doi:10.1017/aju.2025.9

SYMPOSIUM ON INTERNATIONAL CRIMINAL LAW'S CRITICAL AFTERMATHS

UNFINISHED

*Vasuki Nesiah**

This essay examines the unfinished as both a diagnostic and a tactic for how we engage with the terrain of international criminal law (ICL). The diagnostic: recognizing that justice struggles against a five-hundred-year racial-capitalist world order are unfinished and ongoing. The tactic: seeking opportunities for strategically interrupting ICL procedures to keep the ends of justice an open question. In articulating this notion of the unfinished, this essay analyzes the implications of this diagnostic for challenging and troubling how justice is defined and delimited within the terms of ICL, while also exploring the strategy and tactics of "unfinishing" in reframing the ends of ICL.

The Berlin Holocaust memorial site was a gaping hole in the ground for many years, a hollowed-out stage of unfinished memorialization. Debates about what form the memorial should take began from the moment the memorial was first mooted in the 1980s; in time the competition for proposals unfolded, alternative designs submitted, budgets calculated, a jury established, and winning designs chosen. Yet, after all that, the entire process was cancelled. A new competition was announced, new financing raised, new artists submitted proposals, and the process unfolded yet again with extensive public debate.[1] A design was not selected until 1999, and the site eventually opened in May 2005.[2] Many were frustrated by these iterative interruptions and the fraught community dialogue about how the memorial should articulate loss. However, others found that these unexpected interruptions and the prolonged condition of "unfinishedness" opened a space for generative engagement with the responsibilities and challenges of memory and mourning, accountability and resistance. The artist Horst Hoheisel sought to enact this insight in his proposal: dynamiting the Brandenburg Gate and spreading the debris at the site for the memorial; that wreckage would be the foundation for a granite floor that would blend into the pavements of Berlin.[3] Hoheisel's vision sought to break open the memorial form and hold the space of unfinishedness to critically reflect on all that had been monumentalized in the past and what we want to remember in the future. As James Young notes, while such a project would never be sanctioned by the German government, the impossibility of actually "winning" the memorial competition was part of the point. In Young's account, Hoheisel's proposal for the memorial to remain unfinished suggests that officially sanctioned memory is an obstacle to truly grappling with the Holocaust: "[I]t may be the *finished* monument that completes memory itself, puts a cap on memory work, and draws a bottom line underneath an era that must always haunt Germany. Better a thousand years of Holocaust memorial competitions in Germany than any single 'final solution' to Germany's memorial problem."[4]

* *Professor of Practice in Human Rights and International Law, The Gallatin School, NYU, New York, New York, United States.*

[1] *Holocaust Memorial*, Official Website of Berlin (last visited Jan. 30, 2025).

[2] *Id.*

[3] Horst Hoheisel, *"The Long Shadow of the Past" in the Short Light of Present*, Eur. Memories (Dec. 10, 2018).

[4] James E. Young, *Memory and Counter-Memory: The End of the Monument in Germany*, 9 Harv. Design Mag. 1, 2 (1999).

© The Author(s) 2025. Published by Cambridge University Press for The American Society of International Law. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (http://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.

https://doi.org/10.1017/aju.2025.9 Published online by Cambridge University Press

A memorial is not a court case, but the "perpetual irresolution"[5] characterizing the unbuilt memorial offers insight into the value of the unfinished in legal contexts as well. Against ICL's promise of closure and certitude as the measure of justice,[6] an appreciation of the unfinished can open alternative ways of engaging with the terrain of ICL. These alternative paths situate ICL in the unfinished struggles against racial capitalism and the historical debris that is the foundation for the ground on which we struggle for justice today. Recognizing the structural conditions constituting ICL and its received ends has implications for both our understanding of the quotidian procedural conceits and micro-histories of ICL trials and our understanding of the field at a macro-level. How might we engage with criminal trials if we approach their trajectory as unfinished, such that each stage is open to analysis and detours in ways that unsettle the move to closure?

The Unfinished in the Quotidian Trajectory of ICL Trials

"Closure for victims" is declared the "true measure of international justice" by International Criminal Court (ICC) entities.[7] While the ICC often engages in contexts where the scale and intensity of atrocity are monstrous, the ICL process pulls questions of justice into penal logics aimed at rulings on guilt and innocence with an accompanying menu of consequences that mark the successful completion of a justice process. As Mark Drumbl notes, the "classic penitentiary model" dominates ICL sanctions such that "[t]he 'enemy of all of humankind' is punished no differently than a car thief."[8] Monstrous injustice gets relegated to a banal end.

In her discussion of the sanctions due Adolf Eichmann, a key functionary of the Holocaust, Hannah Arendt grappled with arguments about the disconnect between the enormity of the Holocaust and the fact that the telos of the trial was the sanctions menu of the criminal justice system: "Eichmann's deeds [so] defied the possibility of human punishment, that it was pointless to impose the death sentence for crimes of such magnitude."[9] On the one hand, Arendt condemned the spectacle of Eichmann's 1961 trial as a strategic circus deployed by Israeli Prime Minister David Ben-Gurion to encourage nationalist fidelity. On the other hand, it was clear to Arendt that Eichmann was morally responsible, and her diagnosis of the unthinking banality of his *mens rea* impugned, rather than exonerated, him. However, she wrestled with arguments (by Martin Buber, Gerhard Shelom, and others) that defaulting to criminal sanction for those responsible for the Holocaust was to renege on our own responsibility to think critically about those questions.[10]

Sanctions—a sort of *denouement* to the trial itself—are routine in the justice system, but they are a convention with profound stakes for justice and accountability. They help frame injustice as the product of exceptional instances of individual monstrosity, rather than the exceptionally monstrous routine. This framing may exonerate the system while deterring preventive and transformative interventions addressing conditions enabling atrocity and reproducing impunity.[11] Challenging the notion that the Holocaust can be pressed into "a-punishment-that-fits-the-crime" taxonomy of justice, Shelom described the execution of Eichmann as "*a mistaken ending*" that "distorts the historical meaning of the trial by creating the illusion as if something of this event can be settled

[5] *Id.*

[6] Mark Kersten, *"Getting" an Unforgettable Gettable: The Trial of Dominic Ongwen*, Just. in Conflict (Feb. 5, 2021).

[7] The court marries its pursuit of sanctions to a program of ameliorative reparations for some victims through its trust fund. Int'l Crim. Ct. Press Release, TFV Board: Closure for Victims Is the True Measure of International Justice (Nov. 29, 2016).

[8] Mark A. Drumbl, *Collective Violence and Individual Punishment*, 99 Nw. U. L. Rev. 539 (2005).

[9] Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil 250 (2006).

[10] Ultimately, Arendt supported capital punishment for Eichmann: Amit Naor, *Who Opposed Eichmann's Execution?*, The Librarians (Apr. 27, 2021).

[11] Anti-impunity and the Human Rights Agenda (Karen Engle et al. eds., 2016).

https://doi.org/10.1017/aju.2025.9 Published online by Cambridge University Press

by hanging . . . that something has been done to 'atone' for something for which there is no atonement."[12] Trials conscript observers into treating this delimited framing of justice as an adequate response. Refusing such conscription may entail, as Shelom suggests, unfinishing that ending.

While sanctions form the end stage of the trial process, earlier stages also perform contentious and complex work. For instance, whatever the outcome of the current case, the ICC arrest warrant against Benjamin Netanyahu renders him a fugitive from justice and puts Israeli policies in the dock.[13] Similarly, the early stages of the International Court of Justice's (ICJ) genocide case[14] are instructive, even though the ICJ case is not a criminal process. How the Court will eventually rule is not irrelevant, but like the ICC arrest warrants, the ICJ case's greatest significance may well have been in the moment when it was unfinished: when its meanings ricochet off social movements rather than being narrowed, as it will be, when the Court offers its concluding legal holding. The charges of genocide heard in Hague courtrooms in 2024 were intertwined with the condemnation of genocide in non-legal venues, reverberating across student encampments, anti-genocide protest marches, and Gaza solidarity picket lines across the world. Critical Race Theory scholar Richard Delgado's analysis of "storytelling for oppositionists" is helpful in looking beyond the walls of the courtroom to broader material and ideological struggles to reframe the temporalities of a trial.[15] Delgado describes "stories of outgroups" hurling "rocks over walls of social complacency that obscure the view out from the citadel."[16] These rocks dismantle the primacy of the view from the citadel in framing the timeline of accountability.

The Augusto Pinochet case offers another example of this dynamic. After decades of struggle to hold Pinochet accountable for torture, deaths, and disappearances, he was placed under house arrest in November 2006,[17] awaiting trial for the infamous "Caravan of Death" case.[18] However, in December of that year, mere weeks later, Pinochet passed away. His death "unfinished" his long-awaited trial. Those who had longed to see Pinochet convicted lamented that the unfinished trial robbed them of justice. Nevertheless, the fact that circumstances prevented the trial from reaching closure had the unexpected consequence of energizing forces of social transformation seeking to reopen justice questions for the broader legacies of the Pinochet regime. The frustration left by an unfinished accounting opened a conversation about other aspects of Pinochet's time in power, including the structural conditions that sustained, not only his impunity for crimes, but also ongoing economic injustice. These conversations gave rise to a social movement aimed at remedying this legacy.[19]

In the Pinochet case, forces beyond anyone's control interrupted his trial. One can imagine, however, an intentional strategy of interruption to open a trial to a larger conversation about the system of which it is a part. In domestic cases activists have strategically interrupted trial processes to draw attention to the system's blindness to imperial racism and militarism. Consider the trial of the Chicago Eight (later Seven) following the 1968 Democratic Convention—one of the most famous American trials. Abbie Hoffman and other defendants adopted a strategy of irreverent interruption to make the point that the system's "idea of justice is the only

[12] Naor, *supra* note 10 (emphasis in original).

[13] Int'l Crim. Ct. Press Release, Statement, ICC Prosecutor Karim A.A. Khan, Applications for Arrest Warrants in the Situation in the State of Palestine (May 20, 2024).

[14] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Order (Int'l Ct. Just. Jan. 24, 2024).

[15] Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

[16] *Id.* at 2440–41.

[17] *Pinochet "Arrested" in Chile*, AL JAZEERA (Oct. 31, 2006).

[18] Amnesty International, *Chronology of the Case of Augusto Pinochet* (2008).

[19] Terri Gordon-Zolov, *Chile's Estallido Social and the Art of Protest*, 17 SOCIOLOGICA 41 (2023).

https://doi.org/10.1017/aju.2025.9 Published online by Cambridge University Press

obscenity in this court."[20] In some instances, the interruption was a counter-spectacle to the officially sanctioned process such as redecorating the courtroom with Vietcong flags or reciting poetry in the middle of proceedings. David Dellinger, another defendant, dismissed the significance of the final ruling: "[w]hatever happens to us, however unjustified, will be slight compared to what has happened already to the Vietnamese people, to the black people in this country, to the criminals with whom we are now spending our days in the Cook County jail."[21] Their effort to interrupt not just their trial but the court system itself may be described as a strategy of rupture,[22] aspiring to make "the political dimension of judicial institutions overtly visible."[23] The process stumbled from convictions to reversals of convictions to mistrial declarations to court orders for retrials that never took place.[24] Debate and dissension ensued about the trial's insurrectional work connecting the dots between the battlefields of My Lai and Chicago courtrooms.[25]

Performing such agitprop,[26] shock-the-system interruptions to provoke a trial into a state of unfinishedness could contribute to an expanded repertoire of "legal work" in ICL trials. Communities impacted by the subject of litigation may have greater reach in shaping priorities and strategies in domestic trials but such guerilla-law tactics may also have potential in international trials where victim communities are sometimes dragged into ICL processes that may benefit international lawyers in The Hague with little regard for victims' interests and agendas. Indeed, ICL's driving purpose may be understood as "the construction of an international community out of the tragedy of others."[27] Insurgent legal tactics of the kind we have described could be a way of asserting agency by resisting the move to closure in particular cases, while also challenging the larger normative, institutional, and legal baggage that accompanies the move to closure. One of the problems of the ICL field is precisely that it is more removed from the communities most affected by litigation and is thus more constrained in terms of the kinds of interventions audible in a trial.[28]

The Unfinished in the ICL System

The dramaturgy of the trial reflects and refracts ICL's approach to justice. However, it is valuable to step back from the event of the trial to consider the role of unfinishedness with respect to ICL's work in global governance. There is extensive scholarship examining how ICL has replicated colonial and racial logics in focusing prosecutorial energies on African and Muslim majority countries, while contributing, through action and inaction, to impunity for the Global North.[29] These parallel paths of anti-impunity and impunity have narrowed ICL's gaze to

[20] J. Anthony Lukas, *Judge Hoffman Is Taunted at Trial of the Chicago 7 After Silencing Defense Counsel*, N.Y. Times (Feb. 6, 1970).

[21] Nathan J. Robinson, *The Real Abbie Hoffman*, Current Aff. (Oct. 22, 2020).

[22] Emilios Christodoulidis, *Strategies of Rupture*, 20 Law & Critique 3 (2009).

[23] Filip Strandberg Hassellind, *The International Criminal Trial as a Site for Contesting Historical and Political Narratives*, 30 Soc. & Legal Stud. 1, 8 (2020).

[24] Becky Little, *7 Reasons Why the Chicago 8 Trial Mattered*, History (Sept. 23, 2024).

[25] *Newly Discovered: The Insider's Story of the 1968 Democratic Convention Riots, the Trial of the Chicago 8 (Afterwards Chicago 7), the Anti-war Movement, Revolutionary Politics, and '60s Counterculture*, RAAB (last visited Jan. 30, 2025).

[26] I invoke agitprop as a short-hand for diverse art-activist traditions directing parodic and ironic action at mainstream institutions and ideologies. Chris McCoy, *Guerrilla Theatre as Absurd Performance*, *in* The Routledge Companion to Absurdist Literature (Michael Y. Bennett ed., 2024).

[27] Martii Koskenniemi, *Between Impunity and Show Trials*, 6 Max Planck UN Y.B. 1, 34 (2002).

[28] Kamari Clark, Affective Justice (2019).

[29] Rachel López, *Black Guilt, White Guilt at the International Criminal Court*, *in* Race and National Security 211 (Matiangai Sirleaf ed., 2023); *see also Symposium on Race, Racism, and International Law*, 117 AJIL Unbound 26 (2023).

https://doi.org/10.1017/aju.2025.9 Published online by Cambridge University Press

spectacular violence rather than slow violence, and treated violence as ahistorical atrocity rather than symptomatic of historical structures of exploitation. ICL's push to closure doubles down on the notion that the court's work is coterminous with accountability as such, while legitimizing the dominant order by delimiting justice questions, including unfinished justice struggles regarding structures of enslavement, colonization, and dispossession that had worldmaking force over the past five hundred years.[30] The history of ICL entails a history of thwarting and evading these struggles, with colonial atrocities treated as irrelevant to the framing of accountability questions today,[31] and contemporary atrocities treated as problems of monstrous individuals and national pathologies disconnected from the structures of a racial-capitalist world order.[32]

Against this context, the task of strategic interruption begins with recognizing how ICL's narrative of accountability is unfinished.[33] This unfinishedness is inherent in the ways that such narratives and their related institutional procedures reflect the dominant world order—from their prosecutorial priorities, to their Eurocentric knowledge systems, to their reliance on liberal legalist methodologies. In other words recognizing the unfinished in accountability narratives requires opening up dimensions that are naturalized into the routine of criminal procedure. Mapping the unfinished entails reframing the political horizon of transnational accountability struggles beyond the received remit of ICL institutions. This could, for instance, involve exploring alternative, non-carceral approaches to justice struggles. This resonates with the notion of abolition which refers (in the United States) to the goal of overcoming the carceral state, as well as a portal to opening up our analysis of the criminal justice system by grappling with slavery's afterlives.[34] The language of the unfinished speaks to related analytical work, situating ICL's accountability frameworks in the lives and afterlives of an imperial world order.[35]

Such work involves understanding how our present, including our present accountability processes, are constituted by differences from yesterday, and the traces of yesterday.[36] Mapping these differences and traces within ICL terms and knowledge systems can unsettle particular forms of reasoning (such as those normalizing sanctions) that have emerged as the common sense of the field. These disruptions perform ground-clearing work in contributing to unfinished accountability struggles regarding the histories of enslavement, colonization, and dispossession. These struggles are unfinishable but also imperative; they call on us to develop what abolition scholar Amna Akbar describes as "practical ladders to radical visions." [37] The guerilla legal work we have described offers instances of such ladders to radical futures. Whether we are engaging with the quotidian trajectory of specific trials or analyzing the larger ICL system, this is a call to expand the political imagination of legal work.

Just as it might be impossible for Hoheisel to "win" an official Holocaust memorial competition in Germany,[38] it might be impossible for proposals for "unfinishing" to secure official support at the ICC. However, here too it may be the *finished trial* that puts a cap on justice work, and makes us turn away from the accountability questions that should forever haunt us.

[30] Adom Getachew, Worldmaking After Empire (2019).

[31] Vasuki Nesiah, *Human Rights, Human Wrongs*, *in* Race and Transitional Justice (Neha Jain & Sarah Nouwen eds., forthcoming).

[32] Consider the Special Court for Sierra Leone's prosecution of warlords alongside impunity for transnational companies complicit in war crimes. T. Christian Miller & Jonathan Jones, *Firestone and the Warlord*, ProPublica (Nov. 14, 2014).

[33] Denise Ferreira da Silva, Unpayable Debt (2022).

[34] Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010).

[35] Getachew, *supra* note 30.

[36] Jacques Derrida, Speech and Phenomena and Other Essays on Husserl's Theory of Signs 143 (David R. Allison trans., 1973).

[37] Amna A. Akbar, *The Left Is Remaking the World*, N.Y. Times (July 11, 2020).

[38] Young, *supra* note 4, at 1–6.

https://doi.org/10.1017/aju.2025.9 Published online by Cambridge University Press