

UNVEILING (AND VEILING) POLITICS IN INTERNATIONAL CRIMINAL TRIALS
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THE COURT: This is not a political case as far as I am concerned.

MR. KUNSTLER: Well, Your Honor, as far as some of the rest of us are concerned, it is quite a political case.

THE COURT: It is a criminal case. There is an indictment here. I have the indictment right up here. I can't go into politics here in this court.

(Chicago Conspiracy trial transcript quoted in Lukas 1970: 74)

The indictment of Slobodan Milošević in May 1999 in the midst of a NATO bombing campaign against Yugoslavia invited accusations that the International Criminal Tribunal for the Former Yugoslavia (ICTY) was being used as a political instrument of Western powers. This was precisely how Milošević characterised the indictment and subsequent trial when he eventually appeared before the court two and a half years later. 'I wish to say that the entire world knows that this is a political process', he announced to the bench. '[W]e are not here speaking about legal procedures that evolve into political ones. This is a political process to begin with' (*Prosecutor v Milošević*, IT-02-54-T, Transcript, 30 January 2002: 352).

By way of contrast, for the then-chief prosecutor at the ICTY, Carla Del Ponte, Milošević's introduction of politics into the legal proceedings tarnished an otherwise apolitical trial. 'This is a criminal trial', she insisted. 'It is unfortunate that the accused has attempted to use his appearances before this Chamber to make interventions of a political nature' (*Prosecutor v Milošević*, IT-02-54-T, Transcript, 12 February 2002: 6). For the bench, political arguments had little place in the proceedings. Responding to the accused's charge that the court was a mere 'political tool', Judge May responded simply: 'You've made all these points. Mr. Milošević . . . we are not going to listen to these political arguments' (*Prosecutor v Milošević*, IT-02-54-T, Transcript, 30 August 2001: 25).

This rhetorical pattern—recurring attacks on international criminal trials as little more than political show trials and no less persistent refutations that politics has no place in such legal proceedings—is reproduced not only in the courtroom, but also in the international legal literature. Heated debates centre on the political or apolitical nature of international criminal law (ICL) and its institutions. Critics denounce international trials as political tools, while the field's proponents insist they are neutral vehicles for the promotion of international justice and the rule of law. For the latter, in particular,

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the debate is no mere intellectual argument: fear of the unalloyed trial infected with politics is, perhaps, the central anxiety of the ICL field.

This chapter subjects these debates about the politics of international criminal trials to critical scrutiny. It does so, however, not with a view to pronouncing on one side or the other, but rather in order to analyse the very nature of the debate itself. How do we talk about politics in the context of ICL? What do we mean when we say trials are political? What ideas structure the debate? What is taken for granted and reproduced by both sides? What is lost from sight? And what, ultimately, is at stake?

The chapter approaches these questions by interrogating two dominant conceptions of politics in the context of the international criminal trial. Contemporary debates, it suggests, tend to locate politics first in the instrumentalisation of criminal justice. That is, politics lies in the motivation behind a particular prosecution, with the juridical architecture of the trial used for partisan ends—to criminalise and remove a political opponent, for example. Second, debates locate politics in questions of process and procedure. That is, politics is identified with what the chapter calls ‘deformed legalism’, namely the absence of legalistic process and protections for defendants. Both positions, the chapter argues, share a narrow understanding of politics in the context of ICL, as well as a faith that ICL and international criminal trials can be free of politics—that politics is something alien introduced into the trial by the *misuse* of legal proceedings and judicial institutions. While commentators disagree, often fiercely, whether a given trial or court should be characterised as political, they share a faith that ICL *can* and should be made apolitical. Such discourses thus, in effect, reproduce the image of the trial itself as an apolitical, neutral institution, masking, and placing beyond scrutiny, the ways in which even the supposedly neutral trial operates politically. These discourses, the chapter shows, function as ideological manoeuvres through which the deeper political meaning of the trial is obfuscated.

LOCATING POLITICS

What does it mean to say international criminal law is political? The epithet is invoked with such frequency that one might doubt whether any garden-variety political trial exists. Indeed, few commentators define precisely what they mean by politics or the political.¹ Common, though, to most analyses is a normative position that politics *should* have no place in international criminal law.

This denial of politics in the juridical processes and administration of international justice rehearses a similar insistence on the part of liberal jurists with regard to the municipal rule of law. Proponents of international criminal trials echo Judge Hoffman in the famous U.S. *Chicago Conspiracy* trial (see the epigraph above) in insisting on a clear line between criminal and political trials.² The municipal legal academy, too, is characterised by an idealised notion of distinct and independent juridical and political spheres.³ Concomitant with such a view has been a historic refusal to recognise the existence of political trials in liberal Western jurisdictions. Otto Kirchheimer tracked this position already in 1961:

[M]any a jurist is likely to deny that there is such a thing as a political trial; to say that the thing exists and often entails consequences of importance is, in the

eyes of such men of Law Immaculate, equivalent to questioning the integrity of the courts, the morals of the legal profession.

(Kirchheimer 1961: 47)

Political trials, in the liberal consciousness, are associated with unsavory historical events: the Dreyfus affair, the execution of anarchists Sacco and Vanzetti, or the Stalinist parody of justice at the Moscow Show Trials. ‘To say that a trial is political’, one commentator observes, ‘is always to condemn it’ (Posner 2005: 88). Indeed, for liberal legalism, the political trial represents an inherent danger as a corrupting influence on the prized rule of law.

In the context of international criminal law, commentators tend to recognise that trials do not exist in a vacuum and often require a political consensus to take place or even establish the international institutions in which a trial might take place. *Political will* on the part of leading international powers is thus necessary to *establish* institutions, but is to be carefully separated from a depoliticised international criminal justice in action. This bright line division was already apparent in Robert Jackson’s remarks on the International Military Tribunal (IMT) at Nuremberg, where he was the U.S. chief prosecutor. The decision to establish a tribunal to try German wartime leaders was political but that decision, Jackson insisted, was quite distinct from the subsequent trial proceedings, what he called ‘the legal end of the prosecution’ (quoted in Bass 2000). Half a century later, in a leading textbook on international criminal law by Antonio Cassese, a former president of the ICTY, politics again enters into the analysis only in terms of the absence or presence of *political will* on the part of prosecuting powers—again, the Allies at Nuremberg and Tokyo are cited—or in the support, opposition or mere indifference of domestic constituencies (Cassese 2008: 322-23). Similarly, Theodor Meron, current ICTY president, writes of the importance of *political will* for the functioning of criminal justice institutions, distinct from ‘a uniform and definite corpus of international humanitarian law’ that ‘can be applied *apolitically* to internal atrocities everywhere’ (Meron 1995: 555; emphasis added).

Characteristic of the international justice literature, then, is an implicit juxtaposition between the *political* birth pangs of international criminal tribunals and the subsequent *apolitical* prosecution and trial of alleged war criminals by and within those courts. On this view, as Fred Mégret has observed, international criminal justice is ‘a phenomenon *anchored* in power yet simultaneously capable of transcending it’ (Mégret 2002: 1264).

On the view of commentators such as Cassese and Meron, politics should ideally be limited to the establishment of international justice institutions alone. But if politics, in the context of subsequent trials is necessarily pejorative, in what precisely does a political trial consist? In other words, what makes an otherwise ‘ordinary’ trial ‘political’? Two conceptions of politics in criminal trials predominate in international legal thought. Politics is located first in the instrumentalisation of the trial for partisan political ends and second in deformed legal procedures.

Politics as the Instrumentalisation of Criminal Justice

In popular usage, the epithet is commonly used to denote those trials in which specific individuals are targeted for their political views. Classic (U.S.) examples, on this

definition, include the *Haymarket* trial, its defendants prosecuted for their anarchist affiliations, and the *Chicago Conspiracy* trial, where defendants were tried for their opposition to U.S. government Vietnam-era policy.⁴ Under this view of the political trial, prosecutions are used as instruments for partisan political ends, brought often against political opponents for the purpose of eliminating them. Thus, for Donald Hermann, the purpose of the political trial is to ‘discredit and obstruct those who pose a threat to the integrity of the state and to those who hold political power’ (1972: 571). Hermann contrasts the political trial with ordinary ‘non-political’ criminal prosecutions that are ‘brought to deter isolate, punish or rehabilitate individuals who threaten the health, safety, and welfare of other citizens and the social community’ (1972: 571). In a similar vein, for Noam Chomsky, Paul Lauter and Florence Howe, the political trial represents an instrumentalisation of the judicial process by the government ‘to ensure obedience to its orders by punishing those who refuse to obey and threatening others who might be tempted to do so’ (Chomsky et al. 1968). A more recent formulation, suggested by Eric Posner, similarly holds that ‘a political trial occurs when the government uses the judicial process against its opponents’ (2005: 87). Michal Belknap’s definition, if more expansive, likewise points to the use of the trial vis-à-vis political opponents. He argues political trials are those:

intended to affect the structure, personnel, or policies of government . . . or that results from the efforts of a group within society having control of the machinery of government to use the courts to disadvantage its rivals in a power struggle . . . or to preserve its own economic or social position.

(Belknap 1994: xvi)

On a similar note, Judith Shklar famously suggests a political trial is one ‘in which the prosecuting party, usually the regime in power aided by a cooperative judiciary, tries to eliminate its political enemies’ (1986: 149). Like other authors, Shklar sees such instrumentalisation of the trial as injurious to the judicial process. That process, Shklar writes, is designed to deal ‘with individual offenders against law, not with the elimination of political groups. To attempt such tasks is to injure the judicial process, because the principle of legality cannot survive them’ (1986: 217).

In the international criminal law field, such criticisms are often articulated in the form of accusations of ‘victors’ justice’, the view that victorious powers use *post bellum* trials to criminalise their defeated opponents whilst their own conduct remains above judicial scrutiny. This was the essence of Milošević’s jeremiad against the ICTY, but it is also a common refrain from other defendants before international criminal tribunals. Saddam Hussein, for instance, dismissed the court sentencing him to death as ‘servants of the occupiers and their lackeys’ and political ‘puppets’ (quoted in Burns & Semple 2006: A4).

But victors’ justice is also central to many scholarly analyses such as Danilo Zolo’s trenchant critique of international criminal justice. In a recent intervention, he indicts the entire project of international criminal law as one long series of instances of victors’ justice, from Nuremberg through the ICTY (Zolo 2009). Victors’ justice is also the pivot around which Michael Mandel’s polemic proceeds against the ICTY: during the Kosovo war of 1999, NATO also committed war crimes in its campaign against Serbia. The Prosecutor, however, failed to fully investigate NATO’s attack on

Serbia, let alone prosecute the organisation's leadership (Mandel 2001). Some observers have thus argued that the ICTY, and the trials before it, are deeply political precisely because of the seemingly one-sided approach of prosecutions:

Of the leaders in the Balkan wars, Clinton, Blair, Izetbegovic and Tudjman have never been indicted by the ICTY, only Milosevic This highly politicized justice . . . is deeply compromised. And if it is clearly serving a political end and meeting an external political agenda it is almost certain to be biased and fail to bring justice even in dealing with politically eligible targets.

(Herman 2005)

One finds a similar conception of the political in criticisms of other tribunals such as the International Criminal Tribunal for Rwanda (ICTR). Critics argue that ICTR trials of Rwandan *genocidaires* in Arusha have been the subject of selective prosecutions. The ICTR's judicial characterization of the Rwandan genocide has been celebrated by many commentators for memorializing the violence and burying the 'obscene version of history' that would deny 'that what happened in Rwanda in 1994 was neither accidental nor spontaneous' (McGreal 2008). However, the failure to prosecute crimes of the Rwandan Patriotic Front (RPF; currently the ruling party of Rwanda) has led organisations such as Human Rights Watch to bemoan the politicisation of the court (see Human Rights Watch 2009). Former U.S. Attorney General Ramsey Clark, similarly, has argued that the trials before the ICTR amount to 'a rewriting of history using courts to serve a particular political agenda' (Gehring 2011). Filip Reyntjens, too, suggests that the trials have served as a powerful political tool and an 'ideological weapon allowing the RPF to acquire and maintain victim status' and enjoy 'complete immunity' (Reyntjens 2004: 199). He contends that the trials have allowed the Kagame government to shrug off criticisms of authoritarianism, suppression of opposition political activity and outright violence. Makau Mutua, likewise, argues that the Rwanda tribunal serves to legitimise the Kagame regime and 'allows Tutsis a moral plane from which to exact their revenge on the Hutus' (Mutua 2000: 78).

A slightly different critique of international criminal trials, which nonetheless identifies politics with the (illegitimate) motives behind selective prosecution, can be found in literature on what has become known as 'lawfare'. Subscribers to this school, particularly prominent in the United States, highlight the deployment of international legal norms and judicial processes as strategic weapons, not by victorious Western powers but rather against those powers.⁵ 'The enemies of the West . . . are pursuing a campaign of lawfare that complements terrorism and asymmetric warfare', warns the U.S.-based Lawfare Project (2012). 'Terrorists and their sympathizers understand that where they cannot win by advocating and exercising violence, they can attempt to undermine the willingness and capacity to fight them using legal means' (Lawfare Project 2012).

Subscribers to this 'lawfare' school see in international criminal law and the institution of the international trial an invitation for the cynical manipulation of the law 'to achieve strategic military or political ends' (Lawfare Project 2012). On this view, international criminal justice takes on a political hue insofar as international criminal tribunals may be politically instrumentalised to *illegitimately* target and prosecute U.S. or allied political and military leaders, a fear not without significant

traction in U.S. political culture. The spectre of an unrestrained prosecutor acting willy-nilly in The Hague making frivolous accusations of war crimes against Americans looms large in the U.S. psyche and was central to the Bush administration's opposition to the ICC. In 2002, John Bolton, then U.S. Under Secretary for Arms Control and International Security, famously attacked an 'unaccountable Prosecutor and its unchecked judicial power' as 'clearly inconsistent with American standards of constitutionalism' (Bolton 2002). Another Under Secretary, Marc Grossman (2002), remarked of the Rome Statute that it 'creates a prosecutorial system that is an unchecked power We believe that the ICC is built on a flawed foundation. These flaws leave it open for exploitation and politically motivated prosecutions.'

Jack Goldsmith and Stephen Krasner (2003), while avoiding the hyperbole of their Lawfare Project and Bush administration compatriots, express a similar fear about politically partisan prosecutions. The ICC, they argue, 'invites questionable and even politically motivated prosecutions. Legal restrictions and definitional limitations are not likely to provide real checks on the ICC's behavior, for the ICC itself is the ultimate interpreter of these norms' (Goldsmith & Krasner 2003: 54).

Perhaps unsurprisingly, defenders of the ICC, and ICL more generally, are at pains to insist that international prosecutions remain purely legal affairs, devoid of political influence. Concern about political influence from either Western powers, or forces opposed to U.S. hegemony, is dismissed as unwarranted (Danner 2003: 1637; Goldstone & Smith 2009: 114). Liberal commentators appeal to 'numerous safeguards' (Kirsch & Robinson 2002: 663; Brubacher 2004: 72; Sadat & Carden 2000: 401) that are 'in place against a politically motivated Prosecutor running off with the bit between his teeth' (Lahiri 2010: 181). The ICC, its former Chief Prosecutor Luis Moreno-Ocampo insists, is a '*judicial* institution' distinct—hermetically sealed, he seems to believe—from the '*political* environment' in which it operates. His own considerations were never political, respecting 'scrupulously my legal limits' (Moreno-Ocampo 2010).

What is important for the argument here is not how convincing either side of this debate is, but rather the ultimate agreement across both critics and boosters of the ICC, and international criminal justice more broadly, that politics resides in the motivation behind the decision to prosecute (or not prosecute) a particular individual or leader—and that politics should have no place in prosecutions and trials. The complaint in each instance is that international criminal law is being *misused* for political ends: the problem is with politics, not the law or trial itself. The implicit corollary is that if only Allied crimes had also been prosecuted at Nuremberg or Tokyo, if only NATO leaders too had been tried in the Hague, if only the RPF had faced justice in Arusha, then all would be well.

Politics as Deformed Legalism

Not all commentators focus on the motivations behind prosecutions in ascribing or denying politics to or in international criminal trials. Indeed, some commentators have suggested that such an approach is simply vague and analytically unhelpful. Ron Christenson, for example, suggests that '[m]ost attempts to designate a trial as political become mired in the quicksand of motive.' He concludes simply that we must be satisfied with the assumption that 'we can recognize political trials when we

see them' (Christenson 1999: 2).⁶ Many liberal defenders of international criminal trials have tended to not focus on the motivation animating international prosecutions but rather the degree to which trials accord with certain characteristics of an idealised liberal trial, namely the procedures associated with what has been called 'liberal legalism'.

For Judith Shklar, legalism represents 'the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules' (Shklar 1986: 1). Shklar is rather critical of this putative equation of morality with rule following and its elevation, especially amongst jurists, as a 'grand or total ideolog[y]' (1986: 4). As one amongst many values, Shklar suggests, legalism is to be valued, but in its fetishism of legal process, she sees a dismally narrow view of law abstracted 'from all political, moral and social values and institutions' (1986: 33). Nevertheless, many contemporary advocates of international criminal justice have embraced precisely the process-fetishism of which Shklar was most critical. Paradoxically, legalism's most eager proponents in the international criminal law realm, such as Gary Bass, explicitly invoke their debt to Shklar. For Bass, judicial process in criminal trials is paramount: legalism is 'above all about due process' (Bass 2000: 24)—'international trials must be conducted roughly according to well-established domestic practice' (Bass 2000: 20). Social conflicts, dealt with by courts through the architecture of the trial, should be resolved through the application of preexisting rules to individuals who, in turn, have the opportunity to defend themselves.

For writers like Bass, this position seems to be grounded in a moral philosophical view that values legal process as the embodiment of ideals of fairness and respect for human dignity. But other positions too are possible. Eric Posner takes an instrumental approach to legalism—perhaps reflecting his grounding in the Law and Economics tradition—suggesting that legalism reflects the 'principles and attitudes' embraced by any rational, democratic government seeking to maximise its political support (Posner 2005: 98). If governments relax judicial process—or sidestep the judiciary altogether—they risk undermining their popular legitimacy: 'a government that depends on the consent of the public cannot take the risk of allowing the public to think that the government eliminates political opponents who enjoy the support of at least some of the public' (Posner 2005: 100).

If both approaches to legalism are grounded in different theories—deontological and instrumental—they share the common premise that, again, politics has no place in the legalistic trial; that the political trial is necessarily a departure from liberal legalism. Posner thus argues that '[p]olitical trials cannot occur in a regime of liberal legalism as long as legal institutions uphold this ideal' (Posner 2005: 97). The focus on process similarly allows Bass to draw a neat conceptual divide between 'truly legalistic' trials and 'highly politicized trials', of which the show trial provides the leading exemplar (Bass 2000: 16, 310). Thus, on Bass's reading, '[f]air liberal legal arrangements' are 'easily discernible from a Soviet-style show trial' (2000: 24). Following Weber, who emphasised the 'protection of a regular procedure' in modern criminal justice, Bass identifies the leading markers of a 'bona fide trial' as due process, an independent judiciary, the possibility of acquittal, and proportionality in sentencing (2000: 16). Against this benchmark, the show trial stands in sharp relief. For Bass, it represents the 'apotheosis' of political trials and the 'opposite of liberal legalism: the complete

subversion of legal norms’ (2000: 26). It is characterised by a predetermined outcome (‘a show trial has no chance of returning an acquittal’) and judges subservient to the prosecution, and ‘cares little for procedure’ (2000: 16).

In much the same vein, writing during the Milošević trial, Michael Scharf (2003: 915) asked ‘[w]ill history remember Milosevic as . . . a scapegoat tried in a show trial before a one-sided court? Or will the Milosevic trial be seen as fair and free of political influence, and its judgment supported by credible evidence?’ As with Bass and Posner, the political (show) trial here stands in opposition to the procedurally fair trial; politics is something alien to the latter.

Under this view, the international criminal trial, with its due process guarantees—‘an extension of the rule of law from the domestic sphere to the international sphere’ (Bass 2000: 8)—is necessarily an embodiment of legalism *tout court*.⁷ Thus for Bass, Nuremberg is to be celebrated as representing the opposite of the show trial sought by the Soviets who ‘were piqued when the other three Allies would not let them have it’ (Bass 2000: 19-20). In a missive to U.S. leaders dispatched from the London Conference, Robert Jackson wrote approvingly of ‘provisions which assured to the defendants the fundamentals of procedural “due process of law”’ including ‘guaranties securing the defendants every reasonable opportunity to make a full and free defense’ and rights ‘to counsel, to present evidence, and to cross-examine prosecution witnesses’ (quoted in Bass 2000: 24). For Bass, Jackson’s report, which he cites approvingly, is proof that at Nuremberg, defendants faced ‘full-blown Western legalism’ (Bass 2000: 25). For Conway Henderson, too, the question of whether Nuremberg represented justice properly served or the exercise of political power—again, the two stand in antipodal opposition—turns solely ‘on due process questions, that is, the rightful procedures of the two tribunals’ (Henderson 2010: 276). The question is resolved in the affirmative by Henderson: ‘The evidence of their atrocities was massive, yet when doubt arose, several acquittals did result’ (Henderson 2010: 276).

Again it is the ‘*fairness of the process* that makes [the trial] justice’ (Bass 2002b: A33; emphasis added). Moving from Nuremberg to the ICTY, in the face of Milošević’s accusations of a politicised victor’s justice, Bass merely points to the ‘full panoply of United Nations protections’ he enjoys:

Instead of extrajudicial executions, the accused are given the luxury of a full trial, with their crimes laid out in an indictment, with protections of due process and procedure, with the possibility of acquittal and, failing that, a proportionate sentence.

(Bass 2002a: 1040)

This juxtaposition of politics with legalistic procedure (and the association of politics with deformed legalism) implicitly undergirds most contemporary analyses of international criminal tribunals. Moreno-Ocampo defends the ICC’s credibility against claims of politicisation with an appeal first to the apolitical nature of his own (then) office—‘my duty is to apply the law without political considerations’—and second to the procedural guarantees provided defendants—‘[f]ull respect for the rights of all the parties involved is the cornerstone of the Court’s credibility’

(Moreno-Ocampo 2010). A recent intervention by Michael Newton, former advisor to the Iraqi High Tribunal and senior advisor to the U.S. Ambassador-at-Large for War Crimes Issues at the U.S. Department of State, is also symptomatic. Newton recognises that international trials take place in a deeply political context but, he insists, need not be contaminated thereby. Procedural guarantees including, in particular, on Newton's view, access to competent defence counsel, successfully stand between defendants and 'the raw political whims of powerful states that organize and fund the system of modern international criminal justice' (Newton 2011: 383).

Not all observers are as sanguine in their evaluations of Nuremberg, The Hague, and other seats of international criminal justice. Following the Second World War, Hermann Göring said of the Allied prosecution of German leaders at Nuremberg 'As far as the trial is concerned, it's just a cut-and-dried political affair.' The final judgment, Göring implied, was already decided before the trial: 'I'm sure the Russian and French judges, at least, already have their instructions. . . . I know what's in store for me' (quoted in Gilbert 1947: 12-13). One former Nuremberg prosecutor, reflecting on the trial, also expresses doubts about how much the trial really embodied conceptions of liberal legalism (Taylor 1992). Even Shklar, while generally positive in her discussion of the IMT at Nuremberg, is compelled to acknowledge that the trial represented 'a genuine moral crisis . . . for persons of liberal convictions' (Shklar 1986: 155).

Other commentators, in arguing the trial was *politicised*, have focused on the 'inequality of arms' between prosecution and defendant. Thus, with reference to Nuremberg, Otto Kranzbuhler and Hans Laternser have both emphasised the vast resources at the prosecution's disposal and the huge volume of possibly exculpatory material unavailable to defendants (Kranzbuhler 1965; Laternser 1987). More recently, critics have condemned the 'outrageous departures from proper judicial practice' during Milošević's trial before the ICTY: judges' bias, interference with the defendant's invocation of right to act as his own counsel, failure to declare a mistrial when the presiding judge resigned for health reasons, the use of double hearsay evidence (Falk 2007). The proceedings, critics contend, were little more than a 'lynching' before a 'kangaroo court' (Greenspan 2002; Laughland 2007; Cockburn 2006) with Milošević a 'scapegoat in a show trial with a predestined outcome' (Lopusina & Huzsvai 2002).

While there remains much disagreement between those who would dismiss international criminal trials as egregious departures from the procedural norms of liberal legalism and those who embrace them as exemplars of those norms, there is also, if less apparent, much agreement. The animating concern, for both groups, remains the trial's form, that is, its conformity to the model of liberal legalism. Implicit in the critiques, no less than in the hyperbole of Bass and other defenders of ICL, is the assumption that if the neutrality of the legalistic trial and its formal procedures *could* be safeguarded, the trial would remain free of, and even a suitable check on, politics.

BEYOND INSTRUMENTALISM AND LIBERAL LEGALISM

If the instrumentalisation of criminal justice for partisan ends and the deformation of legal process are markers of the presence of politics in the international criminal trial, are these the only sources of politics in ICL? Might the seemingly neutral,

procedurally sound, legalistic application of ICL nonetheless also have important political implications? That is, might ICL and international criminal trials in fact be political in ways that are actually hidden and placed beyond scrutiny by a myopic focus on prosecutorial motive or formal legalism? In reproducing the idea of the supposedly apolitical trial—as reality or ideal—might mainstream debates actually blind us to the deeper politics of ICL?

To understand and scrutinise these other political aspects of the trial, one must take a broader optic that takes account of the wider constellation of social relations in which the trial takes place. Mainstream debates, however, focus on politics as the product of the subjective choices of a small universe of specific judicial or political actors. Prosecutors (or the political powers behind them) *choose* to use the trial as a way of removing an opponent. Judges *choose* to allow the deformation of formal processes and erosion of defendants' rights. The two of course often go hand in hand, as in the classical show trial. But in both cases the source of politics is in the *conscious intent* of actors in or outside the courtroom.

In focusing on judicial (and political) actors' intent and their attendant decisions, these mainstream debates recall what Steven Lukes has called the one-dimensional and two-dimensional views of power. In his influential study of power, Lukes critiques these two dominant approaches to the subject and instead offers his own 'radical' three-dimensional view. The one-dimensional approach, he suggests, is preoccupied with 'behaviourism': its focus is on 'behaviour in the making of decisions on issues over which there is an observable conflict of (subjective) interests, seen as express policy preferences' (Lukes 2005: 19). The two-dimensional view, by way of contrast, 'allows for consideration of the ways in which decisions are prevented from being taken on potential issues over which there is an observable conflict of (subjective) interests' (Lukes 2005: 25). However, it is still ultimately focused, Lukes insists, with behaviourism: 'the study of overt, "actual behaviour", of which "concrete decisions" in situations of conflict are seen as paradigmatic' (Lukes 2005: 25). Against these approaches, Lukes argues that:

we need to think about power broadly rather than narrowly—in three dimensions rather than one or two—and that we need to attend to those aspects of power that are least accessible to observation: that, indeed, power is at its most effective when least observable.

(Lukes 2005: 1)

Whereas the former approaches focus on the operation of power through 'choices consciously and intentionally made by individuals between alternatives', the three-dimensional view points to the ways in which power also operates to shape and constrain behaviour in ways that are 'neither consciously chosen nor the intended result of particular individuals' choices' (Lukes 2005: 25). That is, power can 'prevent people . . . from having grievances by shaping their perceptions, cognitions and preferences in such a way that they accept their role in the existing order of things' (Lukes 2005: 11).⁸

Might politics in ICL also have a third dimension? Could the international criminal trial have political implications independent of the actions or conscious intent of

particular agents? This section considers how the trial—and the discourses, scholarly as well as popular, in which it is embedded—communicate social meaning beyond the immediate actors and events adjudicated in the courtroom. The trial, the section argues, communicates meaning also about social relations and structures more generally. In short, international criminal trials may serve to naturalise and legitimise historically specific social relations and structural sources of crime. Like Lukes' third dimension of power, they contribute to the ways in which people come to accept the existing order of things. As such, even the seemingly neutral, legalistic trial may operate politically, in the sense of politics encompassing broadly the processes, multifaceted and varied, by which social orders and relations of power are sustained or challenged.⁹

Legitimation of Social Structures

A criminal trial, Kenneth Nunn suggests, 'does more than merely determine the fate of the defendant standing trial' (Nunn 1995: 746). It also expresses 'fundamental notions about justice and injustice, right and wrong, law-abiding and crime, good and evil' (Nunn 1995: 746). By labelling particular conduct as deviant, the trial mobilises censure and social sanction and, at the same time, serves to reinforce the 'internal solidarity of the moral community' (Nunn 1995: 760). Struggles to criminalise conduct of others are also, however, struggles to validate one's own behaviour. The trial can thus be seen as a 'communicative forum', a 'social practice for producing authoritative judgments of discourses' about society (Hariman 1990: 24). From the interplay of structured meaning arises what Stuart Hall has called a general 'consensus' regarding the accepted parameters of social conduct and institutions—a consensus, in other words, to 'a particular kind of social order' (Hall 1982: 63).

The social order affirmed by the trial and reflected in the concomitant 'consensus', however, is one that reflects a 'very definite set of social, economic and political structures' (Hall 1982: 63). It is an order, Peter Gabel and Paul Harris argue, that maintains striking asymmetries in the distribution of material and cultural resources and that is premised on exploitative social relations and the structural violence of private property (Gabel & Harris 1982: 370). While acts of individuals that threaten violence to persons or property are criminalised and censured, other forms of social violence—economic exploitation, say—are not conceived of as crime at all (Kelman 1982: 215). At the same time that it establishes criminal responsibility for some forms of violence, the law seems implicitly to sanction other forms. Moreover, even those individual acts of violence deemed criminal are a manifestation of, or at the very least shaped by, material social conditions—namely, the exploitative social relations that undergird the existence of criminal conduct. Marx, more than one and a half centuries ago, inveighed against those who, like Hegel:

instead of looking upon the criminal as the mere object, the slave of justice, elevate[] him to the position of a free and self-determined being. Looking, however, more closely into the matter, we discover that German idealism here . . . has but given a transcendental sanction to the rules of existing society. Is it not a delusion to substitute for the individual with his real motives, with multifarious social circumstances pressing upon him, the abstraction of 'free-will'—one among the many qualities of man for man himself!

(Marx 1853)

The criminal trial takes precisely the abstract ‘free and self-determined being’ as its central subject. This is a ‘delusion’, Marx suggests, as it ignores the criminal’s ‘real motives’, that is the complex economic and social forces—the ‘multifarious social circumstances pressing upon him’—that shape and animate crime. Others have followed Marx’s insights and insisted upon a relationship between social relations and individual criminal behaviour. One interpretation thus holds that ‘it is the class struggle both between and among those who own and control the means of production and distribution and those who do not that is the source of all crime in capitalist societies’ (Bohm 1982: 570).¹⁰

We may question whether ‘*all* crime’ should be understood as the direct product of class struggle while still recognising the more fundamental point that crime is not free-floating, independent of social relations. Much the same can be said of international crimes. The causes of, say, the Iraq war cannot be located solely in the subjective intent of calculating, pious, or evil individuals. As one collective of critical scholars warned in the wake of the war, calls for war crimes trials had perhaps ‘privatize[d] and individualize[d] responsibility for that which should rather be seen as public and systemic’ (Craven et al. 2004: 372). The broader point, here, is that few international crimes occur in isolation. Naomi Klein, for instance, has argued that the human rights abuses in the Southern Cone of Latin America in the 1970s should be understood as rooted in systemic economic transformations. She criticises, for example, Amnesty International’s reporting on human rights violations in Argentina: ‘Without an examination of the larger plan to impose “pure” capitalism on Latin America, and the powerful interests behind that project, the acts of sadism documented in the report made no sense at all’ (Klein 2008: 119-20). Torture and disappearance cannot be simply abstracted from the context of a violent restructuring of the country’s political economy.

If human rights violations or war crimes do not take place in a vacuum, nor do the very conflicts that give rise to them. As a growing body of social science literature has shown, wide-scale violence, be it in the form of internal civil wars or international conflicts, is often—perhaps always—rooted in systemic economic and political forces. Elsewhere, I have argued that the conflict in the former Yugoslavia and the crimes tried at the ICTY cannot be understood independent of the political-economic transformations introduced under World Bank and IMF tutelage in the preceding decades (Krever 2013). The argument has broader application: violent conflict has often followed instances of neo-liberal political-economic restructuring. At the core of neo-liberal reforms is an emphasis on the opening of countries’ political economies to the free movement of goods and financial flows from the North and a transformation of states’ domestic social relations. In addition to macroeconomic reforms—opening domestic economies to imports, freeing prices from controls, macroeconomic stabilization—governments are also instructed to undertake microeconomic reforms such as privatization of state-owned enterprises, financial and labour market liberalization, and deregulation. The role of the state in the economy is to be curtailed and limited to protecting the operation of the free market (Krever 2011; Harvey 2007). The consequence of these reforms, in almost all cases, has been the growth of socioeconomic inequality, insecurity and human misery (Robinson 1996: 339). Such structural violence—‘inequality, exclusion, dispossession, alienation, disempowerment and humiliation’—attendant on Western prescribed economic

reforms can be seen in the lead-up to numerous wars, conflicts and genocide (Orford 2003: 106). Christopher Cramer, in his excellent study of violence and economic transformation, argues that ‘much of the violence in the world may represent the consequences of and reactions to the failures and choices of government policies, including those policies of wholesale liberalisation and deregulation encouraged by international financial institutions’ (Cramer 2007: 198). Mass violence does not arise from thin air. While particular individuals, acting in a social situation, may well bear responsibility for discrete instances of violence, that responsibility should not be understood in isolation of the social structures in which individuals act and are motivated to act.

The international criminal trial, however, fails to deal with either the material circumstances in which individual acts of crime are rooted or the systemic violence of the contemporary social order. The trial only addresses individual crimes and acts of violence, never the structural whole from which those acts or disputes arise.¹¹ It punishes international criminals without ever touching on the social relations which throw up particular instances of international crime. That is, while censuring some conduct—war crimes, crimes against humanity, genocide—the trial leaves unscrutinised the social relations and structures out of which that conduct arises. Systemic forces—neo-liberalism, imperialism, geopolitical rivalry, or even simply capitalism—are thus lost from sight in the international criminal trial. While trials foreground individual actors, they leave the interventions of international institutions and the systemic inequalities of the status quo unquestioned.

Not only do these trials neglect the role of structural forces and transnational economic processes in exacerbating social conflict and creating environments conducive to violence: they also seemingly absolve them. The trial reproduces the image of a society (or even international society) governed by a neutral rule of law with legalistic proceedings publicly demonstrating the neutral application of legal rules and judicial principles to adjudicate and resolve social conflict. The prosecution’s accusation of crime is not taken for granted but must be proved beyond a reasonable doubt; the defendant is afforded an opportunity to contest the charges and provided with ‘a panoply of rights that regulate the trial process in a fair manner and protect the defendant from government overreaching’ (Nunn 1995: 798). But it is precisely through the apparently neutral application of legal rules and procedures that the ‘apparent legitimacy of the existing social order’ is reinforced (Gabel & Harris 1982).

Veiling Politics

To justify the status quo, with its violence, exploitation, and systemic inequalities, is, of course, inherently political. But if the international criminal trial operates ideologically to perpetuate ‘prevailing constellations of power’ (Marks 2007: 208), the debates about the politics of international criminal trials discussed above are also complicit in this same ideological manoeuvre. As already emphasised, the consensus implicit in these debates, regardless of position, is that the neutral, legalistic and apolitical trial does in fact exist.

By directing attention to issues of legalistic procedure or geopolitical calculi, mainstream debates distract from and even blind us to the ideological role of trials in constructing and conveying symbolic forms that sustain often asymmetric and violent

international social relations. If particular asymmetrical power relations are constituted and reproduced through particular signifying practices, we should, if we wish to have a transformative effect on those relations, seek to focus attention on the ideological role of international criminal trials and not retreat into the comfortable but ultimately obfuscatory terrain of a narrowly conceived politics.

And yet contemporary debates about the politics of international criminal trials reproduce and reify the ideal of a trial shorn of politics. Our critical faculties are turned not to the broader ideological operation of the trial, but rather to immediate accusations of politicisation in the form of victors' justice or deformed legalism. Efforts to highlight the more subtle ideological moves of international criminal law and to show how trials may in fact contribute to the perpetuation of systemic inequality and injustice are undermined. These dominant discourses on the politics of international criminal trials may thus themselves be understood as *political*, serving once more, like the trials themselves, to deflect attention from systemic and structural concerns to the immediate and contingent.

CONCLUSION

Mainstream debates about international criminal trials appear hamstrung by the issue of politics. Scholarly analysis tends to oscillate between two poles. On the one hand, critics are quick to dismiss trials as fatally politicised—instantiations of victors' justice and coercive apparatuses deployed to eliminate political enemies. On the other hand, defenders of international criminal law write of such trials in Olympian terms as purified of politics and untarnished by the vagaries of international power relations. But beyond their apparent antagonism, both positions share an idealised notion of an apolitical trial—both insist that war crimes trials *should* and *can* be apolitical. Politics enters in the *misuse* of the legal form for political ends—to eliminate political opponents, as in claims of victor's justice—or in the deformation of procedures and rules or absence altogether of legal process. Common to both positions is a shared view of what the trial *should* represent: the formal, predictable, and equal application of procedures and rules—that together make up the corpus of international criminal law—by a legal body adjudicating the cases presented to it. Where some see a 'sanctimonious . . . fraud' and 'a political act of the victorious States . . . dressed up with a false façade of legality' (Mason 1956: 715-16), others see a 'shining example' of 'full-blown Western legalism' (Bass 2003: 84; 2000: 25), but in both cases, politics is something alien and undesired—and something that *can* be eliminated.

This chapter has argued that these debates reproduce a narrow understanding of politics as synonymous with the misuse of legal proceedings and institutions. Politics, on this view, arises from conscious decisions to instrumentalise the judicial architecture of the international criminal trial or to sidestep or undermine liberal legal process. In so doing, these debates elide the ways in which even the neutral, legalistic trial operates to reproduce and legitimate the social structures and forces undergirding international crimes. While charges of overt politicisation are not unimportant and need to be addressed by the field's practitioners, they should blind neither critics nor advocates of ICL to the deeper structural limitations—and politics—of the field. Without a clear-sighted analysis of the latter, international criminal trials may at best be a limited, even Pyrrhic, victory for those seeking to challenge the deeper structural inequalities and violence that contribute to and throw up international crime.

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ENDNOTES

¹ A notable exception is Nouwen & Werner (2011). They follow Carl Schmitt in defining politics as the act of distinguishing between friends and enemies (see Schmitt 1996).

² The *Chicago Conspiracy* trial involved the prosecution of seven defendants (the 'Chicago Seven') for allegedly inciting riots during the 1968 Democratic National Convention in Chicago. See Danelski (1971).

³ A notion fostered and reproduced by legal education. See Kennedy (2004) and Orford (1998).

⁴ The *Haymarket* defendants were tried following a lethal bombing in Chicago in 1886. While they had advocated violent revolution, no evidence linked them to the bomb thrower. See Avrich (1984).

⁵ See e.g., United States Department of Defense (2005: 5): 'Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.'

⁶ This is somewhat disingenuous of Christenson, as later he distinguishes 'ordinary' trials from 'political' trials on the basis that the former 'do not involve the dual legal and political agendas that political trials simultaneously address' (Christenson 1999: 8).

⁷ 'Liberal states', Bass (2000: 25) further writes, 'have not been willing to seriously compromise their domestic standards of a fair trial when putting foreign leaders on trial.'

⁸ Lukes' three-dimensional view of power recalls Gramsci's theory of hegemony, the mode through which the interests of a particular social group take on an appearance of universality, valid for all of

society (Gramsci 1971; Thomas 2009b). Particular institutions and practices central, and historically specific, to the bourgeois class project come to be seen as both natural and universal. And power, on this view, is exercised through ‘subtle mechanisms of ideological integration’ rather than direct force (Thomas 2009b: 161).

⁹ This section draws on material and arguments developed in greater detail in Krever (2013).

¹⁰ See also Quinney (1978); Groves & RJ Sampson (1986).

¹¹ It may not be only the trial that obscures social structure—Robert Knox suggests this is a feature of the legal form itself (see Knox 2009: 429-33; Knox 2010: 201-11). See also Miéville (2005).