

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

HOW POLITICS SHAPES THE CONTRIBUTIONS OF JUSTICE:
LESSONS FROM THE ICTY AND THE ICTR

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The International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) established a number of precedents in international criminal law, as detailed by Darryl Robinson and Gillian MacNeil.¹ They also set the template for the International Criminal Court (ICC) and other tribunals as to how politics can both empower and constrain international prosecution and determine its potential contribution to peace. The lesson of the ICTY is that international criminal law can assist peace processes in an ongoing way if powerful states and international institutions complement it with coercive political strategies to weaken regimes or militias led by criminal spoilers to the point where their cooperation is not needed to negotiate and maintain a peace settlement. The lesson of the ICTR is that the impact of international criminal law on consolidating peace is dependent upon the political agenda of the state on whose territory the crimes occurred and whose cooperation is needed for effective prosecution. Therefore, the contribution of prosecution to peace depends on whether the law is embedded in national and international political commitments that go beyond compliance with formal legal obligations and over which a tribunal has limited influence.

The Lesson of the ICTY: International Criminal Justice is a Chapter VII Instrument

International prosecution has often been portrayed as a new instrument in the peace-maker's toolbox for addressing ongoing conflicts—an alternative to negotiations, which legitimize war criminals, and regime-changing interventions, which are often unfeasible or likely to exacerbate humanitarian problems.² The experience of international criminal tribunals over the past two decades belies that notion. It demonstrates that prosecution is not an alternative to diplomacy, coercion, or force, but rather, an instrument whose impact depends on which mix of political strategies is chosen. It is incompatible with Chapter VI pacific settlement methods, such as impartial mediation and neutral and consent-based peacekeeping, since they normally depend on the very leaders a tribunal is tasked to investigate. It requires instead a Chapter VII enforcement-

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¹ Darryl Robinson & Gillian MacNeil, *The Tribunals and the Renaissance of International Criminal Law: Three Themes*, 110 AJIL 191 (2016).

² See, e.g., Luis Moreno-Ocampo, *The International Criminal Court: Seeking Global Justice*, 40 CASE WESTERN RESERVE J. INT'L L. 215, 221 (2008); KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* 232 (2011); REBECCA HAMILTON, *FIGHTING FOR DARFUR: PUBLIC ACTION AND THE STRUGGLE TO STOP GENOCIDE* 158 (2011).

oriented approach in which coercive military, economic, and political tools are deployed to defeat or weaken those subjected to criminal scrutiny to the point where their cooperation is no longer needed for conflict management.

The ICTY's experience in Bosnia set the pattern for this relationship between politics and law. The arrest warrants for Bosnian Serb President Radovan Karadžić and General Ratko Mladić did make a contribution to the peace process by sidelining the two most virulent criminal spoilers from attending the negotiations at Dayton and from any formal political role in postwar Bosnia. Those contributions, however, required a fundamental change in NATO's political strategy of conflict resolution after the Srebrenica massacre.

Prior to Srebrenica, the United Nations adopted a consent-based approach to conflict management. Even though the UN-NATO peacekeeping force (UNPROFOR) was authorized under Chapter VII, it did not have a mandate to stop ethnic cleansing. For the most part, its operations were in line with a Chapter VI mission in which UNPROFOR protected humanitarian relief workers while multilateral actors tried impartially to mediate an end to the war.³ These strategies were inconsistent with taking accountability seriously because they required the United Nations and NATO to work with the very leaders and commanders complicit in ethnic cleansing. The first ICTY Prosecutor, Richard Goldstone, would later write that the problem in the early years of the ICTY was the "lack of will on the part of the leading Western states to support and enforce the orders of the tribunal."⁴ A prerequisite to taking that commitment seriously, however, was a political decision to move from pacific to coercive conflict resolution in which the use or threat of force would be used to protect civilians as well as punish and reverse ethnic cleansing.

That political decision was made after Srebrenica, when NATO used military force—directly through Operation Deliberate Force and indirectly by supporting Croatian and Bosnian offensives—to change the imbalance of military power on the ground that was the most important source of impunity for ethnic cleansing. Even then, the Karadžić and Mladić warrants assisted the Dayton peace process because they aligned the ICTY with the U.S.-led mediation effort that sought to exclude the Bosnian Serb leaders from the negotiations since U.S. envoy Richard Holbrooke viewed them as total spoilers who had reneged on every commitment they made to the international community. Holbrooke's alternative was a strategy of coercive diplomacy directed at Serbian President Slobodan Milošević, using the carrot of sanctions relief and the stick of military coercion against his allies in Bosnia to persuade him that it was in his interest to speak for and rein in the Bosnian Serb leadership at the Dayton peace negotiations.⁵ In other words, prosecution was influential because it was operating on parallel tracks with peace-making. That would not have been the case had Goldstone followed the recommendation of some commentators in obtaining warrants for Milošević, and for Croatian President Franjo Tuđman for the ethnic cleansing of Bosnians in Mostar and Serbs in the Krajina.⁶ That is because the U.S.-led NATO strategy relied on Tuđman's forces to put pressure on Milošević and then on Milošević to deliver the Bosnian Serbs. By the time that Goldstone's successor, Louise Arbour, unsealed the arrest warrant for Milošević toward the end of the Kosovo War, Western governments no longer viewed the Serb leader as the key to the peace process, but rather as the primary source of instability in the region. As a result, prosecution was compatible with conflict resolution since NATO's strategy had changed from coercive diplomacy to pure coercion in which airpower was used to put pressure on Milošević to withdraw his

³ See Steven L. Burg, *Coercive Diplomacy in the Balkans: The U.S. Use of Force in Bosnia and Kosovo*, in *THE UNITED STATES AND COERCIVE DIPLOMACY* 57, 59-64 (Robert J. Art & Patrick M. Cronin eds., 2003).

⁴ Richard J. Goldstone, *Bringing War Criminals to Justice in an Ongoing War*, in *HARD CHOICES: MORAL DILEMMAS IN HUMANITARIAN INTERVENTION* 195, 202 (Jonathan Moore ed., 1998).

⁵ GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 227-231 (2000).

⁶ See, e.g., PAUL R. WILLIAMS & MICHAEL P. SCHARF, *PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA* 120-121 (2002).

forces from Kosovo without anticipating the kind of continuing cooperation that had been deemed necessary to negotiate and maintain Dayton.⁷

A similar pattern emerged with the Special Court for Sierra Leone (SCSL), established in 2002 after the end of Sierra Leone's brutal civil war. Some commentators contend that prosecution contributed to the consolidation of peace while attributing the breakdown of the 1999 Lomé Peace Accords to the blanket amnesty provided to all parties, including the rebel Revolutionary United Front (RUF), which returned to violence shortly thereafter and took five hundred UN peacekeepers hostage.⁸ Amnesty, however, was the inevitable consequence of the UN's unwillingness to support the peace process with anything more than neutral peacekeepers after Nigeria, whose forces were protecting the government from the RUF, announced its intention to withdraw. The prospects for prosecution emerged when Britain responded to the hostage crisis by intervening in Freetown and the United Nations altered its neutral approach to conflict resolution to one that sided with the government through targeted sanctions and peace-enforcement.⁹ This contributed to the defeat and disarmament of the RUF, establishing the political preconditions for moving from amnesty to accountability.

This relationship between an enforcement-oriented politics and a criminal justice approach to law can also be seen in the record of the ICC. In the Ituri District in eastern Congo, for example, the Court has been credited with stigmatizing the use of child soldiers, and its involvement coincided with improvements in human security.¹⁰ What made these outcomes possible, however, was the replacement of an ineffectual UN peacekeeping force with a French-led EU mission and a more robust UN deployment, both of which were given the resources and mandate to use force to disarm the militias whose leaders would later be put on trial.¹¹ By contrast, the underlying problem with the ICC's Darfur investigation has been the Security Council's unwillingness or inability to complement criminal justice with meaningful enforcement actions against behavior identified as criminal. Neither the Security Council's Darfur referral nor the Bashir arrest warrants were accompanied by the kind of serious economic sanctions or other coercive threats that would lead Khartoum to reconsider the policy of attacking civilian communities.¹² Nor did they trigger a change in the international community's consent-based approach to conflict management—i.e., full deployment of a UN-African Union peacekeeping mission, humanitarian relief efforts, and impartial attempts to mediate a political solution in Darfur and to implement the Comprehensive Peace Agreement, which ended a twenty-year civil war between the north and the south.¹³ Since each of these strategies required engaging a regime whose leader was charged with genocide, politics and law were pulling in opposite directions.

This is not to argue that the more interventionist strategies used in Bosnia and Kosovo would have worked in Darfur. Rather, it is that taking international criminal justice seriously during ongoing conflicts presumes a commitment to end them either through humanitarian interventions along the lines of the Responsibility to Protect, the kinds of UN peace-enforcement missions envisioned in the Brahimi Report, or independent Western military deployments operating in support of UN peace missions. If such options are viewed by

⁷ See Burg, *supra* note 3, at 94–96.

⁸ See, e.g., LEILA N. SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 70 (2002).

⁹ See TREVOR FINDLAY, THE USE OF FORCE IN UN PEACE OPERATIONS 309 (2002).

¹⁰ See, e.g., HUMAN RIGHTS WATCH, SELLING JUSTICE SHORT 43–50 (2009).

¹¹ See International Crisis Group, Congo: Consolidating the Peace, AFRICA REPORT NO. 128, at 14 (July 5, 2007).

¹² Alex J. Bellamy & Paul D. Williams, The UN Security Council and the Question of Humanitarian Intervention in Darfur, 5 J. MIL. ETHICS 144 (2006).

¹³ See Bruno Stagno Ugarte, Sudan (Darfur), in THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS 337, 353 (Jared Genser ed., 2014).

potential interveners as impractical or counterproductive, that leaves the international community with no option but to negotiate with leaders who should be beyond the pale, but whose continued power makes effective prosecution impossible. In other words, the difference between influence of the ICTY in Bosnia and that of the ICC in Darfur lies in the relative willingness of powerful states and the Security Council not to enforce the law, but rather, to enforce the peace.

The Lesson of the ICTR: The Persistence of Victor's Justice

In the anti-impunity narrative, international criminal justice contributes to postconflict reconciliation by individualizing guilt in criminal leaders rather than allowing victimized communities to collectivize it against entire groups. While there is a growing body of scholarship that questions this narrative—see Marko Milanović's contribution to the symposium—¹⁴any prospect for it being realized requires that trials are perceived as fair by all parties rather than as exercises in which the winners impose a narrow conception of victor's justice on the losers. In theory, international tribunals that are not initiated or conducted by the parties to the conflict should insulate justice from this kind of political bias. In practice, those tribunals' dependence on sovereign cooperation has generally enabled states to circumscribe prosecution in ways that reinforce partisan rather than inclusive political agendas.

This pattern was set by the ICTR when Carla Del Ponte initiated investigations of commanders of the victorious Rwandan Patriotic Front (RPF) for three massacres that took place during the civil war that ended the Rwandan genocide in order to prevent the tribunal from becoming an instrument of victor's justice. Rwanda's President Paul Kagame put pressure on Del Ponte to withdraw her plans by denying exit visas to witnesses traveling to the ICTR in Arusha, Tanzania, thereby triggering the suspension of several trials. When Del Ponte publicized Kagame's obstruction and asked the Security Council to enforce a mandate that it had itself authorized, the Council responded six months later with a statement calling for a "constructive dialogue" between the tribunal and the government over what should have been a binding legal obligation. Shortly thereafter, the United States tried to broker a deal between Del Ponte and Rwanda in which the RPF trials would be delegated to the Rwandan courts. After she refused, the Security Council stripped her of the Rwandan portfolio by creating separate chief prosecutors for the ICTY and the ICTR.¹⁵

Some features of this episode were unique to the ICTR—e.g., Rwanda's ability to deflect pressure for accountability by shaming Western governments for their inaction during the genocide and the Security Council's authority to remove a chief prosecutor. There are, nonetheless, two features of the Rwandan case that are shared with those African states where the ICC is conducting investigations.

First, as with Rwanda, these states control entry into and exit from their territory. This means that investigations of official wrongdoing can jeopardize the voluntary sovereign cooperation on which the court depends for its effectiveness. Some commentators have argued that this has allowed weak-rule-of-law states to use the ICC to criminalize their enemies while deflecting international pressure from their own human rights abuses.¹⁶ This dynamic has been most evident in states that referred situations on their own territory. In Uganda and the Democratic Republic of the Congo, for example, all of the arrest warrants have been issued

¹⁴ Marko Milanović, *The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem*, 110 AJIL 233, 235 (2016).

¹⁵ VICTOR PESKIN, *INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS VIRTUAL TRIALS AND THE STRUGGLE FOR STATE CO-OPERATION* ch. 9 (2008). See also, 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).

¹⁶ See, e.g., Sarah M. H. Nouwen & Wouter G. Werner, *Doing justice to the political: The international criminal court in Uganda and Sudan*, 21 EUR. J. INT'L L. 941, 946-954 (2010).

for rebel leaders despite well-documented allegations of war crimes by each country's security forces.¹⁷ In Côte d'Ivoire, which granted *ad hoc* jurisdiction to the ICC in April 2003 when it was a nonparty to the Rome Statute, the ICC issued arrest warrants for former President Laurent Gbagbo, his wife Simone, and one of his ministers, for orchestrating attacks on civilians rather than accepting defeat to Alassane Ouattara in the November 2010 presidential runoff. There have not yet been any ICC charges against pro-Ouattara commanders, even for the massacre of eight hundred people in Duékoué, which was the worst single atrocity of the postelection violence.¹⁸

Second, Rwanda is a Western client whose development policies comport with donor preferences and with whom the United States ended an arms embargo in 2003 in anticipation of counterterrorism cooperation in central and eastern Africa.¹⁹ Those shared interests—in addition to guilt over the genocide—explain why Western donors did not link aid to Rwanda's cooperation with Del Ponte's RPF investigations. Western governments also have patron-client relationships with those African states that have been cooperating with ICC investigations on their territory. If those investigations target influential state agents in ways that put sovereign cooperation at risk, the United States and European Union are unlikely to act as surrogate enforcers, linking aid to compliance, because of the potential costs to traditional national interests—in contrast to their willingness to link reconstruction aid and a path to EU membership to the willingness of Serbia and Croatia to surrender politically influential suspects to the ICTY, which was valued as a means of marginalizing the ethnic extremists who had destabilized the region.²⁰ This was evident in Kenya, the only case where the ICC has issued charges against influential state actors in a Western client state—and one that is also a major partner in counter-terrorism efforts in Somalia. Despite Kenyan efforts to withhold evidence and interfere with witnesses to obstruct the trials of President Uhuru Kenyatta and Deputy President William Ruto, Western governments never exercised donor pressure, and at the Assembly of States Parties, accepted revisions of the Rules of Evidence and Procedure that effectively exempted Kenyatta and Ruto from having to attend their own trials.²¹

In sum, the ability of international tribunals to hold those in power accountable is limited by their dependence on powerful national or international actors for effective prosecution. Even so, there are circumstances where politically constrained prosecutions can advance peace, democracy and human rights. Nuremberg was an exercise in victor's justice, but one that differentiated Germany's former political system—which was to be purged through prosecuting its leaders—from the German people, who were subjected to a relatively liberal occupation designed to restore it as a rights-respecting democracy that would be reintegrated into the international system. By contrast, the politics in which the African cases of victor's justice have been embedded—e.g., Kagame's use of the antigenocide narrative to consolidate authoritarianism or Ugandan President Yoweri Museveni's marginalization of those northern groups opposed to his rule—more closely resemble the collective punishment of Versailles and may be planting the seeds of future violence. The lesson that should be drawn from these experiences is that the potential contribution of international criminal tribunals to consoli-

¹⁷ See Phil Clark, *Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda*, in *COURTING CONFLICT* 37 (Nicholas Waddell & Phil Clark eds., 2008).

¹⁸ HUMAN RIGHTS WATCH, *MAKING JUSTICE COUNT: LESSONS FROM THE ICC'S WORK IN CÔTE D'IVOIRE* 41-44 (2015).

¹⁹ See THIERRY CRUVELLIER, *COURT OF REMORSE: INSIDE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* 162 (2006).

²⁰ On surrogate enforcement, see PESKIN, *supra* note 15; For suggestions as to why its replication to Uganda and the DRC are unlikely, see Clark, *supra* note 17, at 40, and ADAM BRANCH, *DISPLACING HUMAN RIGHTS: WAR AND INTERVENTION IN NORTHERN UGANDA* 187 (2011).

²¹ Stephen Brown & Rosalind Raddatz, *Dire consequences or empty threats? Western pressure for peace, justice and democracy in Kenya*, 8 J. EASTERN AFR. STUD. 43 (2014).

dating peace is less a function of the law than it is of the character of the political commitments that underlie its enforcement.

Conclusion

The ICTY and the ICTR have been characterized as way stations between the victor's justice of Nuremberg and Tokyo and the independent justice of the ICC. This shift from Security Council to community justice—to borrow from Robinson and MacNeil's typology—has empowered prosecutors to initiate investigations without official political direction. Nonetheless, the same political factors that influenced the effectiveness and legitimacy of the *ad hoc* tribunals have been evident with the ICC—i.e., the dependence of prosecution on coercive conflict resolution during an ongoing war and on the political agendas of those states whose cooperation is necessary for its effectiveness. While international prosecutors should be mindful of these relationships to minimize potential harm, their decisions are less important than the politics in which the law is embedded in determining the contribution of prosecution to peace.