to the judges of the ICTY (one must assume it was an ex parte communication) setting out his argument, and had the same memo delivered—via the US Institute for Peace—to Salem Chalabi, President of the Iraq Special Court. This judicial lobbying is candidly presented by Professor Scharf’s university (Case Western Reserve News Center, 2004) by stating that the “Scharf memo” published in (Scharf and Rassi, 2005) “is influencing the outcome of the Saddam Hussein and Slobodan Milosevic trials.” It is alarming, to say the least, to note academia’s support for such influence over judicial outcomes by individuals and entities who are not a party to a trial. The time-honored notion of audi alteram partem which, perhaps ironically, has centuries old roots as a matter of administrative law, in universities (Wade and Forsyth, 1994: 496) seems to have been sacrificed where international crimes are concerned.

¹⁶ In Akayesu, (Prosecutor v. Akayesu, ICTR 96-4-T, Trial Chamber Judgment, September 2nd 1998), the defendant learned that the act of rape was included in the offence of genocide, not at the time of the alleged commission of the offence (or before), not when he was indicted for genocide, but rather the day he was sentenced to life imprisonment for genocide, including rape as genocide.

¹⁷ (Amnesty International, 1998): “An extremely urgent motion filed by the defence counsel for the protection of witnesses in the case of Georges Rutaganda, was heard by the court almost three weeks after it was filed. Defence counsel filed the urgent motion on 17 February 1997 requesting that the deposition of 16 defence witnesses be taken urgently in writing or by video-conferencing as the defence was of the opinion that the witnesses were living in precarious security conditions in Tingi-Tingi refugee camp in eastern Zaire. The urgency of the application became a moot point when the Tingi-Tingi refugee camp was attacked on 2 March 1997 and as a result of the attack, the defence was no longer able to locate the witnesses. The application was heard on 6 March 1997. The defence submitted that the delay in examining its request constituted a violation of the rights of the accused to a fair trial, particularly rights allowing him to call defence and alibi witnesses. Whilst the Tribunal in its decision expressed “regrets that the extremely urgent motion filed by the Defence was not transmitted to it in sufficient time by the Registry”, it provided no guidance to the Registry as to how urgent motions should be dealt with in the future. The Tribunal also failed to address the defence’s contention that the delay in hearing the application affected the accused’s right to a fair trial.”
“alibi witnesses,” or “requisite mens’ wear for genocide” instead of “requisite mens rea,” and many other instances of procedural dysfunction. The *Rutaganda* notice of appeal alone contained 170 grounds. And though the preceding instances of denial of due process may only resonate for lawyers, other examples reveal much more serious flaws.

A troubling feature of the ICTR (and ICTY) was laid bare in 1999 when immediately following the Appeals Chamber order to release Jean-Bosco Barayagwiza, as a result of the violation of his right to *habeas corpus*, the Rwandan authorities undertook a campaign of pressure against the Tribunal to reverse the decision. Statements were made denouncing the release, and Prosecutor Del Ponte’s visa for Rwanda—where the Office of the Prosecutor is located—was promptly suspended. Memos were circulated advising tribunal employees not to travel alone, even in Arusha, and the Tribunal’s President described an exchange with the UN representative from Rwanda in which he threatened non-cooperation with the Tribunal if Judge Navanathem Pillay did not agree to refuse to apply the Barayagwiza decision. The UN Secretary-General’s spokesman, meanwhile, announced the Appeals Court decision (written by American Justice Gabrielle Kirk-McDonald), following his remarks by “What about the human rights of his victims?” (Edwards, 1999). Then President of the ICTR judge Pillay admitted to the press that the ICTR was entirely dependant on the Rwandan authorities for access to witnesses, and that without Rwandan cooperation trials would grind to a halt: “If we cannot secure the attendance of witnesses, then of course we cannot hold trials.”

The situation was Kafkaesque: a party in the conflict, about whom the UN Secretary-General had claimed should also be prosecuted for crimes, had become the ruling regime of Rwanda and controlled, according to the ICTR President, the court’s ability to function. The Secretary-General’s spokesman, disregarding core principles enshrined in various UN documents such as the Declaration of Human Rights, the International Covenant for Civil and Political Rights, and the UN Basic Principles for Judicial Independence, had expressed bitterness that Barayagwiza, presumed innocent, had been released—never having before made similar claims regarding *convictions*. Gérard Gahima, then Attorney

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19 Prosecutor v. Rutaganda, ICTR-96-3-A, para. 8.
20 At the time ICTR Judge Navanathem Pillay stated “And if we do not secure the attendance of witnesses, then of course we cannot hold trials” (Orlandosentinel.com, 1999); similar opinion was voiced by ICTR President Laïty Kama: “Without the cooperation of Rwanda, it is difficult for the Tribunal to achieve the goal that it set itself, given that most of our witnesses are in Rwanda and that this necessitates collaboration with the Rwandan authorities” (International Crisis Group, 2001: 22).
General of Rwanda, told the BBC that “The decision not only illustrates the utter ignorance of court of what happened in this country, but also betrays the worrying misunderstanding, a gross misunderstanding of the whole purpose of the existence of the tribunal” (BBC World Mediawatch, 1999). It appeared that these events, taken together, conspired to violate article 2 of the United Nations Basic Principles on the Independence of the Judiciary:

The judiciary shall decide matters before them impartially, on the basis of facts, and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.\(^{21}\)

Yet Bass writes:

“Rwanda’s government was furious when the Arusha tribunal in November 1999 ordered that a Hutu leader, Jean-Bosco Barayagwiza, be freed because he had been detained too long before standing trial. No one should have expected the Rwandans to be as unconcerned about the punishment of the genocide as the UN was” (Bass, 2000: 308).

It was in this context that the judges were deliberating in the Rutaganda matter, and it was in this climate that an announcement was made by tribunal spokesman Kingsley Moghalu that the decision would be handed down by the judges. Moghalu hastened to add that he wanted people to know that the judges were rendering decisions, and look beyond isolated cases of “legal subtleties” like the Barayagwiza case. Rutaganda’s lawyer\(^{22}\) filed a motion for stay of proceedings as a result of the tribunal’s lack of appearance of independence and impartiality. The defense motion was supported by an amicus motion written by a Prosecution expert, Professor Filip Reyntjens who had testified against Rutaganda (Reyntjens, 2008: 141). Though it is beyond the scope of this essay to rehearse the legal argument formulated in that motion, it relied on constitutional provisions and decisions of several nations, and case law from the United Nations and European Court of Human Rights regarding the right to a trial before an independent and impartial tribunal. As stated in paragraph 55 of the motion, however, no provision guaranteeing such a right was found in the ICTR Statute,\(^{23}\) a peculiar discovery as article 20 of the Statute is largely a verbatim reproduction of Article 14 of the International Covenant on Civil and Political Rights, with only the exception of the right to be tried before an “independent, impartial, competent tribunal.” Rutaganda’s counsel urged that the Trial Chamber read in the provision, and consider the argument contained in the motion, failing which it would have to acknowl-


\(^{22}\) Omitted.

\(^{23}\) Nor can it be found to this day. The same applies to the ICTY Statute.
edge that it could not grant the accused a fair trial; the motion was denied, and defense counsel fined for filing a “capricious” motion. No rule existed at the time permitting the chamber to inflict such penalties on defense counsel. Rutaganda was acquitted of 5 out of 8 counts on the indictment, but the three counts upon which he was convicted carried a life sentence. Neither the ICTR nor ICTY explicitly guarantee the right to be tried before an independent and impartial tribunal.

Without the right to a trial before an independent and impartial tribunal, what is left of due process before contemporary ad hoc international courts? These rights are considered so fundamental that they cannot be suspended, under international law, even in states of emergency. More importantly, these are precisely, one would think, the kinds of very minimal guarantees that make liberal states—if they are genuinely committed to due process or legalism—procedurally distinct from illiberal states. Yet United Nations declarations, pacts and standards all uphold this guarantee, as do most if not all member states, while it does not seem that such a critical safeguard (recognized by both illiberal and liberal states) has radiated outward toward the two major ad hoc bodies. Due process, and even fundamental fairness, has not been afforded to defendants, and there are more important structural deficiencies, such as the apparently deliberate refusal to include the right to be tried before an independent, impartial, and competent tribunal.

Perhaps of greater concern is the possibility that undertakings with the trappings of legalism—the appearance of due process and liberal procedure—are established and institutionalized, without the capacity to render justice under real standards of fairness, thus degrading and distorting the requirements inherent to criminal trials as understood specifically by liberal, and indeed Anglo-American, polities. But that is to some extent Shklar’s contribution to thinking about legalism: not that liberal states are more legalistic, or even less that their commitment to due process and universal values regarding human rights makes them so, but that legalism, in its forms, obscures the political nature of exceptional trials. Shklar is concerned with the type of politics involved; others express alarm that import of politics into justice can corrupt the enterprise entirely. Shklar’s legalism does not provide much basis upon which explanatory theories of establishment of international criminal tribunals can be based, but it does raise normative questions—of particular interest to lawyers—about whether indeed the “type of politics” involved justifies the effects of politicized international criminal law on justice. If the kind of politics that tend to be promoted superficially correspond to the liberal model as opposed to a non-liberal one (recalling here Slaughter’s point about the potential for distasteful rewrapping of Western interests and deployment of power over the weak), then can this be achieved with

25 (Paciocco, 2004 131): “Until the international community is prepared to make this kind of commitment [to due process] there may well be international law, but there will be no international justice. Undeniably justice comes with a cost. If this cost cannot be borne, either politically or financially, then current efforts to achieve international criminal law should be abandoned in the interests not only of justice itself, but of international criminal law.”
procedures so at odds with those understood to be fundamental to Western liberal legal principles without undermining them? And do serious deficiencies in due process before international courts begin to reveal Western power politics?

A final illustration of a significant inconsistency between contemporary *ad hoc* international criminal practices and fundamental principles of due process—if not justice, *tutu court*—concerns the concept of “Joint Criminal Enterprise,” (JCE) as it is presently framed by the ICTY. JCE is both a very recent and unique legal concept which allows individuals to be held individually criminally responsible for crimes perpetrated by others, which were *outside of the scope of the original agreement*, provided they were the foreseeable consequence of activities that were originally agreed upon or contemplated. Hence, the purpose of JCE is to facilitate convictions, as it significantly reduces the prosecutorial burden of proof, and permits the conviction of the morally—and objectively—innocent (Olasolo, 2009: 284). JCE—described by prosecutors, defense attorneys and by some scholars as “Just Convict Everyone” (Darcy 2007: 386; Badar, 2006: 302; Druml 2007: 39)—is only deployed in cases where there is, in fact, no evidence—or insufficient evidence, from the standpoint of the criminal burden of proof—of genocidal intent. In other words, its purpose can be said to be to convict the innocent.

JCE is recent, as the ICTY’s Statute does not—and did not at the institution’s creation—include this “prosecutorial tool” as a mode of participation in a criminal offence; indeed, Article 7 of the Statute sets out traditional modes of participation, which require evidence of both a criminal act (either a direct act, or as an alternate, traditionally known modes of participation, such as aiding and abetting, or a common agreement, plan or design) as well as criminal intent. The recent nature of JCE as a mode of participation violates the internationally recognized principle of legality, and the universally accepted idea that there can be no prosecutions for acts that were not crimes at the time of their commission.27

JCE is unique as a mode of participation as it requires no evidence of actual participation in an offence, nor intent that the actual offence—in the case of genocide—be committed. This, in contrast to the evolution of criminal jurisprudence in most adver-
sarial (common law) national jurisdictions, which in the main, have sought to protect against wrongful convictions by establishing heavier, rather than lighter burdens of proof on prosecutors regarding requisite intent for the most serious crimes. The Rome Statute for the International Criminal Court does not integrate JCE, as presently framed by the ICTY, and on the contrary, actual intent is a requirement for the establishment of alternate forms of criminal participation.  

JCE now permits conviction for genocide without it being necessary to establish intent to commit genocide. Conviction of the morally innocent is in contradiction with the most basic principles and values of criminal law. In addition, the crime of genocide was held to be the gravest offence, the “crime of crimes,” therefore requiring the highest form of specific criminal intent—dolus specialis—according to the first judgment rendered on genocide by a Security Council ad hoc Tribunal. Presently, not only is the prosecutorial burden considerably reduced, but JCE ignores case law generated by a “sister” ad hoc court, and violates one of legalism’s most fundamental tenets—no conviction without specific intention.

reasonably foreseeable to him that as a consequence of the commission of that particular crime the other crime would be committed by other participants in the joint criminal enterprise.” (emphasis added)

30 Article 25, paragraph 3, Rome Statute of the International Criminal Court, 2187 U.N.T.S. 3, entered into force July 1, 2002:

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
(ii) Be made in the knowledge of the intention of the group to commit the crime;
(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

31 See (Danners and Martinez, 2005: 132): “Joint criminal enterprise provides an example of an international criminal doctrine where certain aspects of the human rights and transitional justice influences are in danger of overpowering the restraining force of the criminal law tradition. As currently formulated, the doctrine has the potential to stretch criminal liability to a point where the legitimacy of international criminal law will be threatened—thereby undermining not only the criminal law aims, but also the human rights and transitional justice goals of international criminal law.”

The question to be posed with respect to JCE is the following: Why is it necessary? The Prosecution—and Chambers’—reliance on this recent and unique concept could in fact be argued to constitute an implicit acknowledgement of the Prosecution’s failure to otherwise prove culpability. Only absence or insufficiency of evidence of genocidal acts or intent justifies the resort to the JCE construct. In other words, when positive evidence of genocidal acts and genocidal intent exists and can be presented, JCE is not necessary, and of no assistance to the Prosecution. The use of such a tool is only of assistance in cases where prosecutorial evidence is insufficient, and would not otherwise establish culpability.

Though I have argued that JCE is a “recent and unique” mode of criminal participation, it is worth noting the historical similarities of JCE and modes of participation proposed well before the Nuremberg trial by Soviet law professor Aron Trainin (Hirsch, 2008: 706). Trainin sought to introduce conspiracy offenses—though Bass incorrectly attributes this initiative solely to U.S. representatives—inspired by the 1938 Moscow show trials. In a memo translated into English, French, and German, which was obtained by Robert Jackson and Maxwell Fyfe, of the British delegation, who declared it a “godsend” (Hirsch, 2008: 706), Trainin argued that a member of an organization “may not know all the other members” of the organization “but should answer for all their criminal activities” (Hirsch, 2008: 705). Trainin explicitly acknowledged that he had borrowed from Vyshinskii’s 1938 definition of complicity (Hirsch, 2008: 707). While JCE is not a mode of participation directly influenced by Trainin or Vyshinskii, the types of difficulties it poses with respect to the “legality and culpability principles” (Olasolo, 2009:285) ought to at least invite circumspection in those who claim that great liberal principles necessarily radiate outwards from liberal due process states and thus inform criminal procedure before ad hoc courts.

In the next section, I examine liberal states’ own commitment to international law, in particular the United States’ position regarding the International Criminal Court, and argue that its refusal to be subject to ICC jurisdiction indicates that liberal theory with respect to international criminal institutions of justice is undermined by systematic and constant U.S. (i) imposition of criminal bodies (when they do) against others; and the (ii) refusal to (ever) be held to those standards itself.

A test for liberal due process theory: domestic procedures and commitment to international law

If due process or legalism means anything, it should be more than the idea, defended recently by Bass, that things could be worse for the accused persons he (not very “legalistically”) calls “war criminals.” Bass has proclaimed that Milosevic could be relieved that he had not “wound up like Romanian President Nicolae Ceausescu” (Bass, 2002: 1039).

33 Olasolo (2009: 285) delicately describes JCE supporters’ arguments as rooted in “policy,” but counters that “policy arguments do not address any of the above-mentioned concerns based on the legality and culpability principles.”
34 Olasolo, 285.
How this claim furthers the theory is unclear, other than to recall Huntingtonian arguments in favor of foreign interventions as necessarily improving dismal situations abroad, and to respond to American complaints about their own institutions’ capacity to ensure American creetal values (Huntington, 198). Such claims invite sober evaluation of American practices at home (Is anything short of the Ceaucescu execution domestically acceptable?), and abroad, in the following manner: Do U.S. liberal values ensure that it will act so morally that it will accept being held to international criminal norms, such as those set out by the International Criminal Court?

U.S. opposition to the ICC began when President Bill Clinton decided not to present the Rome Statute—that the U.S. had signed, and the development of which had been initiated and shaped by the U.S.—to the advice and consent of the Senate (Roach, 2008: 13; Weller, 2002: 693), along with a recommendation that his successor likewise withheld the treaty from Senate (Associated Press, 2001). The most frequent American explanation for U.S. opposition to the ICC is that it has forces stationed all over the world, and this has certainly been the ostensible reason for a variety of measures: from Article 98 bilateral agreements—which stipulate that the ICC cannot exercise jurisdiction over U.S. nationals in any country that has entered into a bilateral accord with the United States—35—to the American Servicemembers Protection Act which establishes extraordinary—and arguably “illiberal,” in that they would likely be characterized as such if adopted elsewhere—measures designed to protect US service personnel from detention or arrest abroad.36

But there are other objections, in particular those related to the “unaccountability” of the Prosecutor,37 or the potential politicization of the crime of aggression (Dickson and Jokic, 2006: 376-377). Theodor Meron, U.S. Representative (before he was named as a judge, then President of the ICTY), displayed a revealing—in light of U.S. support for the ad hoc ICTY and ICTR, as well as their somewhat ex post facto jurisprudence—concern that the crime of aggression might contravene the customary prohibition against nullum crimen and the principle of legality. Meron added, perhaps surprisingly, that customary law—which in the U.S. contention, would have been modified by the inclusion of aggression, as it was understood by the Nuremberg Tribunal, that is, as a crime against the peace, rather than simply codified—“must be not ideology but a reflection of both widespread practice and the general opinio juris of states” (Meron, 2000).

35 This policy has had unintended consequences as Latin American state parties to the Rome Statute refusing to enter into these agreements had military aid cut by the U.S. For Secretary of State Condoleeza Rice, this was “sort of the same thing as shooting ourselves in the foot” (The American Society of International Law, 2009). For an empirical study finding that many states refusing to sign non-surrender agreements did so on a normative, commitment basis, see (Kelley, 2007: 573).
37 A candid expression of this concern was formulated by President George W. Bush in the course of a presidential debate, September 30th, 2004: “And that is, I wouldn’t join the International Criminal Court. It’s a body based in The Hague where unaccountable judges and prosecutors can pull our troops or diplomats up for trial. And I wouldn’t join it. And I understand that in certain capitals around the world that that wasn’t a popular move. But it’s the right move not to join a foreign court that could—where our people could be prosecuted. My opponent is for joining the International Criminal Court. I just think trying to be popular, kind of, in the global sense, if it’s not in our best interest makes no sense” quoted in (Dickson and Jokic, 2006).
In other words, it was the U.S. contention that it might be ideology to criminalize aggression now, but what to make of the IMT’s Nuremberg judgment finding that aggression was the “supreme international crime,” differing from others only in that it “contains within it the accumulated evil of all other war crimes” (IMT, 1950). Would ideology not also be found in such practices as disregarding sovereignty to carry out ad hoc procedures, arrests, and transfer of citizens from one country to another, in violation of the constitutions of their countries of origin? Could it be argued that ideology was altogether absent from the decision of an entity such as NATO, disregarding the explicit requirements of international law (and indeed the very prohibition of aggression, and the UN’s creation as an instrument to prevent the violation of national sovereignty and war) to bomb Yugoslavia for 78 days, while a judicial body—albeit limited in its life-expectancy and territorial jurisdiction—brought an indictment for war crimes, midway through the aggression, against the duly-elected President of that country, and its Prosecutor opines that he—Slobodan Milosevic—can no longer be a credible interlocutor in peace negotiations as a result?

The idea that politically motivated prosecutions could be carried out against Americans is presented as intolerable, ideological, and legally unsound (Glennon, 2010: 71). These claims, though not necessarily inconsistent—they are consistent if, and only if, the litmus test is solely the furtherance of “US national interests”—is at odds with a conception of judicial activity respectful of the Rule of Law or legalistic liberalism, even on its own terms. The U.S. finds itself in the unique position of not supporting the ICC compared to other liberal states, notably Great Britain, the other legalistic due process state involved in the Nuremberg trials. Recent research suggests that “unaccountable autocracies,” other factors being equal, “are more likely to commit themselves to the Court than are democratic countries with a recent history of such conflicts” (Simmons and Danner, 2010). The U.S. wishes to avoid ICC jurisdiction, inasmuch as it could subject U.S. soldiers and diplomats to its jurisdiction and prosecute aggression, an offense American officials have characterized as potentially politicized. Yet it still wishes to “shape” the court.

In the case of Slobodan Milosevic, Zoran Djinjic, Prime Minister, adopted a decree permitting Milosevic’s removal to the ICTY, which Yugoslav President Vojislav Kostunica challenged before the Constitutional Court. On June 28th, 2001, the Court found the Djinjic government decree unconstitutional, but Djinjic, without advising Kostunica, transferred Milosevic the same day. This was done ahead of a donors’ conference in Brussels to be held the following day, upon urging by then Secretary of State Colin Powell, who had called Djinjic twice, threatening to boycott the conference. Serbia was hoping to receive 1 billion dollars in aid, which they could not secure without US participation and support. See (Simons, 2001).

On May 27th, 1999, mid-way through NATO’s bombing campaign against Yugoslavia, an indictment was filed by then ICTY Prosecutor Louise Arbour, against President Milosevic (and other government members) charging him with Crimes against Humanity for events related to Kosovo. She stated, in a press release: “the evidence upon which this indictment was confirmed raises serious questions about their suitability to be the guarantors of any deal, let alone a peace agreement. They have not been rendered less suitable by the indictment. The indictment has simply exposed their unsuitability” (Arbour, 1999).

These “national interests”—although unheard of as a matter of law, as opposed to “national security”—were successfully invoked by the United States government to shield General Wesley Clark’s testimony from public scrutiny in the Milosevic trial, and to request the right to edit its contents, “Decision on Prosecution’s Application for a Witness Pursuant to Rule 70 (B), Prosecution v. Milosevic, IT-02-54-T, 30 October 2003, (initially confidential, and released November 16th, 2003).”

See (The American Society of International Law, 2009, iii); Hillary Clinton, in her confirmation
difficulty here relates in large part to a fundamental contradiction with liberal ideals Bass promotes as central to liberal states’ predilections to establish war crimes tribunals; among those are the principle of legality, and of course, those basic statements from the Declaration of Independence or the U.S. Constitution, or even the Magna Carta, or the British Bill of Rights, that define liberal democracy, and proclaim that no one is above the law.

It is one thing to claim that liberal states are alone in establishing war crimes tribunals (though we have seen that this is far from being the case), but it is another, entirely, to recognize that the paradigmatic liberal state, the U.S., though involved in the creation and “shaping” of international courts, refuses to submit its own citizens and actions to this law. This is not a liberal position, inasmuch as liberal democracy is characterized by the idea of a rule of law system in which leaders cannot create institutions of justice to which they are not subject.

Legalism and due process in the “war on terror”

Much has been written about U.S. treatment of detainees in the context of the post September 11th “Global War on Terrorism,” and in particular about torture and extraordinary renditions (Mayer 2005; Sadat, 2006; Sadat, 2007; Amnesty International, 2004; Amnesty International, 2005; Amnesty International, 2006). Torture is the intentional infliction of severe physical or mental pain or suffering, as defined by the first article of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”). As Jamie Mayerfeld notes, “the government insists that it does not torture, yet it uses methods that it calls torture when practiced by other governments,” such as sleep deprivation, waterboarding, forced standing, hypothermia, blindfolding, and deprivation of food and water, specifically referred to as torture in State Department country reports (Mayerfeld, 2007: 92). Again, cognitive dissonance emerges between U.S. practice and its evaluation of the practices of others. So, too, does the question of whether such practices, when committed in, by, or with the collusion of the U.S., correspond to liberal ideals, and specifically American constitutional values. As Mayerfeld argues: “the American philosophy of government is premised on the Madisonian truth that fundamental rights, beginning with the right against government brutality, must not depend on the individual rectitude of public officials” (Mayerfeld, 2007: 94). “Fundamental rights”, Mayerfeld continues, “must be insulated from the misguided impulses of political leaders by strong institutional protections. The much-vaunted virtue of the American political system is not the moral infallibility of its public officials, but their voluntary submission to the discipline of wise institutions” (Mayerfeld, 2007: 94).

And it is precisely this notion of “voluntary submission to the discipline of wise institutions” that would stand for a truly liberal commitment to international criminal law, yet this is also precisely what is lacking in the pattern of U.S. actions since Nuremberg.\footnote{43 Including the success with which the US Prosecution shielded the Nuremberg proceedings from}
Beyond “liberal due process theory”

As has been pointed out by Frédéric Mégret, Bass’s liberal theory comes attached with so many qualifiers (of a strongly realist nature) that his hypothesis “no longer stands” (Mégret, 2002: 1270) Citing Bass’s conclusion that the “story of the politics of war crimes tribunal is really the story of the constant tension between liberal ideals and crude self-interest” (Bass, 2000: 276), Mégret expresses frustration that “the afterthought did not make its way earlier into the discussion,” asking, after quoting Bass’s assessment that “for the most part, the selfish impulses have won out,” then “if liberalism is such a pierced net (and one might think, the author knew it all along), why bother in the first place?” (Mégret, 2002: 1270) Indeed!

My analysis expands considerably upon Mégret’s, and agrees with Bass that “selfish interests” have won out, though perhaps not as Bass means it. The historical pattern of U.S. participation in war crimes trials sketched out here demonstrates reliance on liberal and legalistic ideals only to the extent that the U.S. itself is not subject to the scope of such prosecutions; liberal legalism has not contributed to alleviating serious due process concerns before ad hoc bodies, nor has liberal legalism protected fundamental human rights (such as those violated by torture) committed by U.S. authorities. Legalism has been markedly absent from the U.S. position, across democratic and republican administrations, on the international criminal court. Thus, a realist view emerges as appropriate to capture the reality of “liberal due process theory,” because U.S. national interests have dominated its decisions regarding war crimes trials. But this should not be understood as suggesting a normative or prescriptive theory of international relations in international criminal law. Quite the contrary, as a solely interest-based approach to international criminal law it risks fatally undermining the undertaking in its entirety. So, too, does a mixed realist-liberal approach (advanced as an empirical claim by Mégret) present normative concerns to the extent that it may be more dangerous from a justice and legitimacy standpoint to claim net beneficial results in creating interest-based courts when vague impressions of liberalism are detected in its promoters’ justifications. This is especially problematic when the “liberals” are (i) the sole superpower; (ii) establish war crimes trials in pursuance of their own interests; (iii) do not accept to be subject to a permanent international war crimes courts; (iv) and disregard international and domestic obligations regarding torture.

A classical realist assessment of the shortcomings of international criminal bodies—in particular when a pattern points to hypocrisy—and when viewing states’ foreign policy—mention of questionable American actions such as Hiroshima. See Hirsch.

44 (Mégret, 2002: 1273): “This puts the decision to create international criminal tribunals somewhere between liberal ingenuity and realist interest, in a way that has perhaps become surprisingly characteristic of our age”; and (Mégret, 2002: 1274): “Indeed classical liberal theory coexists happily with interest and may even emphasize how the pursuit of individual (in this case states’) interest can lead to collectively beneficial outcomes.”

45 (Carr, 1939: 111): “What matters is that the supposed absolute and universal principles were not principles at all, but the unconscious reflections of national policy based on a particular interpretation of national interests at a particular time…The bankruptcy of utopianism lies not in its failure to live up to its principles, but in the exposure of its inability to provide any absolute and disinterested standard for
cies as a Weberian “ideal type”—as Ido Oren has argued was the approach taken by Hans Morgenthau (Oren, 2009: 292), is useful, but fails to provide the necessary normative basis upon which to begin evaluating international criminal justice as an international relations theory. Realism, in any event, (or at least realists) are not themselves immune from tendencies towards criticism of the interests and power politics they claim to observe and predict. As Oren demonstrates, the fact that every major (American) realist, with the notable exception of Henry Kissinger, has publicly denounced (American) foreign policy decisions at one point, in particular where the use of force is concerned, creates some difficulties inherent in the realist position. Indeed, attempts to influence policy decisions when they do not conform to realist expectations is hardly consistent with a scientific methodology; it cannot, as Oren writes, be compared to a meteorologist’s predictions, nor can, crucially, a meteorologist influence weather patterns (Oren, 2009: 289). Thus, discussing John Mearsheimer, Oren argues that “whereas unfolding weather patterns are strictly insulated from the desire of the meteorologist to see his analysis validated, Mearsheimer’s analysis of the objective laws of international politics is not neatly separable from his desire to see the United States heed these laws (Oren, 2009: 289). Given the “impossibility,” as E.H. Carr put it, “of being a consistent and thorough-going realist” (Carr, 1939: 89 quoted in Oren, 2009: 296) an ideal type or normative dimension can usefully be included in a theory or approach to international criminal law.

My position is that “utopianism” of any given type is not without merit, but what is needed, first, is a means of evaluating whether, in the context of international criminal law, such “utopianism” (whether it be liberal legalism, or something else), can be detected as genuinely existing, beyond promotional statements by actors and scholars, and more specifically in certain acts. I propose such a method, Kantian Realism. Immanuel Kant’s observation, made in Perpetual Peace that he was “astonished that the word “law” [had] not yet been banished from war politics as pedantic” is still largely—and tragically—compelling. What Kant meant was that law had been invoked by states as justification for immoral acts, or without considering the “criterion of publicity” (Kant, 1957: xii, 17). Actions are right, according to this criterion, if they can be fully effective when their maxim is known to those affected by the action, and if the action is one that both the agent and patient would willingly decree for themselves. Applied to the establishment of international criminal tribunals, Kantian realism requires examining whether actors establishing such institutions and associated norms would willingly decree such institutions and associated norms for themselves. This provides both an empirical and normative framework for evaluating actions taken in international criminal law, if the term “law” is not to become, as Kant put it, “pedantic.” Thus, if states establish war crimes tribunals, and the moral claim is that they are motivated by concerns for international justice, or international law, the approach proposed here would examine whether that same state would or had willingly decreed such institutions and associated norms for itself. Thus, this approach is diagnostic; it seeks to evaluate the strength of moral and political claims in international law. When states establish war crimes the conduct of international affairs.”
or international criminal tribunals yet avoid being held by institutions they create for others, it can be concluded that their action is not one that is consistent with the moral underpinnings of international law. The state, viewed as a unitary, rational actor, is then not pursuing an idealist view with respect to justice (such as liberalism, legalism, or due process), but is instead pursuing something else: its own interests, and power.

Kantian realism would hold, in its normative component, that states should only ever establish norms and institutions that they would willingly decree upon themselves. Empirically, however, Kantian realism acknowledges that they do not always do so; and it is the evaluation of whether a state respects the criterion of publicity that makes such a conclusion possible. This approach seeks to, in the words of Hans Morgenthau, “look… at the political sphere from without, judging it by, and admonishing it in the name of the standards of truth accessible [to it]” (Oren, 2009: 293). So, too, does the normative aspect, quoting Morgenthau again, “speak, in the biblical phrase, truth to power. [It] tells power what it can do and what it ought to do, what is feasible and what is required. What [it] has to say about politics may have political consequences . . . But these consequences are a mere by-product, hoped for but not worked for, of [its] search for the truth” (Oren, 2009: 293). Since international criminal law is inherently a normative endeavor, Kantian realism seeks to achieve what Oren describes, “translated into the argot of IR theory,” as a Weberian “synthesis of idealism and realism” (Oren, 2009: 292).

Application of Kantian realism

In this final section, I provide a table sketching out the most important empirical indicators to evaluate Bass’s liberal due process theory. Based on the information compiled in the table, I offer four factually accurate restatements of his theory, and conclude that it is not empirically defensible on his own terms, nor under a Kantian realist evaluation.

<table>
<thead>
<tr>
<th>States</th>
<th>Polities</th>
<th>Legal System</th>
<th>Involvement in Nureberg IMT</th>
<th>Position on aggression/crimes against the peace</th>
<th>ICC member</th>
<th>Support ad hoc bodies</th>
<th>Domestic trials (political)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Great Britan</td>
<td>Liberal</td>
<td>Common law-due process</td>
<td>Yes, but Churchill expressed desire to shoot Nazis without trial¹</td>
<td>Nuremberg: yes\ Falklands\ Iraq: no ICC: Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Some (Northern Ireland)²</td>
</tr>
<tr>
<td>France</td>
<td>Liberal</td>
<td>Continental: Civil law</td>
<td>Yes, De Gaulle opposed summary executions and preferred trials in response to Roosevelt aide³</td>
<td>Nuremberg: no, position was prosecute only jus in bello Yugoslavia: no ICC: Yes⁴</td>
<td>Yes</td>
<td>Yes</td>
<td>Some Algeria⁵</td>
</tr>
</tbody>
</table>
The Banality of Liberal Due Process Theory in International Criminal Law

<table>
<thead>
<tr>
<th>Soviet Union /Russia</th>
<th>Communist/ Anarchracy(^6)</th>
<th>Socialist/ Civil Law(^7)</th>
<th>Yes, but Stalin expressed desire to execute Nazis, but not without trial(^8)</th>
<th>Nuremberg: yes</th>
<th>ICC: Yes in working group discussions</th>
<th>No</th>
<th>Yes</th>
<th>Some (Purges)(^9)</th>
</tr>
</thead>
<tbody>
<tr>
<td>USA</td>
<td>Liberal</td>
<td>Anglo-American, common law, due process</td>
<td>Yes, but Roosevelt expressed desire to shoot Nazis without trial(^10)</td>
<td>Nuremberg: yes</td>
<td>Iraq, Granda, Haiti, Yugoslavia, etc: no</td>
<td>ICC: no</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

**Table 1:** Four Nuremberg States and International Criminal Law

**First restatement of Bass’s theory:**

Only liberal polities establish war crimes trials against other nations with guarantees that they will not themselves be subject to such prosecutions, (with the current exception of Great Britain, France, and dozens of other liberal polities) and only liberal polities adhere to due process abroad, as they observe it domestically (except for France and the Soviet Union, in Nuremberg, and scores of other non-common law countries who do not apply an Anglo-American due process model domestically).

**Second restatement:**

The United States is the only liberal polity that establishes war crimes trials observing a form of due process (well beneath its own domestic requirements) against other nations, exclusively. The US has established the Iraqi Special Court, however, which does not respect even minimal due process (Heller, 2007: 261). The US is the only liberal polity to have established military commissions in the context of the “global war on terrorism” that also violate due process norms (Posner, 2005).

**Third restatement:**

Illiberal states have established war crimes tribunals.

**Fourth and final restatement:**

The United States has established war crimes trials in some instances, and not in others, but never accepted that its own actions could be subject to prosecution. The United
States, contrary to (all) other liberal polities, rejects the idea of a permanent court to which its actions would be subject. The United States has ensured that war crimes trials subject to its control would function according to a model resembling due process in some cases, but not in others. Illiberal polities have also established war crimes trials, and accepted due process-like models. Both the U.S. and illiberal polities occasionally conduct domestic trials that violate due process norms. Some illiberal polities, contrary to the U.S., accept to be subject to prosecution at the ICC.46

**Kantian realist evaluation**

Empirically, the claim that only liberal states establish war crimes trials is grossly inaccurate. Furthermore, liberal states have based decisions to establish, or not to establish, war crimes tribunals on interests, while claiming to promote law, and ending impunity. If the liberal state considered by Bass is understood to be the U.S. (and indeed, he presents America as an archetype of the liberal state) the theory suffers additionally from the fact that the U.S. violates the Kantian criterion of publicity, in establishing against others institutions that it is unwilling to decree upon itself.

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**Literature:**

Amnesty International (2006) USA: Amnesty International’s supplementary briefing to the UN Committee Against Torture.

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46 Such as Afghanistan and Venezuela, both ICC state members.
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Committee on Foreign Relations, (2009) *Nomination of Hillary R. Clinton to be Secretary of State*.


**Table Footnotes:**

1 (Taylor, 1991).
3 (Wieviorka, 2006: 19).
5 Racine R (2000).
7 (Partlett, 2008: 1).

**Banalnost liberalne teorije nepristrasnog pravnog procesa u međunarodnom krivičnom pravu**  
(Apstrakt)

Suđenja za ratne zločine u međunarodnom pravu predstavljaju normativne postupke *par excellence*; oni razumljivo direktno izazivaju emocije kao rezultat užasa i nepravdi koji vode njihovom pokretanju. Pošto do tih procesa dolazi na osnovu političkih odluka glavni izazov u međunarodnom krivičnom pravu tiče se nastojanja da se pravni postupci zaštite u svojoj autonomiji, od strasti i političkog uticaja. Savremeni legalizam, insipirani demokratskom teorijom mira, tvrdi da je veća verovatnoća da će liberalne vlasti uspostaviti međunarodne tribunale za ratne zločine nego što će to učiniti neliberalni režimi, i
tvrdi da ima više izgleda da će ti liberalni sudovi biti više privrženi vođenju nepristrasnih sudskih postupaka. Ja tvrdim da je oslanjanje na legalizam (kao političku teoriju) pogrešno: ne samo što u uspostavljanju sudova za ratne zločine učestvuje i neliberale države, nego pravne norme zaklanjaju činjenicu da mnogi sudski postupci bivaju narušeni usled značajnih nedostataka sudskih procesa u pogledu nepristrasnosti. SAD – kao arhetipska liberalna država – nije prihvatila norme i institucionalna ograničenja koja proističu iz institucija međunarodnog krivičnog prava koje bi trebalo da obrazuju i promovišu. S time u vezi, počinjem da razvijam pristup koji zovem kantijanski realizam, koji tvrdi da bi države trebalo samo da uspostave norme i institucije za koje bi bile spremne da ih primene na sebe ili da ih propišu u važenju i za same sebe.

Ključne reči: Legalizam, liberalizam, ratni zločini, Međunarodni krivični tribunal za Ruandu, kantijanski realizam.