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

DEMYSTIFYING POLITICAL VIOLENCE: SOME BEQUESTS OF ICTY AND ICTR

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As Sara Kendall and Sarah M. H. Nouwen rightly notice, "legacy" is a big word, and it may be too soon even to begin to evaluate the legacies of the international criminal tribunals.[1] Legacies are whatever future generations take from the tribunals. That, obviously, is in their hands, not the hands of the tribunals.

So the question of legacies is more properly a question of bequests, and the inquiry must be a modest one: how do we evaluate the successes and failures of the tribunals in the here and now rather than the further future? Failures matter as well as successes, and as in science, failures can be as instructive and useful as successes. For example, many observers concluded that the tribunals, operating in The Hague and Arusha without an initial ground game in former Yugoslavia or Rwanda, were too far removed from the peoples who experienced the crimes; that perception helped motivate the movement toward hybrid tribunals. If that is right, the hybrid model counts among the "legacies" of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), if only in the negative way that they exposed a problem the hybrids tried to remedy. As another example, Kendall and Nouwen remark that the impunity of the RPF has also become part of ICTR's legacy.[2] That too would be an instructive failure—instructive, in this case, as a foretaste of how difficult it is to prosecute cases against an intransigent government in power, a lesson that the International Criminal Court's (ICC) troubles in Sudan and Kenya confirm.

Making History

One of the most important aims of the tribunals was to gather evidence and create a judicially-authenticated record for future generations, as a hedge against denial and as a service to future historians. Kendall and Nouwen seem skeptical that ICTR's "kilometers and terabytes of material on Rwanda" will be valuable. "Historical accounts produced through international criminal trials are notoriously incomplete."[3]

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[1] Sara Kendall & Sarah M. H. Nouwen, Speaking of *Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda*, 110 AJIL 212, 213, 217 (2016).

[2] *Id.* at 221.

[3] *Id.* at 222-23.

No doubt this is true. Martti Koskenniemi has rightly emphasized the incapacity of international criminal trials to take account of large historical movements.[4] In any case, forensic truth is not historians' truth, and courtroom processes—limited to the evidence the parties choose to submit, and constrained by rules of admissibility and the requirement that evidence be germane to specific elements of the crime—are imperfectly suited to historical inquiry.[5] Courts ask and answer different questions than historians, and they answer them in an abbreviated way. The Akayesu trial chamber sets out the background of the Rwanda genocide in a bare thirty-four paragraphs,[6] and it takes only eighteen additional paragraphs to conclude that genocide took place in Rwanda.[7] That latter finding may be historically obvious, but no historian would draw far-reaching conclusions in so few pages. And "genocide in Rwanda" is indeed a historical judgment, not a legal one. As Sangkul Kim points out, the law defines genocidal acts committed by individuals, but strictly speaking there is no legal category defining a collective entity called "a genocide."[8]

Of course, the judges themselves sometimes differ in their historical judgments. For a notable example, in *Šešelj* the ICTY Trial Chamber's majority reached the surprising conclusion that there was no widespread or systematic attack on civilians in large parts of Croatia and Bosnia-Herzegovina;[9] Judge Lattanzi, dissenting, believes that "no trier of fact could reasonably reach" any such conclusion considering the evidence presented.[10]

But focusing on the trials and judgments misses the most important service the tribunals do for getting the history right, namely collecting those kilometers and terabytes of evidence. If the Allies had not gathered evidence for the Nuremberg trials, the first generation of Holocaust history could hardly have been written. If the ICTY and ICTR archives are secured and accessible—a big if—these will make it possible for future historians to examine the events in a way that could not possibly be done as well had the tribunals never existed.[11]

It is easy to overlook one important reason this is so. The point isn't simply that the tribunals amassed an enormous trove of material in centralized locations. It is also that without the prospect of future criminal trials much of that material would not even exist. There would not be the same motivation for witnesses to come forward or for investigators to gather depositions, examine graves, or compile statements. No matter how critical one might be of the histories produced by the tribunals, if the tribunals had never existed we would know far, far less about the horrifying events; and victims might never have told their stories except in hushed tones to their own families. This is an important lesson for the present. The prospect of some future Syrian tribunal, remote though it is, drives the work of the Commission for International Justice and Ac-

[4] Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK UN Y.B. 1 (2002).

[5] The trial court in *Eichmann* emphasized this cautionary point in its judgment, CrimC (Jer) 40/61, Attorney General v. Adolf Eichmann, para. 2 (1961) (Isr.). For a bleak assessment of ICTR and Special Court for Sierra Leone fact-finding, see NANCY A. COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2010).

[6] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, paras. 78-111 (Sept. 2, 1998).

[7] *Id.* at paras. 112-129.

[8] SANGKUL KIM, A THEORY OF COLLECTIVE GENOCIDAL INTENT 81-84 (2015).

[9] Prosecutor v. Šešelj, Case No. IT-03-67-T, Judgment, paras. 192-193 (Mar. 31, 2016).

[10] Prosecutor v. Šešelj, Case No. IT-03-67-T, Partially dissenting opinion of Judge Flavia Lattanzi, para. 39 (Mar. 31, 2016).

[11] Kendall & Nouwen, *supra* note 1, at 223-224 note that there is some anxiety about whether the archives can survive the closure of the Residual Mechanism. Wherever the archives are housed, a searchable electronic duplicate should be created and stored securely in the Cloud—an expensive but crucial safety measure.

countability in documenting crimes of the Assad regime. Without the hope of future accountability, it is unclear whether defectors would undertake the perilous job of smuggling these documents out of Syria.[12]

To take one example of historical evidence that would likely not have existed without the ICTY: although journalists like David Rohde had reported on the Srebrenica massacre, it was the surrender and testimony of Dražen Erdemović that provided the first break that enabled investigators to nail down details; had there been no ICTY, Erdemović (who was in deadly danger) would likely have been killed or intimidated into silence.[13] As a second example, without the *Milošević* trial, it seems unlikely that Vojislav Šešelj would ever have confirmed on the record that the 10th Sabotage Detachment murdered Muslims in Srebrenica.[14]

Resisting Denialism?

It is in this connection that Marko Milanović's important article looms large.[15] If one aim of the tribunals is to create a bulwark against denialism, the data he reports and analyzes seem to show utter failure, with staggering levels of denialism in former Yugoslavia, coupled with high levels of mistrust of the ICTY.

The phenomenon itself is hardly surprising. It is exactly what the best-confirmed findings of cognitive dissonance theory in social psychology predict. When we confront cognitions that contradict and threaten our self-concept, we bend, bury, or deny the cognitions, consciously or unconsciously.[16] Nietzsche puts it briefly and best: "'I did that,' says my memory. 'I could not have done that,' says my pride, and remains inexorable. Eventually—the memory yields."[17] What surprises in the surveys Milanović describes is how deep and widespread the denial is. Importantly, it seems to increase as time passes.[18]

What should we conclude from these depressing findings? Milanović argues that the data are consistent with two opposed hypotheses: "yes, the situation is bad, but it would have been *worse* had it not been for the ICTY; or, yes, the situation is bad, but it was *made* worse by the ICTY."[19] What would be the reason for the latter? It must be this: that, because Serbs and Croats believe strongly (and self-servingly) that the ICTY is biased, its prosecutions fuel their sense of victimization and induce a kind of psychological circling of the wagons, to defend the narrative that nobody suffered the way we suffered.[20]

One way to test this conjecture would have been to conduct some of the surveys on denialism without including questions about the ICTY. If denialism was lower without the survey itself making ICTY salient, it would support the claim that ICTY actually increases denialism. Absent such a test, though, I see no reason to accept the "ICTY made denialism worse" interpretation. It seems more likely that without ICTY there would simply be far less knowledge to deny.

[12] *See* Ben Taub, *The Assad Files: Capturing the top-secret documents that tie the Syrian regime to mass torture and killings*, THE NEW YORKER (Apr. 18, 2016); Ian Black, *Syrian regime document trove shows evidence of 'industrial scale' killing of detainees*, THE GUARDIAN (Jan. 21, 2014, 2:39 PM).

[13] DAVID ROHDE, ENDGAME: THE BETRAYAL AND FALL OF SREBRENICA, EUROPE'S WORST MASSACRE SINCE WORLD WAR II 345 (1997) (describing Erdemović's plight), and sources cited in *id.* at 412 note 24.

[14] Prosecutor v. Milošević, transcript of proceedings 43172 (Aug. 24, 2005).

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

[16] *See, e.g.,* ELLIOTT ARONSON, THE SOCIAL ANIMAL 230-33 (7th ed. 1995). *See also,* Stuart K. Ford, *A Social Psychology Model of Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VAND. J. TRANSNAT'L L. 405, 426-430 (2002).

[17] FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL para. 68 (1886).

[18] Milanović, *supra* note 15, at 248.

[19] *Id.* at 256.

[20] *Id.* at 242 (bias), 243-44 (Serb sense of victimization), 244-45 (Croat sense of victimization).

For example, consider one of the most dramatic moments of the *Milošević* trial, when the prosecution surprised the defense with a horrifying video of Scorpions murdering Muslims. This occurred during the cross-examination of one of Milošević's witnesses, Obrad Stefanović—a portion of the trial that Milošević supporters could be counted on to watch on television. Stefanović's reaction undoubtedly reinforced the point, in case the TV audience had missed it: "As I am upset, I have to say that this is one of the most monstrous images I have ever seen on a screen."[21] As Milanović notes, denialism in Serbia was at its lowest soon after this video.[22] Without the ICTY, it is likely that the video would never have surfaced, or would have surfaced in a much less public way.

The evidence Milanović reviews radically deflates claims that international trials will combat denialism in the affected populations—identity politics and cognitive dissonance are too powerful. But international trials have a global as well as local audience, and the efforts of ICTY have almost certainly helped fight denialism and historical oblivion in the world outside former Yugoslavia. Even if residents of Republika Srpska feign ignorance of the Srebrenica massacre, the outside world knows about it, which may not have been true if the ICTY never existed.[23] Margaret deGuzman calls attention to a "global-local dilemma" of whether to give greater weight to global or local goals of international criminal justice.[24] An implication of Milanović's article is: think globally, hope locally—but don't be surprised if trying to establish the truth locally fails in the face of ongoing identity politics. As Hobbes acidly commented almost four hundred years ago, if a basic theorem of geometry ran contrary to self-interest, it would be, "if not disputed, then by the burning of all books of Geometry, suppressed."[25]

Demystifying Sacred Violence

What does thinking globally mean? It means, fundamentally, aiming for a global audience. Elsewhere, I have argued that the ultimate purpose of international criminal justice is a radical one: to change the way humanity imagines political violence undertaken in the name of states, peoples, or other collectives.[26] Violence on behalf of the state or tribe typically represents itself as "sacred" violence (to borrow Paul Kahn's deep-cutting phrase)—violence on behalf of something greater than me, whose defense gives life meaning, for which killing and dying are not murder but sacrifice, and which is beyond (ordinary) good and evil.[27] International criminal justice aims to demystify sacred violence, and call its most brutal forms by their rightful names: war crimes, genocide, crimes against humanity. The goal is to project these new, demystified norms for imagining violence, through the dramatic medium of trial and punishment.

That doesn't mean the trials must be dramatic; just the opposite. Rebecca West, covering the Nuremberg Tribunal for *The New Yorker*, wrote memorably about its incredible tedium: the courtroom was "a citadel of

[21] Prosecutor v. Milošević, transcript of proceedings 40279 (June 1, 2005); the video can be found at Michael Dobbs, *Srebenica Executions – Trnovo*, YOUTUBE (Feb. 2, 2012).

[22] Milanović, *supra* note 15, at 247.

[23] *Id.* at 254.

[24] Margaret deGuzman, *The Global-Local Dilemma and the ICC's Legitimacy*, *in* LEGITIMACY AND INTERNATIONAL COURTS (Harlan Grant Cohen et al, eds.) (forthcoming 2016).

[25] THOMAS HOBBES, LEVIATHAN, ch. 11 (1651).

[26] David Luban, *After the Honeymoon, Reflections on the Current State of International Criminal Justice*, 11 J. INT'L CRIM. JUST. 505, 509-511 (2013); David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW (Samantha Besson & John Tasioulas eds., 2010).

[27] PAUL W. KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY 93-130 (2008); on the same theme, MOSHE HALBERTAL, ON SACRIFICE 63-78 (2012).

boredom," "boredom on a huge historic scale."[28] "However much a man loved the law he could not love so much of it as wound its sluggish way through the Palace of Justice at Nuremberg."[29] Much the same could be said about the ICTY and ICTR. But what West misses is that subjecting unthinkable atrocities to the tedium of legal trial is a kind of triumph of law. As a practical matter, routinization belongs inherently to legal process: it is what distinguishes fair trials from kangaroo courts and drumhead courts-martial. But in atrocity trials routinization serves another and more symbolic purpose: it cuts the pretensions of the perpetrators down to size. Performatively, it deflates *raison d'état*, *Kriegsraison*, and other "beyond good and evil" mysticisms offered in justification of illicit violence, by subjecting that violence to the same formalities as all other crime. Thus understood, Koskenniemi's complaints that the trials are inherently incapable of taking politics, ideology, and History with a large 'H' into account should meet the reply that this is exactly the point.[30]

Milošević and Šešelj sensed this danger, and that is why they tried to disrupt their trials:[31] to be subjected to the tedious routines of the law was itself a demolition of their political defense. That ICTY acquitted Šešelj actually represents a defeat of his *défense de la rupture*, for it was an acquittal on the Tribunal's terms, not his, just as acquittals at Nuremberg—which the prosecutors feared would delegitimize it—enhanced its legitimacy.[32]

Reimagining political violence is a global, not only a local project. But it can occur locally as well, even in the face of denialism. Understood in these terms, one of the bleak findings Milanović reports actually has something of a silver lining. Although only 40 percent of those polled in Serbia had heard of the Srebrenica massacre and believed it happened—that's the bleak part—83.7 percent of those who accepted its reality agreed it was a crime.[33] Admittedly, one's first reaction might be a dismayed "only 83.7 percent think the massacre was a crime?" But if the project of international criminal justice is recasting political violence as a crime and not a necessity of ethnic self-defense, this high percentage counts as a success—all the more so in a population with a strong victimization narrative.

Reconciliation and Peacemaking

One thing seems clear: with such high levels of denialism, and enormous mistrust of ICTY's credibility among both Serbs and Croats,[34] the Tribunal has not been an instrument of reconciliation. For different reasons, the same must surely be said of ICTR, as Kendall and Nouwen note.[35] Whatever reconciliation has occurred in Rwanda came from Rwandan politics, not from the ICTR.

What about the restoration and maintenance of peace, which the Security Council resolutions cite as a principal motivation for creating the tribunals? Early on, many worried that ICTY would prevent a transition to peace. As always, it is hard to evaluate counterfactuals (what would have happened without the tribunals?). But one point that deserves emphasis is that in former Yugoslavia, at any rate, the Tribunal succeeded in incapacitating a number of toxic leaders. As Milanović notes, the Karadžić indictment prevented him from

[28] REBECCA WEST, *Greenhouse With Cyclamens I*, *in* A TRAIN OF POWDER: SIX REPORTS ON THE PROBLEM OF GUILT AND PUNISHMENT IN OUR TIME 3, 11 (1955).

[29] *Id.* at 17.

[30] Koskenniemi, *supra* note 4, at 12-15.

[31] Following Jacques Vergès's theory of "*défense de la rupture*", see *Rupture Defense*, CRIMINAL DEFENSE WIKI

[32] ICTY's prosecutor announced he will appeal the acquittal, see *Prosecutor to appeal UN tribunal's acquittal of Vojislav Šešelj of war crimes in the Balkans*, UN NEWS CENTRE (Apr. 6, 2016).

[33] Milanović, *supra* note 15, at 246.

[34] *Id.* at 242.

[35] Kendall & Nouwen, *supra* note 1, at 227-230.

participating in the Dayton peace talks; it probably smoothed the way to the agreement.[36] Milanović might have added that the indictment drove Karadžić underground and out of politics in his thirteen years as a fugitive. Had Milošević not been extradited to The Hague, he might have been able to work future mischief in Serbian politics notwithstanding his downfall. Probably others among those convicted by ICTY would have created political turmoil after the war if ICTY had not driven them into hiding and then imprisoned them. Incapacitating toxic leaders is not the usual way we think about special deterrence, but it is the most obvious contribution of the Tribunal to peace and security.

Latitude for Militaries?

In my remaining space, I have little to add to Robinson and MacNeil's penetrating overview[37] of the tribunals' jurisprudential achievements—the concrete way the tribunals have elaborated the norms restraining political violence.[38] Overall they view the tribunals' jurisprudence as a success story (and so do I), although they have doubts about command responsibility. As they note, others have expressed doubts about the extended liability category of JCE III.[39] No problem is harder than apportioning responsibility among actors occupying various roles in a complex joint enterprise, and whoever solves it deserves a Nobel Prize in moral philosophy. The tribunals' jurisprudence of joint enterprises has had false starts, but they have done more to sort this out than any other court.[40] Robinson and MacNeil might have added other milestones: the ICTY was the first court to declare terror a war crime,[41] and the first court to hold that under international law rape is a form of torture.[42]

I do want to mention two decisions that—for better or for worse—have continued resonance for military practice going forward, in ways that strike me as problematic. One is the 1995 Tadić decision on the geographical scope of internal armed conflict.[43] Tadić argued that his activities had occurred outside the zone of active hostilities, and thus outside the armed conflict over which the ICTY had jurisdiction. Rejecting this argument, the Appeals Chamber held that the armed conflict extended over the "entire territory of the Parties to the conflict."[44] This finding had unanticipated consequences: the "*Tadić* test" has appeared in discussions of U.S. drone targeting policies, to argue that rules of international humanitarian law (IHL) apply

[36] Milanović, *supra* note 15, at 255.

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

[38] For a noteworthy example of how the Tribunals have refined the definitions of international crimes, see the concise summary of the crime elements offered by ICTY Trial Chamber II in Prosecutor v. Stanišić, Case No. IT-08-91-T, Judgment, paras. 22-118 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 27 2013).

[39] Robinson & MacNeil, *supra* note 37, at 203-204.

[40] For an exemplary sorting-out, see Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgment, paras. 410-432 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007).

[41] Prosecutor v. Galić, Case No. IT-98-29-T, Judgment and Opinion, paras. 136, 138 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

[42] Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgment, para. 151 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002); the European Court of Human Rights held the same under European law in Aydin v. Turkey, Eur. Ct. H.R., 57/1996/676/866, para. 86 (Sept. 25, 1997).

[43] Prosecutor v. Tadić, Case No. IT-94-1, Decision on the defense motion for interlocutory appeal on jurisdiction, para. 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

[44] *Id.* at para. 68.

even outside areas of hot conflict.[45] Where the original rule plainly aimed to extend IHL *protections* of non-combatants to a geographically broad area, the current application extends IHL targeting *permissions* broadly, displacing more protective law enforcement and human rights standards. Probably the Appeals Chamber had no such result in mind; to those of us who find this an unwelcome consequence, this too will count as a failed experiment.

The second is the highly controversial *Gotovina* conviction, paired with the equally controversial appellate reversal that acquitted General Gotovina of all charges. Gotovina is a military hero to Croats for driving back the Yugoslav Army, but he was accused of ethnic cleansing in Krajina. The Trial Chamber's conviction of Gotovina was noteworthy because it seemed to find that his forces engaged in shelling the town of Knin that exceeded the bounds of proportionality. Legal decisions on proportionality are extremely rare, and the jurisprudence is almost nonexistent. The reason is obvious: proportionality judgments are a lion's den for a court, because they require second-guessing the military evaluations of field commanders. Predictably, the decision caused outrage, including among U.S. military lawyers.[46] Regrettably, the Trial Chamber's opinion was opaquely reasoned, and it never pinned down the concrete military advantage that was supposed to be balanced against anticipated civilian damage.[47] In the end, the Trial Chamber didn't even make clear whether its judgment turned on the violation of proportionality.[48] Then, when the Appeals Chamber reversed the conviction, it did so by finding one element of the Trial Chamber's proportionality analysis to be arbitrary—but it proposed no substitute and in the end left the proportionality issue as soapy as it was before.[49] The outcome of *Gotovina* is that proportionality analysis remains a kind of tennis without a net, and military commanders have reassurance that they will seldom be held accountable for getting it wrong.[50]

The upshot of these decisions is greater latitude for militaries in deeply problematic activities—unholy violence. I can't help wondering whether these bequests will be a bit of poison in the Tribunal's legacy.

[45] Michael N. Schmitt, *Charting the Legal Geography of Non-International Armed Conflict*, 90 J. INT'L L. STUD. 1 (2014); and for a contrasting view Jennifer Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside of the 'Hot' Conflict Zone*, 161 U. PA. L. REV. 1165 (2013).

[46] International Humanitarian Law Clinic at Emory University School of Law, *Operational Law Experts Roundtable on the* Gotovina *Judgment: Military Operations, Battlefield Realities and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law* (2012).

[47] Compare Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment Volume I of II, para. 1244 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011) with Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment Volume II of II, paras. 1910-1911 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011) (describing the sought-after military advantage as, alternatively, forcing the enemy commander's capitulation, increasing his insecurity, and disrupting his movement and communications).

[48] Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment Volume II of II, para. 1911 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

[49] Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment, paras. 49-84 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012); Marko Milanović, *The Gotovina Omnishambles*, EJIL:*TALK!* (Nov. 18, 2012).

[50] ICTY subsequently convicted Jadranko Prlić for proportionality violations in the destruction of the Old Mostar bridge (Prosecutor v. Prlić, Case No. IT-04-74-T, Judgment Volume 3 of 6, paras. 1581-1584 (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013)). This, however, was an atypical judgment, because the Trial Chamber weighed the military importance of the bridge against its cultural significance—in other words, it weighed the military and civilian uses of a dual-use object against one another.