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Address to the Cornell International Law Journal Symposium: Milošević & Hussein on Trial

Ruth Wedgwood†

How should one try deposed tyrants such as Saddam Hussein and Slobodan Milošević, and in which courts? In answering the question, I am going to be evasively eclectic. There is plenty of work to go around in dealing with the aftermath of tyrannical regimes. Prosecution of a deposed dictator who has committed crimes against humanity will not always be possible. And a wise choice of forum will depend less on abstract doctrine and more on situational judgments. There is a lesson in the recent prudence of Luis Moreno-Ocampo, the prosecutor of the International Criminal Court (ICC). The United States has been wary of the ICC's unbounded jurisdiction (and I have shared that caution). Moreno-Ocampo decided prudently that he would use the ICC's assets to focus on civil war conflicts in Africa where civilians have been deliberately attacked. Cases were referred to the court with the consent of the governments of the Congo, the Central African Republic and Uganda. Despite the rhetoric of the Rome conference in 1998, Moreno-Ocampo understood that the ICC should not seek to become supreme commander of NATO in its joint operations, or to displace ongoing conversations about problems in modern targeting doctrine or fighting international terrorism. In international institutions, as in much of life, there is no substitute for adult judgment. You need people involved who have a deep sense of political prudence as well as moral commitment. The Yugoslav Tribunal would not have worked so well as it did, had Richard Goldstone, Louise Arbour, or Carla del Ponte taken decisions in complete ignorance and disregard of the situation on the ground. The complicated vocation of international lawyers is not taken sufficiently seriously.

But if we are talking about Saddam Hussein, let me focus on some reasons why we should not be too derisive of the Iraqi tribunal that has been created for his trial. When a tribunal was established within Iraq to try Saddam for his crimes, one NGO based in New York confidently pronounced that local Iraqis just weren't up to the task. Iraqi tyranny had endured so long, said these critics, that Iraqi lawyers would have no memory of how to try a fair case, or how to manage complex evidence. That is

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a dangerous and doctrinaire attitude, in my judgment. One of the enduring criticisms of the ad hoc international tribunals established by the United Nations Security Council for war crimes in the former Yugoslavia and in Rwanda is that the process of trial was entirely removed from the local scene. Bosnians and Serbians, Hutus and Tutsis, could not easily travel to a foreign capital to watch the trial process. The tribunal was not a decision of the local population, trying to establish a democracy after conflict. But there are also reasons favoring local tribunals that turn upon the nature of trials and factfinding.

The first is language and differences in legal categories. I became acutely aware of this when I was teaching at the Hague Academy for International Law in the Netherlands. I lived in the house of a translator serving at the Yugoslav tribunal. This dedicated international civil servant had more than a few war stories that show the delicacy of finding facts, when one stands outside the society, and the acute difficulties of translating into a foreign language. This is at times key to matters of culpability, for criminal law often times turns on issues of knowledge and intention. Not just the facts on the ground, and a person's mental state, will be seen through a glass darkly. Prosecutors and defense counsel reared in the common law system are challenged even to understand, in a ground level way, some of the abstract categories that describe intention in the civil law system, such as *dolis eventualis*. What does it mean to have appropriate notice of likely misconduct by your subordinates? These are issues one thinks about for tort and negligence, but they often are going to be the primary theory on which you attribute *criminal* responsibility to leadership, under the idea of "command responsibility." It may depend exquisitely on language and how it was used. What should a commander have known? What should he have done in response? What was a reasonable investment of his time as a commander? In the midst of a battle situation, should he have acted as a full-time gainsayer, saying "tell me what you are doing every minute of every day" or could he set a budget line, allocating how he would invest his time in managing battle strategy and in auditing the conduct of his troops?

Consider the example of witness interviews. You are conducting a trial in English and French. But the witnesses all speak a local language. When the Yugoslav tribunal has sent investigators into the region, it gathers the witness statements in English. The investigator goes to a little village and interviews a person who speaks Serbo-Croatian—or as people insisted during the war, Bosnian, Croatian, or Serbian. The account is translated on the spot into English, and because of a shortage of certified courtroom translators, the witness account is not rendered as a certified translation. The original vernacular account is not preserved in writing. The statement is brought back to The Hague. It may be entered in the record as a statement directly. If the witness appears, it will be translated back into Bosnian, Croatian, or Serbian, and the witness will be asked questions about it. It would not be utterly surprising if a witness replied, "that's not what I said." I can attest from my experience on the United Nations Human Rights Committee that any act of translation will inevita-

bly lose a degree of texture and you are at the mercy of your translator. Colloquial expressions are missed, and subtleties of verb form and mood may be as well. This is a lesson to all of you: do not neglect foreign language study if you want to be rich international arbitrators doing work for ICSID! Go learn a foreign language because one always prefers an arbitrator who can read the contractual documents in the original. But in criminal cases, the matter is crucial and immediate. One doesn't want to have trial by interpreter, just as in the 1960's and 70's there was some disillusionment about the role of psychiatrists who served as expert witnesses on issues of moral responsibility. After a period, we grew more skeptical of the phenomenon of trial by psychiatrist.

What does it mean to have moral responsibility? Good factfinding turns on a very deep confrontation with the language of witness testimony. The problem of language also affects the impact of a trial on the people it is meant to serve. Watching a trial conducted in French and English, even with a translation into Serbian, Bosnian, or Croatian, is not an immediate experience. The monotone voiceover of a translator is not the same as the intonation of a witness on the stand or a lawyer in summation. A local listener will not have the vivacity of voice inflection to help in understanding what really was said. The local listener may not feel that the trial reflects the local culture and normative system, if it is filtrated through the sensibility of a different language.

Consider, as well, the central duty to provide exculpatory evidence to the defense. In a trial conducted in an international language, with a prosecutor who does not speak the local tongue, how can a prosecutor discharge his duty to turn over all material that is helpful to the defense? If the defense lawyer also does not speak the local tongue, how will he evaluate material even if he is given free access?

Under the theory of command responsibility, guilt can be established by negligence. One is attributing culpability to the top leadership on a theory that they should have known about misconduct, had a duty to stop it, and did not make an appropriate effort to do so. You do not have to prove that an actual command, or actual order, was issued, rather just a criminally negligent failure to supervise. But that turns on states of mind and states of intention. Language is key there.

The second reason that local trials may be worthy is institutional capacity building and recognition of who took the risks. Anybody who is plucky enough to be in Iraq during and after the war has had a long period of uncertainty on how things would turn out. The occupation did not go quite as planned, and the insurgency gathered strength. On the day of the purple finger, Iraqis voted for their own government, and everybody felt an enormous exultation, locally, nationally, and internationally. This was an extraordinary kind of bravery. This kind of popular bravery—call it a carnation revolution, orange revolution, or purple revolution—is an immediate demonstration of what has occurred. This summoning up of courage demands some respect for local capacity. To sustain a decent government Iraq will require local people who are willing to fight for their country, and

who think that they are themselves capable of confronting evil and confronting a past regime, taking risks, and not leaving it to intermediaries to do the work for them. Impugning Iraq's right to try its tyrant, and its legitimate authority to put on a trial, amounts to saying to the Iraqi people—you are not fit, you are not educable, you cannot learn to do this, even with the assistance of experts familiar with international case law. You cannot possibly rise to the occasion. That statement would have a very dismaying effect on people who have been under tyranny for too long. One has to worry about a perception of international condescension.

And who would be the alternative authority for a trial? The United Nations is not seen as pristine, in parts of Iraq, not simply because of Security Council sanctions, which were very hard on the civilian population, or the United Nations' failure of integrity in its administration of the Oil for Food program. Some people also may remember the U.N.'s failure to act against Saddam when the moment finally came. The Iraqis take seriously that they were left on their own. Surely the post war occupation might have been simpler if there had been added forces available from other countries. With the discipline problems of U.N. peacekeepers in some countries, we can no longer assume that a "Little Blue Beret" garners instant support. One should not assume that there is going to be any attribution of great moral supremacy to the U.N.'s conduct of trials. The moral authority to conduct trials may have some connection to who was willing to shed blood to overturn Saddam's tyranny.

Countries coming out of a colonial past, and countries that recall the Sykes-Picot agreement, may conclude that having a trial apparatus designed and structured by the Western Europeans or the Permanent Five (P-5) members of the Security Council does not have the universality that one would wish to have in place. It is true that there is an attempt to be diverse, in staffing international courts but, in fact, the motive force behind the courts is the P-5, because the international courts need diplomatic muscle, economic muscle, and military muscle, and that comes from powerful countries in a U.N. system. Some of the major countries, like India and China, typically do not play. You can call it United Nations, you can call it universal, but to somebody who has recently emerged from colonialism, it may look just like his former masters.

And then there is the worry of cost, and we are all puzzling how to fix this for trials that have to, or should go international. Again, we are used to a very different style of due process than we had in 1945. Nuremberg really was a historical examination, more than a common law trial, with documentary evidence coming in by the ream, judicial notice of facts, and quite a strict limitation on what defenses could be brought. The trial was meant to be as good as one could put on in the circumstances of having to get it done quickly, so that the democratization of Germany could proceed. In our own domestic legal systems, we now have a very different sense of what a trial is. It should be painstaking, fact by fact—how do you know? what was the lighting? The overall impact of a trial can be lost in this kind of desultory, slow-boat pace of events, in which it is hard to even discern a

narrative, and which gives, frankly, the defendant lots of time to outlive any particular political cycle. We have not yet fully solved how you reconcile due process with the desire for an intelligible trial, in the midst of a conflict, or in the unsteady aftermath of a tyrant's fall.

Indeed, one of the most exquisite problems for the international community is letting the defendant defend himself. Should Joseph Goebbels have been allowed to speak in his own voice, about his views of the inferiority of the Jews? If Adolf Hitler had lived, surely he would have tried to use the Nuremberg trials as another platform for the oratory at which he was so brilliant, in summoning people to the worst of their natures? And yet some would argue that it is preferable, or even required, to allow a person to defend himself in his own voice, without a lawyer if he chooses. In a trial conducted by the United Nations, it is doubtful that one would be able to alter the rules set by the Yugoslav tribunal, and a defense and cross examination at trial might turn into a political rallying cry.

In considering the place of local trials, also recall the Rome Statute. The ICC, certainly, is bound to honor its promise of complementarity—to generally defer to the right of nation states to try the crimes of their own nationals. That is the treaty's standard. Complementarity may extend as a duty, and certainly as a prudential judgment, to include not only national courts, but also mixed tribunals and regional tribunals established with a country's consent. If one believes that the ICC was meant to be a template, among countries that subscribe to the Rome treaty, on how international justice should be applied, then the ICC's promise of complementarity also must be observed. It is inconsistent with subsidiarity to dismiss and scoff at the capacity of local lawyers and local citizens to put on a fair trial.

And then there is the law. You are likely to draw a blank stare, if you accost a lay person on the streets of Paris and New York, as much as Baghdad and Basra, and demand an explanation of the difference between crimes against humanity, genocide, and war crimes, or the difference between *jus in bello*, and *jus ad bellum*. Local people want to know what happened to their friends and families, in a legal language that is intelligible and familiar. In this, the relative simplicity of a local criminal court may have great virtue. A local family understands what it means to murder a son or daughter, and will understand the prohibition of murder in the Shari'a. But I do not know how to translate the idea of crimes against humanity or genocide. There is a greater impact, perhaps, if you use the language that is most familiar to your audience and tell them what happened in that way.

At the current moment, quite apart from the ICC's contractual commitment to complementarity, we are faced with the problem of simply too little capacity at the international level for all trials of brutal leaders. I think, once upon a time, we all thought the Yugoslav trials would go very quickly, and a lot of good people, such as Tom Warrick of the Coalition for International Justice and Ambassador David Scheffer worked very hard to get extra trial chambers and funds for the Yugoslav tribunal, with coordinated court sittings in the mornings and afternoons. But at the moment,

after the decision to shut it down in 2008, the Yugoslav tribunal has been forced to turn back some crimes and defendants to the states in the region. It is not really clear how you streamline a trial. The Rwandans proposed the so-called Gacaca process, which does not bear much resemblance to a conventional trial. There are concerns about it for fear that it might be a low-level, below-visibility, occasion for revenge.

But still, facing 100,000 defendants in Rwanda, nobody has ever proposed that international prosecutor Richard Goldstone should have asked to have the 100,000 defendants turned over to him, which in theory he could have, since the Rwanda tribunal had “primacy” over those cases. So at the moment, really, if anything, we are at the limit of international courts’ capacity. The ICC decision to take on the situations in the Congo, the Central African Republic, and Uganda, may be close to the limit of what the ICC can handle. You cannot take on five or six or seven situations and then pretend you are going to do justice by all of them.

On the primacy of the nation state, so to say, this is a point that is really not disputed by many international lawyers. Frits Kalshoven has spoken of the role of the nation state in international law as not simply an enforcement mechanism, but as a potential source of normative authority. International law is in large part made by the decisions that countries take. If you think that facts-on-the-ground, not simply protestations or agreements, are what make customary law, then the customary law of international crimes is made when countries are willing to step up to the plate to secure the turnover of defendants, and that depends indeed on military and diplomatic power.

Another concern is sentencing, and I do not know the answer to this. On the U.N. Human Rights Committee, where I sit as the American expert, most members are critical of the death penalty. And certainly, I am a “death is different” person—one expects that any trial with such somber and irrevocable consequences must be conducted with great care. But in the U.N. community, there is no possibility of using the death penalty for any crimes. You simply cannot get any consensus on its applicability. There is no claim that the death penalty violates customary law. The European Convention for the Protection of Human Rights does not, as such, forbid the death penalty, although Protocols 6 and 13 invite countries to abolish it, and new entrants to the European Union are required to do so. The International Covenant on Civil and Political Rights does not forbid the death penalty, although Optional Protocol 2 invites countries to abolish it. But there are perfectly respectable countries in the world, such as Japan and the United States, that maintain some use of the death penalty. There is a death penalty in Iraq. But if you turned to a U.N. tribunal, you couldn’t get consensus on such a penalty, and likely as not, even a sentencing option of “life without parole.”

This can have serious repercussions. In Iraq, Saddam has proven himself to be a master of violent reprisal, often able to fake back and have his adversaries expose themselves, then cut them off at the knees. He is a brilliant, or was, a brilliant politician. There are a great many people in Iraq

who would never believe that Saddam and the Ba'athists are gone until Saddam was executed. Certainly unless he was remitted to a sentence of lifetime without parole. But what would it do to the stability of any new power-sharing regime in Iraq if that were an unacceptable sentence in an international tribunal? If Saddam was coming back sooner or later? So one cannot necessarily achieve the political arrangement one wants—the sense of liberation from reprisal—without perhaps indulging sentences, like life without parole, that are harsher than many in the international community would like to have.

Then there is the problem, if you will, of equal protection. In any theory of justice, it makes no sense to exempt from punishment a tyrant who has ordered a massacre and yet punish the local actors who are tried for similar crimes. The same might be said for the proportionality of sentences. That disparity is a problem never solved, or even openly addressed, by the International Criminal Tribunal for Rwanda. It is part of what led to the tribunal's friction with Kigali. It seems inappropriate that the leaders and instigators of the genocide faced at worst the penalty of life imprisonment in an international forum, but many lower level defendants were subject to execution in the national courts.

On neutrality, let me just add a word of caution here. In international politics, you have to be a Machiavellian realist. And to do international law, you have to take account of international politics. The Nuremberg Tribunal was sitting, to be sure, as a mixed military commission of the victors who had opposed Hitler's fascism. But it found, even with its noble provenance, that it was very hard to be all encompassing, in regard to other crimes. Professor Bernard Meltzer, who teaches at the law school of the University of Chicago, was a young man at the time of Nuremberg, working in the prosecutor's office. He has noted the close call to the credibility of the Nuremberg tribunal, when the Soviets attempted to rewrite history and avoid their own responsibility for the infamous massacre of Katyn Forest, which ended the lives of thousands of Polish officers and intellectuals. The Soviet prosecutor at the Nuremberg tribunal worked up a dossier of proof that purported to show the Germans had done it. The German army may well have been in that area at some time. One could have supposed that the Germans might have copied the methods used by the Soviets elsewhere to dispatch undesirable persons. Only at the last moment and without explanation, the charges were quietly withdrawn. One should not assume that it is always easy to guard against attempts to manipulate the facts, simply because you place a neutral international label on a tribunal.

The same caution might obtain for the Rwanda tribunal. The jurisdiction of the court was limited to the year 1994, and events on the territory of Rwanda. As limited by the Security Council, it could not look at other countries and actors involved with the Hutu *Interahamwe* in the years leading up to the genocide. Even within its limited competence, the Rwanda tribunal depended on Tutsi authorities in Kigali for cooperation. When it began to investigate serious charges of Tutsi crimes in the northeast of the country, Rwanda leader Paul Kagame threatened to cease all cooperation

with the tribunal and campaigned against prosecutor Carla del Ponte within U.N. circles. It has been reported that several ready indictments were quashed. In the case of Jean-Bosco Barayagwiza, a defendant accused of organizing Radio Milles Collines, there was a serious problem of speedy trial deadlines. When the international tribunal dismissed the case on those grounds, Kigali threatened to withdraw all cooperation, and the court acquiesced in a motion to restore the indictment.¹ So one shouldn't assume that international tribunals are in any way exempt from the hard lessons of *machtpolitik*. One is obliged to look behind the curtain, whether in the land of Oz or in international space.

And finally, on the trial of heads of state, it is also a complicated area. In 1919-1920, when the Allies wanted to try the Kaiser for a war of aggression and war crimes on the battlefield and at sea, he fled to Holland. At that time, the Dutch were entertaining a very different role internationally than they claim nowadays, and refused to turn him over. The American delegation, curiously enough, objected at that time to the kinds of charges proposed against the Kaiser, arguing that "crimes against the principles of humanity" were too vague and undefined, and that one could not neglect the absolute immunity of a sitting head of state.² In Japan, of course, Emperor Hirohito was not tried, in exchange for his cooperation with General Douglas MacArthur in the occupation and reconstruction. Adolf Hitler killed himself. And that was the full history of trying heads of state for international crimes, until Milošević. No one has, even now, systematically addressed the question of head-of-state immunity, and which institutions, if any, might puncture that immunity.

As you know, immunity comes in two forms: qualified immunity, for official acts, and absolute immunity for one's person. If a ruler leaves office, he is reduced to immunity for official acts. But a sitting head of state or perhaps a sitting foreign minister who needs to travel and negotiate, traditionally has had absolute immunity from arrest. This might come in handy if he is to take part in peace negotiations. In the case of *Congo v. Belgium*,³ the International Court of Justice cautioned against disregarding this prerogative of sovereignty. Many people were surprised to discover that the ICJ thought that general international law still required respect for the absolute immunity of a foreign minister, even though he may have uttered words that incited other to interracial hatred or violence.

In regard to Milošević, Louise Arbour as prosecutor of the Yugoslav tribunal obtained an indictment against him while he was in office, but did not arrest him until he was in fact displaced from office. So that case gives little support to the idea of going out and arresting a sitting head of

1. Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, Decision on the Prosecutor's Request for Review or Reconsideration (Mar. 31, 2000) (Appeals Chamber), reprinted in 39 I.L.M. 1181 (2000).

2. Robert Lansing & James Brown Scott, *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities*, 14 AM. J. INT'L L. 127 (1920).

3. Case Concerning the Arrest Warrant of 11 April 2000 (D.R.C. v. Belg.), 2002 I.C.J. 121 (Feb. 14).

state. In the Sierra Leone Tribunal, David Crane, the American prosecutor, pursued the indictment of Liberian president Charles Taylor while he was in office. Especially for a tribunal established without a Chapter 7 mandate from the Security Council, this was new legal ground. But one should not make light of the problem of conducting peace negotiations in the face of threats of arrest. If you really want to bring people to the peace table, they will not come if they think you are going to serve them with a warrant. The Yugoslav tribunal has been surprisingly tolerant of stratagems of arrest that may make suspects wary of even meeting international officials. Take the case of Slavko Dokmanovic, a former mayor of Vukovar, who requested a meeting with the head of the U.N. transitional administration, Jacques-Paul Klein, in order to discuss compensation for his property in Eastern Slavonia. He was promised by a U.N. administrator that "he would not have any problems" entering the region. But when he arrived across the Sava River, U.N. personnel carried out the arrest.⁴ To be sure, he was accused of horrible crimes, in the killing of hospital patients in Vukovar. But one can carry out that ruse only a few times. So if there is to be a safe zone, an international space, in which to conduct negotiations with people we don't like, such as Slobodan Milošević, one should be cautious about turning the attribute of immunity into an over-flexible category. In this regard, it is important to note the key role of the nation state abused by the tyrant. For the decision to remove a tyrant from office, and to strip him of *ex officio* immunity for the purpose of national trial, lies within the competence of local authorities and is a matter of the sovereign decision of that state. In that regard, national prosecution again may offer a safer course, compared to international prosecution.

I will safely take up an eclectic position, somewhere between the poles of this debate. But one should engage in international politics and international criminal law with a careful realism. With eyes wide open, simply muttering the I-word does not immunize institutions from all the debilities of politics, corruption, inefficiency, and a romantic kind of *naiveté* that can fracture one's best wishes.

4. Prosecutor v. Mrksic, Radic, Sljivancanin, Dokmanovic, Case No. IT-95-13a-PT Decision on the Motion for Release by the Accused Slavko Dokmanovic, ¶ 80 (Oct. 22, 1997), reprinted in 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS 127 (A. Klip & G. Sluiter eds., Intersentia Publishing) (2001).

