SYMPOSIUM ON THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA: BROADENING THE DEBATE

ON A SELF-DECONSTRUCTING SYMPOSIUM

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It is not clear what there is left for a commentator to say once a symposium has unfolded in such a way as to cancel itself out. But in case others read it differently than I do, I am happy to explain how I think this process occurs across the wonderful though self-canceling pages of the *American Journal of International Law* symposium on the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and—through valedictory reflection on those enterprises—on contemporary international criminal law so far. The self-cancellation process, as I see it, takes place in the move from creation story and doctrinal evolution to impact measurement amidst legacy rhetoric. One might take this result as an index of where things stand (or whether anything stands) in the fascinating emergence of a prestigious enterprise—and what might come next.

A sense of fragility has haunted the contemporary revival of international criminal law from the first. In their excellent overview of how the U.S. government has engaged with the enterprise, from the self-interested perspective of two of its representatives in the pivotal 1990s, Michael J. Matheson and David J. Scheffer vigorously deny that the inception of the enterprise was "simply a token alternative to effective action or a mere act of political contrition."[1] They are, of course, right in this contention. But it may not be so much or only, as Matheson and Scheffer themselves contend, because the outrage of ongoing impunity demanded justice. That may have been the motivation of key actors, but, to put it bluntly, states do not have a very good record so far of providing justice for the crimes of world history, and so one has to ask why they started when they did and in the places they did.

An obvious answer follows, though it is not in the symposium: there was a cultural frame that made it meaningful and a geopolitical context for specific action. There had always been political evil (defined in different ways), and atrocity wrongs as one of its versions. To the rare extent some response to evil occurs, it is always a matter of *which evil* the powerful have singled out for attention and *which response* the powerful have chosen to match—if only because they think the weak want it.

By 1992, the frame had been set by a convergence of a human rights revolution and Holocaust memory—and indeed the latter belatedly transforming the former. As Karen Engle has noted, in the early years of the human rights movement, Amnesty International (as its very name implies) aimed at getting people out of jail, not throwing people into it. More broadly, the early human rights movement traded on a newfound skepti-

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[1] Michael J. Matheson & David Scheffer, *The Creation of the Tribunals*, 110 AJIL 173, 173 (2016).

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cism about state power, and about its penal authority and methods in particular.[2] Early transnational human rights movements had been concerned by political repression and police states, and even their Latin American versions in the 1970s and 1980s were not so much about mass atrocity and genocide as disappearance and terror. But by the 1990s, as anyone who lived through it will remember, the very phrase "human rights" had become so tightly linked to a surge of Holocaust memory across the prior two decades that political evil had now become synonymous with forms of horror that appeared analogous to the World War II events. In the absence of other agents, it seemed critical for states to act to prevent and punish such outrages.

It mattered utterly, in this rich and specific context, that the first move towards international criminal accountability occurred in response to the shock of atrocity on the European continent—at a moment when European identity depended so much on its sense of having put the Holocaust behind it—even though the subsequent geography of the field has been essentially postcolonial and "southern." It was in part for this reason, as Matheson and Scheffer nervously admit, that the new international criminal accountability reversed the priorities of the very Nuremberg precedent it has so often claimed to honor, by demoting aggression as "counterproductive"[3] (and, for the American state, committing to permanent struggle against its return as a chargeable offense).[4]

I would not disagree for an instant with Matheson and Scheffer that morality counted for something too, but it was defined in a specific way. And it is remarkable that as state actors Matheson and Scheffer provide next to no information about how state interests (including those of their own state) must have concurred with that new definition. For example, Matheson and Scheffer allude briefly to the fact that the United States might not have ratified a treaty creating a tribunal, so that it was fortunate that the Security Council could act. Scheffer has written movingly of his action in memory of "all the missing souls," but someday, especially once state archives have been opened, it will be fascinating to learn more about all the present interests—and all the souls that may not have not been missed as much either before or after this pivotal 1990s moment.[5] It is already obvious that a unique geopolitical conjuncture obtained, with a post-Cold War glow seducing statesmen and—women into thinking that a discontinuous moralization of global affairs was now possible. It strikes me as highly unlikely that states would have converged in the same way at any other time—even leaving out the most recent controversies over the International Criminal Court and the spike in its unpopularity.

Once created, the tribunals for Yugoslavia and Rwanda took on a jurisprudential life of their own, as Darryl Robinson and Gillian MacNeil record in their knowledgeable contribution.[6] Aside from providing yet more evidence of how fundamentally Nuremberg-era law had to be abandoned or revised to suit the search for accountability in noninternational armed conflict or indeed outside the setting of armed conflict altogether, not to mention to allow pursuit of rape as a war crime, Robinson and MacNeil provide a rich account of how contemporary international criminal law was made. Their reflections on the collectivist turn of the jurisprudence are especially thought-provoking. Voltaire once remarked that he feared to break with the

[2] Karen L. Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069 (2015). See more generally SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

[3] Matheson & Scheffer, *supra* note 1, at 187.

[4] For my own thinking about this history, see Samuel Moyn, *From Aggression to Atrocity: Rethinking the History of International Criminal Law*, *in* OXFORD HANDBOOK TO INTERNATIONAL CRIMINAL LAW (Kevin Jon Heller et al. eds., forthcoming).

[5] Compare DAVID SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS (2011). For preliminary political accounts of two state agendas, see DAVID BOSCO, ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS (2014) or RONEN STEINKE, THE POLITICS OF INTERNATIONAL CRIMINAL JUSTICE: GERMAN PERSPECTIVES FROM NUREMBERG TO THE HAGUE (2012).

[6] Darryl Robinson & Gillian MacNeil, *The Tribunals and the Renaissance of International Criminal Law: Three Themes*, 110 AJIL 191 (2016).

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Zeitgeist, for those who lack the spirit of an age may still have all of its defects. Robinson and MacNeil acknowledge contemporary scholarly worries about "progress" narratives, but the real risk is that they portray the conformity of international criminal law with contemporary assumptions, imperatives, and understandings about the purposes of such a body of law as more surprising than it in fact is. However interesting it may be to recall that the application of extant war crimes law to noninternational armed conflicts was once controversial, for example, it seems unlikely that a set of doctrines originally crafted for interstate war could have failed for long to be applied to noninternational armed conflict. For all the resistance of some states, the new atrocity law emerged at a time of the decline of interstate war, and the persistence of civil war. In claiming Nuremberg's legacy, indeed, the new accountability broke fundamentally from it not simply in its reorientation to atrocity but also in freeing itself from the original context of interstate war (or even war of any kind).

As for the closing thought experiment that Robinson and MacNeil offer—to ask what international criminal law might look like without the *ad hoc* tribunals—I confess that it feels a bit strange. Counterfactual history has experienced a vogue of late, but asking what international criminal law would look like today without the *ad hoc* tribunals is unlikely to be illuminating because it is not as if the field has had any real life (certainly in recent decades) except through the accident of the *ad hoc* tribunals in the first place. It is somewhat like asking what someone's life might look like had her parents never met: she would not have existed at all. Similarly, without the contingent but decisive intervention of the 1990s tribunals, there would not really exist a field of international criminal law to speak about. Especially given the elusive and transformed precedent of Nuremberg—followed in the 1950s in extant proposals to set up an aggression court—atrocity law was essentially brought about by the *ad hoc* tribunals, not merely "helped" or "hurt" by them as an intervening factor.

It is in turning from *creation* and *doctrine* to *impact* that the symposium makes the self-deconstructing move. In the best book ever written about international criminal law, Judith Shklar long ago indicted exclusive focus on doctrine—that is to say, the focus that Robinson and MacNeil take up—as if "the future of international law" were an important aim regardless of whether Nuremberg improved the world in any way. "To think of either the immediate political needs or the ideological impact of the Trial on Germany would have been to descend to mere politics," she allowed. "Nevertheless, it was these and these alone that justified the trial."[7] I fully accept the implicit argument of Robinson and MacNeil that the reason doctrinal evolution mattered is that it allowed for just retribution for hitherto unpunished crime. But a wider political lens investigates whether that retribution in fact accrued, compared to imaginable alternative mechanisms. And it inquires into what wider effects—both intended and inadvertent—the chosen mechanisms achieved.[8]

In his superlative "anticipatory postmortem" for the ICTY, Marko Milanović concedes that retribution happened that would not have occurred otherwise. But he rightly indicts the tendency to "continue theorizing about the potential impact" of international criminal law without checking.[9] Meanwhile, in their sophisticated piece, Sara Kendall and Sarah M.H. Nouwen willingly acknowledge that the ICTR has struck a blow for international law in some form, but rightly worry that in the absence of "demonstrable findings, many of the claims made about the ICTR's impact are either hypotheses, setting forth how the Tribunal could have an impact, or assertions of hopes or normative opinions as to what its impact should be."[10]

[7] JUDITH N. SHKLAR, LEGALISM 181, 147 (1963).

[8] *See* Samuel Moyn, *Towards Instrumentalism at the International Criminal Court*, YALE J. INT'L L. ONLINE 39, 55-65 (Spring 2014).

[9] Marko Milanović, *The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem*, 110 AJIL 233, 235 (2016).

[10] Sara Kendall & Sarah M. H. Nouwen, *Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda*, 110 AJIL 212, 217 (2016) (footnote omitted).

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I read these two fine essays combined as upsetting a current asymmetry in literature on the contemporary "justice cascade" of prosecutions. Like justice, the "empiricism" currently championed in international law scholarship is a specific kind of empiricism, privileging quasi-scientific proof. More than challenging that orthodoxy, the symposium implies how odd it is that "empiricism" is most associated not with critics but with promoters of international criminal processes, who have positioned themselves as cautious fact-finders compared to both conservatives who propose to do nothing and radicals who long for doing something else. These essays suggest that if a promotional empiricism is familiar when it comes to atrocity law, it is because too few empirical questions have been asked.[11]

Milanović appeals to "objective" evidence of what impact the ICTY has had on how peoples of the region (Bosnia, Croatia, and Serbia) understand what went wrong—and in particular, what responsibility their own people or leaders might bear.[12] The results are sobering about how little the proceedings have affected dominant narratives, but even more illuminating is Milanović's observation that one of the ICTY's smallest acts—the indictment of Vojislav Šešelj—had the biggest consequences for the Serbian people, paving the way for the "soft" authoritarian rule under which they find themselves today. The important lesson is that international courts are on the hook not just for the little progress they may make towards their avowed or expected aims (from retribution to reconciliation), but also for the whole set of consequences that follow from their deployment. Of course, no one can guess what would have happened had the ICTY or the current wave of international criminal law never come about. But to flee in response to Milanović's findings into world-weary observations about the opacity and unknowability of things is hardly going to work as justification for trying again. Presumably one would want a better defense of the rise of international criminal processes pursuing atrocity than the speculative guess that doing nothing might have made things even worse.

Especially since, as Kendall and Nouwen register in passing, postgenocide Rwanda provides a case in which local justice—not to mention other choices than prosecution whether local or international—has proceeded in tandem with the ICTR.[13] Ascending to a brilliant higher-order inquiry into what the desire for a "legacy" and the search for it might involve, Kendall and Nouwen distinguish legacy talk from impact measurement of the sort Milanović attempts. Along the lines of their analysis, indeed, one might suggest that legacy talk is a prime way to distract from an avoidance of impact measurement. Dwelling on the epistemological quandaries involved in assessing a legacy, Kendall and Nouwen persuasively show that it all depends who is asking and from what vantage point, including how distantly from the events: legacy talk, it seems, is not infrequently image management, which does not necessarily mean it gains more plausibility the further away the assessment takes place or the less involved those conducting it are. Emphasizing the selectivity of retributive justice and its doubtful contribution to reconciliation, Kendall and Nouwen also worry that the ICTR has played havoc with historical knowledge, and not simply provided the foundation for it. They even cast doubt on how powerful an effect the tribunal had on domestic legal processes and reform, attributing even positive changes to a "confluence of interests."[14]

From their survey, Kendall and Nouwen wisely infer that an indefinite sense of fallibility is much more important for the ICTR than a quick bid for immortality. The sheer difficulty of achieving progress, as Kendall and Nouwen argue, counsels modesty about this sort of undertaking. Yet the enterprise of international

[11] See KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (2011) or Hyeran Jo and Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT'L ORG. 443 (2016); For counterpoint, see Samuel Moyn, *Anti-Impunity as Deflection of Argument*, *in* ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA (Karen L. Engle et al. eds., 2016).

[12] Milanović, *supra* note 9, at 235.

[13] Kendall & Nouwen, *supra* note 10, at 213.

[14] *Id.* at 226.

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criminal law has had so much invested in it, literally and rhetorically, that it may be difficult to restore it to the usual constraints in which even normalized legal reform must operate: with effort, it may make a bit of difference for the good, while eternally risking failure. The very overhyping lavished on the agenda of atrocity law, up to and including the International Criminal Court, may lead to equally irrational backlash, not so much reasonable moderation. One would not want that result either.

Not to put words in their mouths, but by the end it seems as if the conclusion Kendall and Nouwen reach—like the self-cancellation process of the overall symposium they complete—feels quite a bit more devastating than they openly state. Kendall and Nouwen (citing Jean-Marie Katamali) call the ICTR a case of "experimental justice," which is a good label for the entire post-1989 endeavor so far. True, potshots after the fact dishonoring such inevitably imperfect experiments, not to mention those who have committed their lives to them, are frustrating in the extreme, but the same is true of experiments that are never allowed to fail, assuming it made sense to try them to begin with. The symposium forces readers to ask: Has the rise of "atrocity law" in our time been worth it? Would selective retribution alone, to the extent it is being achieved (as all commentators acknowledge), suffice to allow an affirmative response?

I do not know the answers to these questions after witnessing the symposium self-deconstruct, but the experience leads to a different outcome than moderation. It feels more paralyzing, but more productive too. It is the intuition that what people need is not exactly a legacy monument for the ICTY or the ICTR so much as a reality check about what it might actually take to improve a recalcitrant and violent world.

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