

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

LEAVING LEGACIES OPEN-ENDED:
AN INVITATION FOR AN INCLUSIVE DEBATE
ON INTERNATIONAL CRIMINAL JUSTICE

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As a response to the *Symposium on the International Criminal Tribunals for the former Yugoslavia and Rwanda* published by the *American Journal of International Law* on the occasion of the tribunals' closure, this AJIL Unbound Symposium intends to broaden the debate on the "legacies" of those courts. The AJIL Symposium contains articles on the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR);¹ the *ad hoc* tribunals' jurisprudential contributions;² and their extra-legal impacts and legacies.³ The concept of "legacy" is itself contested and the appropriateness of the courts' own efforts to consolidate it may be questioned, especially as they have barely ended (or are about to end) their work. Nevertheless, their over two decades of existence does provide an occasion to assess all they have done and not done, and have affected, intentionally and unintentionally. Against that background, we have invited a group of scholars to respond to the AJIL Symposium and to reflect upon the work of the tribunals with a view to enriching the debate with more voices, from different regions, from different interest groups, and from different disciplines.

This effort is as much a matter of looking forward, as it is one of looking back. Exploring the successes and failures of international criminal justice is particularly opportune given the recent, and frequent, reference to a "crisis" in international criminal law and of the International Criminal Court (ICC) in particular. The ICC has been said to be in "crisis" since the beginning of its operations, a characterization describing the stay of proceedings in its first trial,⁴ the Office of the Prosecutor's announcement to hibernate its investigations in

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

² Darryl Robinson & Gillian MacNeil, *The Tribunals and the Renaissance of International Criminal Law: Three Themes*, 110 AJIL 191 (2016).

³ Marko Milanović, *The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem*, 110 AJIL 233, 235 (2016) on the ICTY; Sara Kendall & Sarah M. H. Nouwen, *Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda*, 110 AJIL 212 (2016) on the ICTR.

⁴ *The Controversial Actions of the ICC Prosecutor: a Crisis of Maturity?*, THE HAGUE JUSTICE PORTAL (Sept. 15, 2008).

Darfur,⁵ and, most recently, three states' announcing their intention to withdraw as states parties⁶ and Russia's announcing its intention to withdraw its signature from the Statute.⁷ Over time, given the frequency with which and contexts within which it is applied, the term "crisis" loses credibility. One reads about the "crisis" in the ICC, expects a fundamental decision, turning point or termination, but business seems to go on as usual, until the next "crisis" comes around.

Rather than accepting this "crisis" speech as a reflection of a more general dilution of the term in common parlance, it could be productive to redeem the critical roots of the word, and to grasp the experience of it in the field of international criminal law as an opportunity. Sara Kendall has taken the Greek term *krisis* as a starting point to argue that critique in international criminal law need not be seen as criticism or rejection, but as a constructive, self-reflexive praxis.⁸ She cites political theorist Wendy Brown,⁹ who in turn relies on the German historian Reinhart Koselleck, on the Athenian origins of the term:

Nearly untranslatable from the holistic Greek context to our much more compartmentalized one, *krisis* integrates polis rupture, tribunal, knowledge, judgment, and repair at the same time that it links subject and object in practice. *Krises* refers to a specific work of the polis on itself—a practice of sifting, sorting, judging, and repairing what has been rent by a citizen violation of polis law or order.

Taking the "crisis" in international criminal justice seriously means interrogating the polis law and order that it constitutes, strengthens, or represents, and identifying what is in need of repair. Engaging in critique rather than criticism, one focuses not so much on whether international criminal courts and tribunals have erred, but on the conditions for their existence and operations, and how these conditions influence the type of justice they render, intentionally or unintentionally. An exploration of the ICC's "crisis" of legitimacy then takes into account not only what the Court does but also what it cannot do: open investigations in situations outside its jurisdiction (Syria), enforce arrest warrants, or compel states to become parties (China, India, Russia, United States). But it does not end the exploration with the observation that the Court "simply" does not have these powers. Rather, it reveals that the conditions for the Court's operations, for instance, not interfering with the interests of the world's major powers,¹⁰ have consequences, for example inequality in the distribution of criminal blame across the world.¹¹ Bound by the Rome Statute, the organs of the Court may argue that they have limited freedom to address the problems that emerge from these critiques. But that is no reason for not producing them: the order that has been created can be altered.

The AJIL Symposium and this AJIL Unbound Symposium reflect upon that order, and in particular, the legacies of the ICTY and ICTR. In classic critical mode, some authors have focused on the spotlight of the international criminal tribunals: what have they made visible, what have they left in the dark? And what are the consequences? Larissa van den Herik uses the spotlight metaphor to illuminate the ICTR's "blackholes."¹² Engaging in critique rather than criticism, she does not argue that the ICTR itself could or should have shone lights on these blackholes, but rather that the moment of closure and legacy construction presents an occa-

⁵ *Is the ICC in crisis?*, BBC NEWSHOUR (Dec. 13, 2014).

⁶ *International Criminal Court in crisis*, EUROTOPICS.

⁷ *Statement by the Russian Foreign Ministry*, THE MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION (Nov. 16, 2016).

⁸ Sara Kendall, *Critical Orientations: A Critique of International Criminal Court Practice*, in CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW 54, 58-59 (Christine Schwöbel ed., 2014).

⁹ Wendy Brown, *Introduction*, in IS CRITIQUE SECULAR? BLASPHEMY, INJURY, AND FREE SPEECH 7, 9 (2009).

¹⁰ See DAVID L. BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* (2014).

¹¹ Frédéric Mégret, *What Sort of Global Justice Is 'International Criminal Justice'?*, 13 J. INT'L CRIM. JUST. 77 (2015).

¹² Larissa van den Herik, *International Criminal Law as a Spotlight and Black Holes as Constituents of Legacy*, 110 AJIL UNBOUND 209 (2016).

sion for “reckoning” that accounts for results as well as omissions and that provides opportunities for emancipating from international criminal law’s “straightjacket.”¹³ Kelly-Jo Bluen, for her part, argues that the tribunals have shone a spotlight on sexual violence connected to armed conflict, thus directing attention to, and provoking policies on, a previously neglected injustice, but also concentrating attention on one context of sexual violence, to the detriment of other contexts.¹⁴ Also focusing on sexual violence, Karen Engle considers the legacy of feminist activists involved in the turn to criminal law and the treatment of rape and sexual violence in the tribunals.¹⁵ She, too, points to both accomplishments on the one hand, and biases and blind spots on the other. In the final piece on sexual violence, Kirsten Campbell moves from the gaps in the practices of the tribunals, to recommendations for “transformative gender justice.”¹⁶

We then shift from spotlights to enabling conditions, with Kenneth Rodman exploring the political environment in which the ICTY, ICTR, and now ICC can, or cannot, contribute to peace.¹⁷ Zooming in on specific political contexts, Veronika Bílková and Bing Bing Jia present refined analyses of the type of support that Central European states and China, respectively, have given to the *ad hoc* tribunals and how these states’ perceptions of the tribunals’ legacies have influenced their approaches to the ICC.¹⁸ We conclude with two pieces that address the legacies of the tribunals and the AJIL Symposium more generally, with diverging conclusions. David Luban identifies “bequests” of the *ad hoc* tribunals in at least five areas: making history; resisting denialism; demystifying sacred violence; reconciliation and peacemaking; and latitude for militaries.¹⁹ Samuel Moyn explains why in his view the AJIL Symposium on the *ad hoc* tribunals has cancelled itself out as it moves “from creation story and doctrinal evolution to impact measurement amidst legacy rhetoric.”²⁰ He argues that the AJIL Symposium forces readers to ask some fundamental questions about international criminal justice: Has the rise of “atrocities 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? What is needed, in his view, “is not exactly a legacy monument for ICTY or ICTR so much as a reality check about what it might actually take to improve a recalcitrant and violent world.”²¹

The AJIL Symposium and the diverse assessments provided in this Unbound Symposium are obviously incomplete. They are incomplete firstly given the constraints of time, resources, and access that prevented us from generating responses from all parts of the world or from people affected by international criminal justice who are not used to writing in the style of Western law journals. But the assessments are also incomplete because the legacies of the ICTY and ICTR continue to evolve, and be interpreted, while other international criminal courts and tribunals, in particular the International Criminal Court, are creating their own.

¹³ *Id.* at 209, 212.

¹⁴ Kelly-Jo Bluen, *Globalizing Justice, Homogenizing Sexual Violence: The Legacy of the ICTY and ICTR in Terms of Sexual Violence*, 110 AJIL UNBOUND 214 (2016).

¹⁵ Karen Engle, *Feminist Legacies*, 110 AJIL UNBOUND 220 (2016).

¹⁶ Kirsten Campbell, *Gender Justice Beyond the Tribunals: From Criminal Accountability to Transformative Justice*, 110 AJIL UNBOUND 227 (2016).

¹⁷ Kenneth A. Rodman, *How Politics Shapes the Contributions of Justice: Lessons from the ICTY and the ICTR*, 110 AJIL UNBOUND 234 (2016).

¹⁸ Veronika Bílková, *Divided We Stand? The Ad Hoc Tribunals and the CEE Region*, 110 AJIL UNBOUND 240 (2016); Bing Bing Jia, *The Legacy of the ICTY and ICTR in China*, 110 AJIL UNBOUND 245 (2016).

¹⁹ David Luban, *Demystifying Political Violence: Some Bequests of ICTY and ICTR*, 110 AJIL UNBOUND 251 (2016).

²⁰ Samuel Moyn, *On a Self-Deconstructing Symposium*, 110 AJIL UNBOUND 258, 258 (2016).

²¹ *Id.* at 262.

Yet we cannot afford deferring our assessment while having faith that meanwhile the glass of justice that the international criminal courts and tribunals are filling is getting fuller and fuller.²² While the *longue durée* may provide a better perspective, it does not remove the need to assess the state of the ICC, and indeed, the field of international criminal justice more generally, here and now.²³ Even if difficult to assess and contextualize, international criminal courts *are* producing effects in the world—effects that already shape people’s lives in a multitude of ways, and that are “positive,” “negative,” or “neutral,” depending on where one stands. In other words, international criminal law is filling, and draining, multiple glasses, some filled with accountability, others with distributive justice, governmentality, intervention, and (in)equality.²⁴ Future generations may be in a better position to add up the sums—insofar as the various types of glasses filled and drained can be part of one and the same computation—but the present generation still needs to interrogate its current efforts to promote “justice,” in the broadest sense of the term.

²² On this faith, see David S. Koller, *The Faith of the International Criminal Lawyer*, 40 N.Y.U.J. INT’L L. & POL. 1019 (2008).

²³ Darryl Robinson, *Take the Long View of International Justice*, EJIL:TALK! (Oct. 24, 2016).

²⁴ See Sarah M. H. Nouwen, *Legal Equality on Trial: Sovereigns and Individuals before the International Criminal Court*, 43 NETH. Y.B. INT’L L. 151 (2012).