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Experiencing Tipping Points in International Law

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Things always have more than one beginning. It was one of those slightly cold days for my Californian blood, but this was northwest England and what would be described by locals as a pleasant afternoon in early 2017. The Manchester International Law Centre had arranged a two-day event, inviting colleagues to talk shop around formal panels and catch up on the latest professional gossip and personal updates over drinks and meals. Walking out from the sessions, Mortimer Sellers mentioned in conversation that the American Society of International Law (ASIL) Interest Group in International Legal Theory runs a series with Cambridge University Press. Maybe Jean and I would be interested to put together a proposal for an edited volume, and if we could land some funding, there might even be an occasion to host a workshop for authors at the ASIL Washington DC headquarters. In fact, we were just working to secure some seed money from the university to push international research and this seemed one of those fortuitous moments that life (or less romantically, our social status) occasionally arranges. But what to organise a volume around? Towards what ends? Over the coming months, Jean and I occasionally met up, usually over black coffee for an hour before catching a train or in between administrative meetings, and swapped ideas back and forth what might be interesting to do.

In hindsight, those months in spring feel an altogether more innocent time. Today, pandemic and protests rage in the streets while systemic ecological and economic collapse build on the horizon and digital technologists (or perhaps, the technologies themselves) dream up futures without the need for humanity. To enjoy a steady income working from home, to be writing from a quiet room, with food delivered to the doorstep and friends and family more or less immune from the immediate consequences of the unrest and violence, I cannot avoid the absolute reality that despite any complaint I may have day to day, that me and my cohorts are insanely privileged – and more

troubling, that there is something intimately connected between our comfort and the precariat. If you had told Jean and I this in 2017, we would have of course agreed, each in our own ways. After all, wasn't the point to internalise the readings about the dark sides of our virtues, to begin to come to terms with the hard lessons of critical race studies, feminist approaches, political economy literature, queer theory and so forth, to personally and professionally not only check our status as white, Eurocentric/Anglo-American men of comfortable means, but act to some extent as traitors to our congregation in the name of real universal enfranchisement? Isn't a class traitor – on our best days – something to be? And was it not also in our own interests as well, at the level of pure survival instinct? Looking at the world, something felt terribly wrong. It was increasingly difficult not to pick up the bad vibrations. The 'establishment', the 'system', just didn't seem like it cared or knew how to address very visible problems. And yet there seemed so many good people of good will trying each in their own more or less quite competent ways to make things better. Whatever to do? We knew back in 2017 that so much was at stake, even as it often felt like not very much was actually at stake in our everyday lives. It was in the face of these contradictions that we sought to work harder, work better. Or so we told ourselves.

The two refrains that came out of shared sensibility was 'commitment/critique' and 'tipping point'. We were not exactly sure what we wanted to get at with these terms, but we had some ideas. We figured others also felt as if something was building – maybe reaching a 'tipping point' – though it was up for grabs what value to put on this momentum, or where it was located and how it might express itself, or exactly what one might hope could emerge. Our disciplinary training, personal affiliations, anecdotal backgrounds and professional obligations would undoubtedly reveal as much discord as shared sentiment. How are people, we wondered, experiencing the moment from their corner of the room? Could we steal away some time from the warp and woof of daily struggle and come together to reflect on the exact nature of what we felt troubled us regarding the nature of our critiques and the commitments that undergirded these critiques and pointed us towards certain normative inclinations? Maybe these commitments were internally at odds; maybe they didn't link up with our critiques. Maybe our critiques were more pedestrian than we imagined. Could we sidestep some of the suburban protocols of the professional lexicon that midwifed us into professional life? How much of what we were experiencing and doing was the stuff of (narcissistic) fantasy world-building; or could there be something meaningful to learn and say (beyond simple self-discovery, though nothing necessarily wrong with that)?

We felt, importantly, that this line of questioning could be fun, but that it also might be a serious intellectual project. Would the Interest Group and the publisher also think so? Were we right that there were colleagues interested to participate? Could they help us better understand the questions we were trying to ask? Would they be willing to actually reflect on their professed critiques and publicly speak about their personal and professional commitments? Would there be an audience for this sort of volume? We wrote multiple drafts and in mid-summer finally agreed to send the document off. The group was very supportive and not long afterwards the publisher also confirmed the project could have legs. The university provided just enough funding to reserve some hotel rooms near the Tillar House and cover meals for a cosy size cadre, but travel expenses and the like were off the table. Even then, Evan Criddle and Tim bent backwards to fill in gaps with the budget and the venues.

We put together a wish list of people that we would like to listen to in the volume. We tried to identify all the topics that we imagined might offer room for the experience of a 'tipping point' and then thought of people who might care to write on that theme. We tried to put more than one person down for each theme. The list was much longer than seats at the table in DC. Do we find some additional funding? We tried, but no dice. And we were on a timeline; we would have to send out the invitations sooner than later. Do we just slash the list of people and go with a smaller volume of contributors? But we had taken a long time putting the invitations together. We had even developed rules on the basis of what a fun party looks like: some unpredictability, a diverse set of folks, not everyone knowing each other . . . That sort of thing. Here was a rule: the participants would be authors whom we had never yet published with together. In fact, neither of us had met a number of the possible invitees. Another rule: the cohort must include senior and emerging scholars, men and women, not everyone white (or, more accurately, a beige/pink hue), and not everyone traditionally situated within international law or even the legal discipline. The mirror is, after all, not usually the best place to know oneself. We learned things quickly about our own prejudices. Our list was almost exclusively divided down the middle between Anglo-American and European-based scholars. It privileged men and usually white people. There was definitely a wealth gap between our group and the general public. We were missing important topics. Why nuclear power/weapons but not agriculture/food? Why gender struggle but not refugees? Why development but not debt? We tried to fix some of these gaps – imperfectly. This was going to be difficult and time was running out.

We settled on an imperfect decision. Since the event was in the United States and we had just about as many seats as North American based colleagues on the list, they would be invited to the on-site event, and then the rest of our colleagues would be invited to contribute to the volume and we would try to create as many feedback loops and opportunities for communication and peer review as we could. Some folks did not reply. Others sent apologies. Others were tentatively interested but then dropped out. By some chance, we ended up with just about the exact equation of available seats for the workshop as colleagues in North America with resources to travel out and spend two days together, and we were able to match just about all our refurbished themes with an author. We held the event in May 2019. Tim, Evan and the ASIL community were very generous hosts. There were some slightly awkward moments trying to figure out how to talk to each other and some precious unscripted moments. I think folks had a good time. I know I did. The morning after, Jean and I met up for a late breakfast at an outdoor cafe not far from the hotel. We sat for hours, reflecting on the conversations from the previous day, looking through our notes, realising that in some ways we had to go back to the drawing board. How would we ever write an introduction to this set of themes? There were a lot of questions we needed to reflect on further. We would see each other the following month and see where we stood. Everyone unable to be in DC, we tried to keep close in the loop. The cohort was almost embarrassingly generous. Many people shared multiple drafts, showing real care in actually shifting direction or changing their overarching theme as they engaged with their chapters. A few people fell out due to life events, and their topics disappeared from the volume (e.g., gender, peace/war). Colleagues continued to offer suggestions that led us to rethink our own position towards the questions. The volume may be edited by two names, but we served merely as custodians to a group curating their own impromptu space and making sense of this only partially mediated congregation. Where we started was not where we ended up.

I remember speaking with Jean and a metaphor emerged to describe the document. We had all the session musicians in the studio and we were sharing with them the basic melody. And with any recording with an element of impromptu performance, wrong notes were expressions of soul – they weren't wrong notes at all, just the actual expression of what was going on. Here is what we sent around to the entire cohort – after the initial workshop in DC and subsequent email correspondence with a number of contributors – as what we were doing together:

The context: the feeling that international law is at a tipping point . . .

We feel, one again, that we live in a moment where international law looks on the precipice of foundational change – a perceived tipping point where what came before is about to change, or is already changing, and we are yet to understand this new environment or fully experience its effects.

This sense of impending change is a complex phenomenon. In the same instance, we may experience a type of modernist excitement and (at the very least, sublimated) existential dread, a feeling that so much is possible but also that we are being swept up by forces that scoff at resistance (e.g., global economic crisis), an experience that our actions matter and that we are only bit players in a much larger only somewhat human drama. What exactly might be newly possible and the exact nature of this looming dread is simply unclear. But what feels shared is the sense of crisis and the desire to escape our current situation.

This is, of course, not the first time we have collectively felt this way; within just the recent memory of Western oriented governance, other moments immediately come to mind, such as the build-up and immediate aftermath of the first and second world wars or when the Cold War came to a head. Conversely, what exactly is felt to be at stake and the institutional configuration of danger and possibility is distinct in its own historical particularity. Crisis comes in familiar guises but never actually returns the same. We are always faced with new challenges and constraints, and equally, new opportunities.

Even the 'we' referred to throughout the previous paragraph is itself always changing. Not too long ago, for instance, there would be no women, and certainly no women 'of colour' in an academic endeavour to think together and write about the crises of global governance. The feeling of profound crisis, however, warns against thinking this fact to reflect some progress narrative to the direction of history (as if it were a coherent, unified terrain of human experience writ large) nor that a particular tradition is responsible for whatever more inclusive communities we work (and possibly live) within. In so many almost countless respects, inequality functioning through the prism of race is manifest throughout the very structure of societies, impacting everyone albeit in different ways. The same could go for a number of other phenomena, often referred to under rubrics such as class, gender, human dignity, and so forth. And the interlocking configuration of dynamics that make up a given historical moment shape us differently where we almost feel our moment as different histories in the making and unmaking, and what is possible and should be possible along differing perceptions. We feel crisis but the nature and consequences of that crisis is ripe for miscommunication, confusion and despair.

To complicate matters further, even if we were of the same mind about the nature of crisis, how it is manifest and how it can be met changes depending on our chosen terrain of governance. We might agree that socio-economic

inequality is a fundamental problem to a sustainable world order (at home or abroad), and that discrimination on the basis of race and gender is a stain on any individual or political order, but when it comes to tracing out the scope of the problem or fashioning solutions, our consensus rapidly breaks down. Or it may coalesce in one situation, but then diverge at the next stop. We are less a we, less in harmony, more at odds than we might have initially thought. What a strange reality to find ourselves within: people that feel themselves of good will, coming together in a spirit of camaraderie, willing to listen and to share, united around certain broad objectives, hopes and fears, and yet also finding ourselves in substantive disagreements without clear resolution. If this is so within our merry cohort, how much more so in the wider cultures we live within, at home, around the globe. If the crisis poses deep challenges, our solutions need to be equally bold and sweeping. If we cannot achieve consensus or a majority, do we still push forward? How does that impact the prospect of democracy, in terms of what it means and constituting a goal or metric of behaviour? What is it exactly, in short, that we stand for, at large and in a variety of specific contexts?

Whatever the specific personality of this crisis, this collective endeavour that brought us together to contribute to this volume is premised on the shared sense that there is indeed a crisis that confronts the architecture of global governance and which we feel with a sense of dread, which itself animates – or at least runs through the background of – our current thought and work . . .

Against the backdrop of the feeling that international law is at a tipping point, authors are asked to reflect on two mutually constitutive tasks.

First, there is the task of diagnosing what is currently troubling, wrong, being missed. However framed, this task is primarily about critique because it presupposes there is an unresolved problem. And this unresolved problem points to the world ‘out there’, but specifically to those cultures of expertise meant to confront these sorts of problems. Otherwise, if it was a problem that we had adequate answers for and which we were adequately addressing, then there would be no need to write further. It would already be something being taken care of, and so, on to the next thing. When we choose to research and write on a topic, it is always carried out with an at least implicit critique of the existing approaches among expert communities. This takes different tones (e.g., blind spots, class prejudices, intentional bad faith), but scholars are usually most comfortable in this mode of writing: pointing out problems, responding to what we believe other colleagues to be missing, and attempting to analyse the character of a given problem. In short, we are doing critique.

The second task is also always at work, though it is usually less pronounced in scholarship: *commitment*. By this, we mean to designate that normative orientation that motivates the critique and which points the way forward. Any critique, after all, is grounded on a standard, a metric of evaluation, of some

form of commitment. Any stance (or attempt to not take a stance) is grounded on some commitment – or to put this a bit more simply, a belief. For a number of reasons, this is a far more difficult task for scholars generally to carry out.

It is true that we may find that we have multiple commitments functioning at once. For example, we might have a belief in the rule of law as a neutral process of adjudication that we feel necessary to uphold in the face of rising charismatic political authority, but at the same time, the issue in front of us seems to require we act perhaps slightly out of professional legal character to ensure a certain political outcome conforms to our broader understanding of truth, justice, the ‘good’. One may identify as a Marxist and fight to uphold the legal ‘reasoning’ of the judge; one may call oneself a liberal committed to equality but side with the property rights of the few over the well-being of the many; one might be persuaded by deconstructionist literature but defend human rights legislation . . . So we are faced with understanding a range of commitments and how these commitments are themselves part of an albeit loosely held broader commitment, however that might be characterised. Often, syncing critique and commitment means we expose ourselves to criticism of cognitive dissonance or being hypocritical. More often, we pass off any disconnect as being practical, noting that the world is complicated and constraining and that this is the best of the given situation as far as we can understand it – though, this itself is again, in a round about way, to speak to one’s commitments without necessarily being explicit. To do so, would potentially mean a more uncomfortable situation: revealing that we actually believe something different to what we tend to think of ourselves, or simply that we don’t care about following through on our beliefs, or facing that what we believe is different from what we tend to declare. Or, at the very least, that we haven’t sufficiently thought through the hierarchy of our commitments or, if not a hierarchy, the relationship between our commitments, and in a variety of relatively common situations. So the task is extremely difficult to understand our commitments in relation to one another, how they make sense and operate in a variety of situations, and how our actions can be coordinated with our deliberate ideas and faiths.

At a more practical level, naming our commitments – let alone developing them in a programmatic fashion – is not common practice in scholarly circles, at least not in relation to law. We academics are most unassailable when we seek to ‘analyse’, ‘clarify’, ‘diagnose’, ‘examine’, ‘investigate’, ‘study’, ‘test’ . . . We are in the business of ideas and understanding, not politics or making money – at least not in the first instance and perhaps such secondary interests are best kept to consultancy work for government or private industry. When we highlight a commitment or draw a conclusion it is almost always a general statement at the beginning of a paper that is not rigorously worked out in the text or occurs in the concluding passages of the text, pointing

generally in some directions for others. The implicit assumption behind these tendencies is that the scholarship has shifted our thought in some way through its analytical clarity, and this will compel a change of mind among readers, which will somehow lead to reformed personal behaviour or institutional practices. Us scholars are part of a tradition – or perhaps more accurately, an industry – saturated by the belief that reason can guide thought and passion, and that ideas (the power and product of reason) shape deeds, and all of this subject to clarity and deliberation and wilful choice. The role of the scholar in this situation is to help clarify a given situation, to clear the way for reason to then chart our path forward. To concentrate on commitment raises the spectre of siding with individual passion and interest. And this is all the more the case with law-related scholarship and the humanities at large (and some social sciences): no more grand narratives or big explanatory pictures of the world or universal truths, at least not spelled out in substantive, specific terms.

All this amounts to an environment where academics tend to be distrustful of naming their faith. To do so is potentially bad form, bordering on the impolite, of saying that your tribe or club or belief is better than someone else's. It all feels a bit intolerant, a bit partisan, a bit out of step with the work of the scholar. And within the cultures of expertise surrounding global governance and the international legal architecture, not in keeping with being the counsellor, offering wise evaluation to the client, the elected officials, the prince . . .

To the extent that academics do take up this challenge, the suggestions suddenly look like a modified form of the tools and ideals that already exist, the argument that the promises of the international legal order have simply remained unfulfilled and need to be implemented with protestant zeal. The critics suddenly look not all too different from their mainstream counterparts, the difference largely the extent a given situation is liveable as it is, that it is a matter of complex practicalities that counsel cool passion and technocratic expertise, but not an existential emergency in need of profound revision.

Or perhaps it simply is a matter of following through on the promises embodied in the tradition of law. But even if we commit to a vision of dignity, equality, justice, or any other ideals, what exactly those ideals mean in our current historical configuration and how they specifically inform our critique in specific fields of law remains undeveloped within international legal theory. In short, while the discipline has become versed in critique and apology, it is less equipped examining the character of our commitments, of what a realised utopia looks like in practice.

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No easy task to try and wrestle out. There could be any number of reasons for this, though perhaps most prominent in my mind is that the experiment

embodied a contradiction. On the one hand, authors were called to adopt an almost confessional tone. With your tongue confess your heart! No more hiding behind your professed agnosticism and measured balancing posture! On the other hand, the legal discipline is fine with critiques and commitments, even with a bit of confession, so long as such gestures can plausibly be seen as going somewhere in the eyes of the practitioner, the policy maker or the judge. Thou shalt be useful! A confessional tone can easily get out of hand and relegate the author to amateur or outsider or quack status.

The real disquiet with a confessional tone is that the legal discipline is – for all its affinities and histories – not actually like religion (or therapy). Sure, you can plead guilty like the sinner in the confessional, but that is not why lawyers are trained. The advocate stops the police soliciting the confession, blocks incriminating evidence, contorts the documents and the facts to put their client in the most pleasing light before the judge and jury. In short, law is not about truth or justice – at least not in our practical training. It is a performance to an audience. When we write to an international law audience, we are being asked and perceived to perform. It can be impolite to say the quiet part loud, but anyone in the field can related to this. The author is also an actor; not necessarily dishonest but definitely putting on a show.

In an edited volume, the authors are catalogued into different types of roles and with different stakes – all of which are distinct from other types of publication medium. What is most striking about edited volumes, I think, is how rarely the chapters tend to become widely referenced sources within the genre. Not always the case, but book chapters are definitely lower on the totem pole than journal articles and monographs. The question then, why publish in an edited volume? For the love of the craft, for the opportunity to spend time with colleagues (edited volumes are often attached to in-person events), as a favour to this or that colleague . . . All these are undoubtedly true in many instances. At a formal level, for an emerging scholar, publishing in the volume is signalling that one is being invited into the club; for more established academics, that they are still important in the game and/or magnanimous to the community; for the editor, that there are a significant and well-respected cohort of colleagues to vouch for their credentials; perhaps to mount a collective assault on a certain professional sensibility that requires a show of numbers.

The edited volume also tends to follow certain conventions. One common trope that particularly impacts editors is that the introduction is expected to provide a short description of each chapter, which is usually situated within some claim about the overall new-ness or innovation of the volume and its potential impact on thinking in the field. The editor as curator of the artisan set

pieces; the sum of the volume greater than its individual parts. This convention, however, seems categorically not the case in our volume and against the very spirit of the project. Ours was deliberately designed to make something together, to experiment in collaboration, and without a specific goal beyond trying to capture a snapshot of our current moment – of what felt to many of us, in different ways and for different reasons and with different anxieties and hopes, as a type of ‘tipping point’ that brought our commitments and critiques into sharp relief. If I were to characterise this time together, it was a conversation – sometimes with authors, regularly with my co-editor, Jean, and definitely with myself. Often it took the form of an internal dialogue, sitting alone over coffee, reflecting on what we talk about when we talk about ‘tipping points’. To try and capture this mental back and forth, I feel, is somehow both confession and performance (or confession as a byproduct of performance). To personify this conversation that turns on itself, I tend to imagine the detectives that made a guest appearance in my first comic book as a young child, *Asterix in Belgium*: the incompetent twins, Thompson and Thomson . . .¹

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Thompson: The text so far has already intimated a number of things that might be interesting to consider in relation to the discipline, though I imagine we may already be exhausting the reader’s patience. Then again, perhaps that serves its purpose and they skip ahead, so long as they don’t close the book instead. I have to admit I myself become wary whenever someone invokes language that we are undergoing some sea change. Is this taking place from within or outside the discipline and how are we really sure that something big is happening? I am not at all convinced that things ‘out there’ exist in advance of our professional lexicon, or if they do – as I guess things are happening all over the place all the time outside international law – I would wager it only registers on our radar to the extent it may be incorporated into our habits of thought and argument. The twentieth century dates that might spell big change for an international lawyer would gravitate around conflicts between major state powers: 1918, 1945, decolonisation and Cold War tensions, the Vietnam war, 9/11, and so on. These dates are attached to actors and organisations and ideas that seem to shape the narrative arc of how the world has come to be. If I was instead trained as an epidemiologist, however, I would have a very different sense of the drama of historical change: tracing outbreaks, looking at triggers that might spark new pandemics and getting into professional debates over how to stage and manage situations. The word

¹ In *Asterix in Belgium*, the twins appear with a specific legal-oriented mission. Thomson and Thompson disrupt a local brawl to announce that Julius Caesar has entered the territory.