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Response

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Response

Paul Schadewald

Dr. James von Geldern is a public scholar, lawyer, teacher, and professor who raises questions with profound moral implications for international policy, activism, and human rights work. Von Geldern's argument that the Institutional Criminal Court (ICC) may be fatally flawed is disturbing for people who work for human rights, but it is also a critical line of inquiry. His argument is troubling because it does not engage us solely in an intellectual conundrum. The topics raised by his essay, such as whether universal global justice is ultimately possible, engages us in multiple ways. We enter the conversation as scholars, human rights workers and activists, and as human beings, who live with the recent images of Darfur and with memories and stories of other genocides.

My response is divided into three parts. First, I consider some of the strengths and challenges of James von Geldern's analysis of the ICC and of international criminal justice in general. Second, I suggest implications of this essay for Non-Governmental Organizations (NGOs), engaged scholars, and others involved in human rights work. In particular, I want to bring Von Geldern's insights into conversation with Martha Minnow, a scholar who has probed questions related not only to criminal justice per se, but also other forms of justice, forgiveness, reconciliation, and healing. Minnow does not offer a recipe for human rights work; instead her meditation offers an "anti-recipe," an acknowledgement that any attempt to address the tragedy of genocide, war crimes, and crimes against humanity will always be aspirational and incomplete.¹

I want to suggest that NGOs, activists, and public scholars engage the ICC as one item in a larger toolbox of strategies. The flaws in the ICC remind us that criminal justice is only one form of justice and one form of human rights work. The ferment around the ICC points to an impressive network of scholars and activists committed to human rights, not only in local contexts, but who now, more than ever, are able to connect their local situation to broader concerns. I conclude by turning to the New Tactics Project of the Center for Victims of Torture as one example of this network that has found ways to work from specific situations to engage the broader theme of global justice.

Let us begin with James von Geldern's essay. Von Geldern is an accomplished scholar and lawyer. The theme of International Global Justice is in Von Geldern's "courtroom" and his criticisms of the ICC are wide-ranging, accurate, and largely convincing. He is at his strongest in mounting a specific critique of the ICC. Utilizing a Rawlsian conception of justice, Von Geldern finds the ICC "unfair."²

According to Von Geldern, the ICC's problems are more systemic than merely a single inept or corrupt prosecutor or one especially difficult case, such as how to address the genocide in Darfur. Von Geldern points instead to conflicts of interest and unfair processes within the Court itself. There are three ways that a case can come before the Court: brought by the prosecutor, by the self-referral of a government, or by the United Nations Security Council. Each is problematic. As Von Geldern argues, in a world marked by numerous human rights violations and historical social conflicts, the selection of cases by the prosecutor may appear capricious, even when checked by a review panel. The prosecutor's lack of a police force makes the prosecutor dependent upon the often-conflicting agendas of states and the United Nations in the gathering of evidence and the apprehension of human rights abusers.

If the ICC prosecution begins instead with self-referral by a state, then in practice the government can use the investigation and proceedings to settle scores against political opponents or groups, while the state and its allies may avoid charges by selectively cooperating with an investigation. In the case of Uganda, for instance, Von Geldern (and other scholars such as Adam Branch) has pointed out that the ICC's criminal prosecution has entered into a complicated arrangement in which many parties are responsible for atrocities. Government officials as well as perpetrators, such as Joseph Kony of the Lord's Resistance Army, have all committed acts that may rise to the level of war crimes, genocide, or crimes against humanity. Yet, thus far, it seems likely that only one side may face the brunt of the investigation.³

Finally, as James von Geldern asserts, Security Council referrals are perhaps the most controversial form of criminal prosecution for post-colonial states, and in particular African states, which have been the primary focus of ICC processes. Von Geldern cites such critics as Mahmood Mamdani in analyzing how humanitarian processes may resemble colonial relationships. Powerful nations, particularly in the West,

may initiate proceedings on behalf of people or populations within post-colonial states. Those affected by human rights abuses enter this relationship as victims to be “saved” by the world rather than as political citizens. Countries on the Security Council can hold other countries accountable, while absenting themselves from prosecution. Security Council members can also postpone prosecutions for renewable one-year periods. Most damning, several Security Council members are not current signatories of the Rome Statute of the ICC. These “rogue” states include China, the United States, and Russia. This lack of reciprocity violates Von Geldern’s Rawlsian sense of fairness. Powerful states on the Security Council are not subject to the same rules that they would apply to others.⁴

Particularly compelling are Von Geldern’s points about the United States’ resistance to being held accountable to the same international standards as other states, and we can even extend his argument further. Von Geldern does not mention this in his essay, but in certain instances, the United States has actively sought to undermine international human rights law. Especially under the recent Bush administration, the United States went several steps further in its resistance to being held to the same international standards as other states. The U.S. threatened to withhold military and financial aid from countries until they signed binding agreements with the United States *not* to enforce the rules of the ICC against American citizens. The United States even pledged to liberate American citizens within the process of the ICC. Politicians and diplomats of various political persuasions in the U.S. assert these resolutions under the rubric of U.S. sovereignty and the practical fact that the wide-ranging network of U.S. service members and aid workers around the globe are potentially exposed to human rights prosecution.⁵

I also worry that the U.S. resistance to reciprocity within the ICC is rooted not only in an argument about strategic interest but also in a public culture committed to a particular notion of American exceptionalism. By this I mean a culture that narrates its history in terms of “progress,” sees its own past atrocities at the margins rather than the center of history, and interprets its own mission in the world as not just strategically advantageous but as virtuous. Until this culture is addressed there is very little hope for U.S. reciprocity and fair play in the terms that Von Geldern describes. Engaging the culture and narrative of American exceptionalism is one specific way that NGOs and activists can lay a better foundation for global justice.⁶

In my estimation, Von Geldern's essay correctly criticizes the ICC, but his argument haunts me in its implications for broader human rights and criminal justice work. After all, the topic of his article is not the ICC specifically but rather international criminal justice. Even though the ICC does not measure up to a Rawlsian sense of fairness, other ways of dealing with conflict are not entirely palatable either. Blanket amnesties disregard the suffering of victims and disrespect the norms of humanity that are the basis of human rights movements. If states bypass international mechanisms, such as the ICC, and enforce justice unilaterally, their motives can also become politically tainted and may appear biased to the international community.⁷

Von Geldern's argument is least developed in its defense of international criminal justice and its place in human rights and humanitarianism as a larger project. I wonder whether Von Geldern has given us enough substance in its defense to save and enhance the larger international justice project in general from the failures of the ICC in particular. Where might we go from here? Are we left with only micro-strategies to combat human rights abuses and enforce justice? Do we need to give up global strategies, such as the ICC?

These questions are especially relevant and poignant for activists and human rights workers in NGOs because organizations, such as the World Federalist Movement and Human Rights Watch, worked alongside states to help form the ICC and thus are heavily invested in its success. Common narratives of international criminal justice, particularly those narrated by NGOs and engaged scholars, are progressive in nature. They begin with the Westphalian system of state sovereignty, proceed to initial forays into international agreements in the context of World War I, and next describe the achievements of the Nuremberg Trials and, to a lesser extent, the Tokyo Trials, which held individuals culpable for war crimes. The progressive narratives proceed through the establishment of the Geneva Conventions on Human Rights and ad hoc tribunals called forth by the United Nations to prosecute the crimes of genocide in Rwanda and the former Yugoslavia. The ICC is narrated as a culminating event. First-hand accounts of the formation of the ICC indicate that human rights workers were among the largely unsung "heroes" of this process. Criminal trials rely on the invisible foundation of routine human rights work, such as data gathering and documentation of crimes. It is thus disturbing for NGOs and activists that the result of so much work can still be flawed.⁸

I want to argue, however, that Von Geldern's essay can actually be affirming for human rights work because it makes clear that the ICC cannot replace the "down and dirty stuff" of human rights work—the mundane, difficult, and "close to the ground" labor. Indeed, it makes these efforts even more necessary. It is true that there is something seductive about a criminal trial. A trial can garner much attention and seems to offer victims "closure" and a form of justice. Sometimes it truly can accomplish these aims. Yet James von Geldern's contribution gives us an opportunity to consider that (apart from the individual criminal trials) there are people and movements creating alternative strategies for global justice through small-scale actions like reforming police practices, accompanying human rights activists, and setting up Truth and Reconciliation processes within specific locations. These efforts are not as visible as the ICC, to be sure, but understanding the flaws of the ICC can refocus our attention on this other necessary work.

Moreover, Von Geldern helpfully reminds us of two points: first, international justice, human rights, and humanitarianism are aspirational goals, and second, the ICC's international criminal justice project is useful in offering definitions, in recording crimes, and perhaps in shaming some violators. I wonder if we can further develop these lines of thought by considering the ICC not as the highest achievement of human rights work, but as one particular effort that is aspirational and strategically useful in strengthening the human rights project as a whole.

The first writer that might inform a larger criminal justice project, and in fact a larger human rights project, is Martha Minnow, whose work, *Between Justice and Vengeance*, offers wide-ranging reflections on genocide and other human rights abuses from Rwanda, Yugoslavia, and South Africa, among others. Minnow interprets criminal justice courts and tribunals as remarkable achievements but not as the ultimate answer for human rights work in general or those people in pursuit of justice.⁹

I do not think it wise to claim that domestic and international prosecutions for war crimes and other horrors by themselves create an international moral and legal order, or prevent genocides, or forge the political transformations of previously oppressive regimes. Expansive

claims may be tempting, but exaggerated assertions are bound to yield critical and even hostile responses.¹⁰

For Minnow, criminal tribunals and courts are one strategy (albeit an important one) among many others to guide a response to human rights abuses that avoids the twin pitfalls of vengeance and a simplistic forgiveness that forgets all past crimes and offers nothing to the victims. Minnow reminds us that while ideals of justice may be broad and laws hold up important standards of human conduct, the practice of justice is also situational. Justice may be defined in specific instances as criminal justice, invoking the punishment of perpetrators. But justice can also be defined as restorative in attempting to move forward with healing and the re-establishment of social bonds. For example, Minnow interprets alternative strategies, such as the South African Truth and Reconciliation Commission, not as second-best options when criminal trials are not possible, but as a viable (but still imperfect) option, given the conditions of government stability and a relatively peaceful transition among regimes.¹¹

Perhaps most useful for our deliberation is Minnow's reminder that "justice" does not stand alone as a value. Justice is instead closely connected to other values that societies, states, and NGOs pursue: establishing peace in conflict situations, the reconciliation of social factions, the healing of victims, and the documentation and remembrance of abuses. NGOs and engaged scholars must keep in mind how their work enhances these efforts and not focus solely on the pursuit of individual criminals. Sometimes a criminal trial will enable these processes and sometimes it will hinder them, depending on specific situations and the needs of local stakeholders. The key is how local circumstances connect to broader efforts.¹²

Ideally, the small-scale, site-specific work of NGOs from the ground up must be paired with larger efforts at the state and international levels. Because of the various strategies that are used, the International Criminal Court and international law will never supplant the work of engaged scholars and NGOs in documenting abuses and tracing complex histories in order to understand and engage local circumstances. At the same time, an engagement with states is still essential for NGOs in larger human rights work by contributing to diplomacy, reforming national policies, and articulating ideals for the international community.

Within these larger efforts, we must remind ourselves of the "youth" of the global human rights community. As examples, Amnesty Interna-

tional was founded in 1961, Human Rights Watch in 1978, and Advocates for Human Rights in 1985. The continuing struggles over the ICC and the emergence of such NGOs are perhaps evidence of an emergent global community. Adeno Addis contends that the ICC may have a constitutive role in helping to form an “imagined international community” that interplays universal obligations of humans toward one another with respect for local situations. The laws against genocide, crimes against humanity, and war crimes mark a boundary beyond which humans—as humans—cannot go. According to Addis, the common values that are articulated through these laws are a defense of diversity as well as a recognition of a shared vulnerability against threats.¹³

I am less optimistic than Addis in the efficacy of international law to address specific situations. I am intrigued, however, by his notion that human rights laws may not have a solely negative function—telling us what we do not want and prosecuting specific criminals—but also a constitutive function that helps us decide who we are within an imagined global community. To Addis’ stress on law, I would add for the international human rights community, the primacy of practical work, conversation across geographical boundaries made easier by technology, and the sharing of witness stories across lines of difference. These efforts also may contribute to an emerging “imagined global community” that aspires to balance universal commitments while taking into account specific contexts.¹⁴

In conclusion, I want to turn to the New Tactics Project as an example of the kind of network that balances concerns for locally specific situations with broader conversations. The New Tactics Project is an initiative within the Center for Victims of Torture, a Twin Cities nonprofit organization. The Center for Victims of Torture was founded by a Macalester graduate, Douglas Johnson, in 1985 as a nonprofit to heal people affected by torture and to advocate for policies that would put an end to torture. It celebrated its 25th anniversary in 2010. The New Tactics Project utilizes a web-based tool that allows human rights activists to document locally specific responses to human rights abuses, to map underlying relationships underpinning these abuses, and to share these locally specific responses across cultures and contexts.¹⁵

As one example, the New Tactics Project has documented the work of Peace Brigades International, through which volunteers from throughout the world accompany human rights workers in Mexico, Guatemala, Columbia, and Indonesia. Their goal is not so much to

protect the workers but to bear witness and allow the international community to know that these human rights workers are acknowledged. The volunteers draw attention to their vulnerable situation and put pressure on governments to live up to international standards. The New Tactics Project also documented how, in Argentina, activists research human rights abuses and demonstrate outside the home of people responsible for human rights abuses who are living anonymously in their neighborhoods. The Project describes “Follow the Women for Peace,” which brings together women from thirty countries to ride bicycles through Lebanon, Syria, Jordan, and Palestine to raise the issues of women’s rights, peace, and the situation in refugee camps. Within the web-based discussions of the New Tactics Project, activists from such places as Sierra Leone and Greensboro, North Carolina, share strategies for Truth and Reconciliation processes. The activists in Sierra Leone describe efforts to heal a people affected by war, while in Greensboro, people share questions about how to work with museums and other sites of public memory to document the history of slavery and the legacy of racism.¹⁶

This sharing of tactics among organizations helps the “imagined community” of human rights workers in far away places connect to one another. Most importantly, it builds on the grassroots efforts of human rights work—documenting abuses, testing strategies to counteract human rights abuses, and sharing those strategies with others. This kind of project does not circumvent or prevent criminal justice proceedings. Rather, it contributes to documentation and collaboration with states and criminal justice bodies. Furthermore, it addresses some of the “what next?” questions raised by James von Geldern’s essay.

Notes

1. Martha Minnow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1998). For an accessible essay on the ICC, see Elizabeth Rubin, “If Not Peace, Then Justice,” *The New York Times* (2 April 2006). For another interpretation of the International Criminal Court that has been particularly useful for my analysis, see Zoe B. Whaley, “Timing Justice: Lessons from the Tribunals in Yugoslavia, Rwanda, Sierra Leone, and Cambodia” (2009), found online on the Macalester College Digital Commons under Macalester Honors Projects, Paper 22, at digitalcommons.macalester.edu/poli_honors/22.

2. On John Rawls’ conception of justice and fairness, see John Rawls, *A Theory of Justice* (1999); and John Rawls, *Justice as Fairness* (2001).

3. See Adam Branch, “Uganda’s Civil War and the Politics of ICC Intervention,” *Ethics and International Affairs* 21, no. 2 (Summer 2007): 179–198; and Victor Peskin, “Caution

and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan," *Human Rights Quarterly* 31 (August 2009): 655–691.

4. See Mahmood Mamdani's contribution to "Humanitarian Intervention: A Forum," *The Nation* (8 May 2000); and Mahmood Mamdani, "The New Humanitarian Order," *The Nation* (29 September 2008).

5. The following are chapters in *The United States and the International Criminal Court: National Security and International Law*, edited by Sarah B. Sewall and Carl Kaysen (Lanham, Md., 2000). Sarah B. Sewall, Carl Kaysen, and Michael P. Scharf, "The United States and the International Criminal Court: An Overview," pp. 1–27; Lawrence Wechsler, "Exceptional Cases in Rome: The United States and the Struggle for an ICC," pp. 85–111; David J. Scheffer, "The U.S. Perspective on the ICC," pp. 115–118; Robinson O. Everett, "American Servicemembers and the ICC," pp. 137–151; William L. Nash, "The ICC and the Deployment of U.S. Armed Forces," pp. 153–164; and Samantha Power, "The United States and Genocide Law: A History of Ambivalence," pp. 165–175. See also, Robert C. Johansen, "The Impact of U.S. Policy toward the International Criminal Court on the Prevention of Genocide, War Crimes, and Crimes Against Humanity," *Human Rights Quarterly* 28, no. 2 (May 2006): 301–331. For an interesting debate on the role of the United States within the ICC, see Henry Kissinger, "The Pitfalls of Universal Jurisdiction," *Foreign Affairs* 80, no. 4 (2001): 86–96; and Kenneth Roth, "The Case for Universal Jurisdiction," *Foreign Affairs* 80, no. 5 (2001): 150–154.

6. See especially the discussions of U.S. involvement in the ICC in Sewall and Kaysen 2000. Andrew Sullivan's blog has intriguing discussions of American exceptionalism in a contemporary context, online at andrewsullivan.theatlantic.com.

7. Kenneth A. Rodman, "Compromising Justice: Why the Bush Administration and the NGOs are Both Wrong about the ICC," *Ethics and International Affairs* 20, no. 1 (March 2006): 25–53; and Juan E. Mendez, "National Reconciliation, Transnational Justice and the International Criminal Court," *Ethics and International Affairs* 15, no. 1 (April 2001): 25–44. For a critique of the unidirectional mode of enforcement and an argument that the ICC is capable of being reformed, see Jamie Mayerfeld, "Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights," *Human Rights Quarterly* 25, no. 1 (2003): 93–129.

8. See Vesselin Popovski, "International Criminal Court: A Necessary Step Towards Global Justice," *Security Dialogue* 31, no. 4 (2000): 405–419; Fanny Benedetti and John L. Washburn, "Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterward on the Rome Diplomatic Conference," *Global Governance* 5 (1999): 1–37; Lawrence Wechsler, "Exceptional Cases in Rome: The United States and the Struggle for an ICC," *The United States and the International Criminal Court*, 85–111; Ved P. Nanda, "The Establishment of a Permanent international Criminal Court: Challenges Ahead," *Human Rights Quarterly* 20 (1998): 413–428; and Rodman 2006, pp. 25–53.

9. Minnow 1998, especially pp. 25–51.

10. *Ibid.*, p. 49.

11. *Ibid.*, especially pp. 52–117.

12. *Ibid.*, especially pp. 1–24.

13. Adeno Addis, "Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction," *Human Rights Quarterly* 31 (February 2009): 129–162. On

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“imagined communities” in a national context, see Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London, 2006).

14. Addis 2009, pp. 129–162.

15. On the Center for Victims of Torture, see especially cvt.org (accessed online on 7 October 2010). On the New Tactics Project, see newtactics.org/ (accessed online on 7 October 2010).

16. *Ibid.*

