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The Ad Hoc International Criminal Tribunals and a Jurisprudence of the Deviant

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> [N]ecessarily law, every legal system which is in force anywhere… either claims that it possesses legitimate authority or is held to possess it, or both.[1]
>
> *Joseph Raz*

> Our sense of selfhood can arise through the little ways in which we resist [society's] pull. Our status is backed by the solid building of the world, while our sense of personal identity often resides in the cracks.[2]
>
> *Erving Goffman*

Joseph Raz's positivist philosophy of law, as encapsulated in the above quotation, proposes that a *claim* – rather than a reality – of legitimate authority is central to understanding 'law' and that a *conceptual* connection exists between law, authority and communication. Conceptually, "what cannot *communicate* with people cannot have authority over them".[3] Raz's social-fact claim, the methodology it derives from

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2 *Ethics In The Public Domain: Essays In The Morality Of Law & Politics* 199 (1994).

3 *Asylums: Essays On The Social Situation Of Mental Patients And Other Inmates* 320 (1961).

4 Joseph Raz, *Ethics In The Public Domain* 201 (1994) (emphasis in the original). I refer to this as 'Raz's social-fact claim' to distinguish it from what legal philosophers call 'the social fact thesis'. The latter refers to the idea that law's possibility must be explained in terms of social facts because, even though law is a normative social practice, it is made possible by some set of social facts. *See*, Jules Coleman (ed.), *Hart's Postscript: Essays on the Postscript to the Concept of Law* 396-97 (2001). Generally, I use the term 'social-fact claim' to refer to concrete, 'real-world', characteristics put forward by most positivists as a necessary

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('conceptual analysis') and the jurisprudential implications it entails ('legal positivism') are deeply disputed and have been widely criticized. *Law As Communication: A Concept of International Law* aims to defend and further develop these three elements by looking at 'contrarian performances' (performances that transgress accepted codes of conduct) of participants in legal institutions and by looking at what itself has traditionally been regarded a deviant case of law: international law.

Ronald Dworkin, postivism's most prominent critic, argues that contemporary positivists in general, and Raz in particular, can "offer no … empirical evidence that might support large generalizations about the forms and histories of legal institutions. They make no attempt to connect their philosophy of law either to political philosophy generally or to substantive legal practice, scholarship, or theory."[4]A project such as Raz's is therefore 'neither possible nor interesting'. Moreover, Dworkin (and others) take particular issue with Raz's version of positivism, puzzling over what it means to say that the 'law' claims legitimate authority. Surely, Dworkin asserts, this is nothing more than a troublesome personification of 'law'. For their part, critical studies scholars point both to the 'arm-chair sociology' that characterizes some positivist theories, the disinterest in the empirical that characterizes others and the dubious validity of a conceptual-analytic approach to the study of the social phenomenon that is law.

The dissertation therefore seeks to answer the following questions: Is there empirical evidence that 'law' 'claims' legitimate authority? Indeed, can we even make sense of such a theory? If so, how does law communicate its claim to authority? And how is it that this claim is reflected in the concept of law? Having posed these questions in Part I, the dissertation goes on to show that while 'law' cannot communicate, *institutions* can and courts most certainly do.

Recent developments in international law, including the establishment of judicial institutions such as the *ad hoc* International Criminal Tribunals for Rwanda and

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condition without which law cannot be said to exist. The actual characteristic put forward varies by author, but the implication is always the same: The operative social fact lends itself to description divorced from normative evaluation and is universal in the sense that wherever some normative practice is found that our concept of law would pick out as 'law', the social fact will also be found. These elements of descriptivism and universality are core elements of positivism.

[4] Ronald Dworkin, "Thirty Years On The Practice of Principle", 115 *Harv. L. Rev*. 1655, 1678 (2002) (reviewing Jules Coleman, *The Practice Of Principle: In Defense Of A Pragmatist Approach To Legal Theory* (2001)). This is a micro-cosmos of the debates between natural law and positivism in Anglo-American legal philosophy and particularly of the famous Dworkin-Hart debate. *See, respectively*, Ronald Dworkin, *Law's Empire* (1986) and Hart H. L. A., *The Concept of Law* (2nd ed. 1994).

for the Former Yugoslavia (the ICTR and the ICTY respectively, the ICTs collectively), are pushing the boundaries of the phenomenon of law and therefore of the concept of law and as such they provide an opportunity to examine these very questions. In particular, given international law's deeply disputed status as law, as authoritative and as legitimate, its voice in claiming that authority is necessarily louder and more strident than that of its more settled domestic counterparts. It is precisely that clamor to be heard and acknowledged that provides a glimpse into the kind of communicative action that is usually relegated to the back regions of legal-institutional design. By mapping the forms that such communicative action takes it is possible for both proponents and critics of the proliferation of international bodies to better understand the actual operation of such bodies and thereby either improve on their design or develop more profound critiques.[5]

Based on an ethnographic study of ICTs[6] – both their affirmative attempts at power display and the particular kinds of dissent and transgression they breed – Part II consists of an analysis of international law's claim of legitimate authority from a semiotic and performance-studies perspective. The myriad ways in which international legal institutions socially constructs their authority and claim international law's legitimacy and supremacy are sketched out: from the Western architecture and interior design of the ICTR and its surroundings to the face-to-face interactions in the Milosevic trial at the ICTY, the verbal and nonverbal, textual and contextual, codes of the ICTs are analyzed for their symbolic meaning and their role in the construction of community, selfhood, authority, legitimacy and, of course, law.

A specific emphasis is given within the already-borderline case of international law to deviations, disruptions and transgressions of individual participants such as Milosevic – a defendant who is seeking to subvert the judicial process by putting the West on trial – and Judge Maqutu of the ICTR, who failed to adhere to the codes of judicial conduct. The idea behind the examination of these institutionalized transgressions is that the 'deviant' and 'degenerate' always teaches us about the

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[5] The notion of a *claim*, rather than a *reality*, of legitimate authority, as well as the Interactionist view that reality is socially constructed, invite and facilitate, though they do not necessitate, a critical stance towards the phenomenon described. This and other aspects of the relationship between positivism and critical studies is discussed in the dissertation.

[6] The sociological component of the dissertation is based on five months of field work in Rwanda and at the ICTR and, in respect to the Milosevic trial at the ICTY, on an analysis of approximately 250 hours of videotaped footage of the trial tapes (95 days of testimony) and approximately 400 pages of pre-trial transcript and more than 10,000 pages of trial transcript in the Kosovo phase of the trial.

'normal': Milosevic's theatrical rejection of the authority and legitimacy of the ICTY, for example, illuminates the ways in which international law – through international legal institutions – claims supremacy over state sovereignty. Similarly, the attempts of institutions that shape international law to claim legitimate authority shed light on the practice of law generally.

Thus, while taking as its data such minutia as verbal cues and graphic design, the analysis is ultimately and always concerned with the symbolism and social significance of the various performances on a general, sometimes abstract, level: with the deep structures revealed, with the construction of self *vis-à-vis* the legal regime and with inter-subjectivity mediated through legal concepts (such as 'crimes against humanity', 'genocide' and 'woman').

Indeed, inter-subjectivity is a key element in the answer to the research questions. Inter-subjectivity and the inescapability of reflective endorsement/rejection of others' viewpoints is the thematic thread that unites the three levels of academic inquiry undertaken: the empirical, the social-philosophical and the jurisprudential. Based on an Interactionist account of the 'social conversation' taking place between international courts and their audiences, it is suggested that the *phenomenon of law*, the operation of legal institutions in general, should be regarded as a set of ongoing conversations between officials, representing the Generalized Other – the abstract community – and their various audiences. The *concept of law* is the *internal* conversation between the participant and the internalized legal regime as representation of the Generalized Other. Such that, *law itself* emerges from actual conversations and interactions between various specific and generalized others, and *the concept of law* simultaneously emerges from a more abstract version of the same process. This is a description of the co-emergence of social consciousness and individual consciousness as it applies to law.[7]

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[7] Philip Allott seems to share this intuition when he writes that:

> Society and law exist nowhere else than in the human mind. […] They are products of, and in the consciousness of, actual human beings. But a society generates a social consciousness, a public mind, which is distinct from the private mind, distinct from the consciousness of actual human individuals. Social consciousness flows from and to individual consciousness, forming part of the self-consciousness of each society-member. [] The psychology of the public mind is a manifestation of the psychology of the private mind. The constitution of a society and the personality of a human person are both the product of human consciousness. Social psychology is a form, but a modified form, of personal psychology. But social consciousness functions independently from the private consciousness of every society-member, and is retained in forms (the theories, structures and systems of self-constituting society) which are an 'other' in relation to the 'self' of the self-constituting of any particular society-member.

Consider, for example, Milosevic's attempts to subvert the proceedings at the ICTY in order to use the very same stage in order to counter-try NATO. A trained attorney, he uses his right as a *pro se* defended to 'prosecute' NATO:

> Q. Well, don't you feel that it is precisely these arguments presented by you, as indeed the argumentation of the indictment is, in essence, as is this trial; that is to say that the main goal is to justify the crimes perpetrated by NATO against a *sovereign* country? Yes or no.
>
> Judge May: We have been over this. It is not for the witness to comment on the purpose of the trial. He is merely here to give evidence. You have made these allegations about justification of the NATO bombing as a reason for his evidence. He's given you his answer. He says it's completely untrue. Now, there's no point going over it again.[8]

The same purpose of undermining the Tribunal's authority is achieved through 'role-disruptions' – contrarian performance such as the following:

> Judge May: Mr. Milosevic, it is time for the interpreters to have a break.
>
> The Accused: Okay. I would be glad to have a cup of coffee for your break.
>
> Judge May: We will adjourn for 20 minutes.
>
> The Accused: Half an hour.
>
> Judge May: Twenty minutes.[9]

As the excerpts show, the Tribunal, in the person of Judge May, attempts to construct its authority, and color the nature of the proceedings, by insisting on form, on legal rituals and ceremonies that are established Western codes of legal authority. Milosevic's role disruptions, his refusal to adhere to the same forms, unveil the subtexts

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Philip Allott, "The Concept of International Law", 10 *EJIL* 31 at 33 (1999).

[8] Tr. at 6160 (June 4, 2002). *Prosecutor v. Milosevic*, Case No. IT-99-37-PT (Trial Chamber, Intl. Trib. for the Prosecution of Persons Responsible for Serious Violations of Intl. Humanitarian Law Committed in the Territory of Former Yugo. since 1991, May 7, 1997) (emphasis added) *as quoted and discussed in* M. Steinitz, "'The Milosevic Trial – Live!' – An Iconical Analysis of International Law's Claim of Legitimate Authority", 3 *Oxford J. Int'l Crim. Justice* 103 (2005).

[9] Tr. at 259-60 (October 29, 2001) *as quoted in* M. Steinitz, *ibid.*

of the Tribunal's performances and prod the audiences to reflect on them. All this is in addition to subverting the forum to suggest a different narrative of history through the explicit text of his interventions. The interpersonal dynamics represent not only a struggle over authority in the particular case but also a struggle between a form of sovereignty in-the-making – the 'international community' personified by Judge May – and the nation-state sovereignty personified by Milosevic, a former head-of-state. It is through such everyday performances, through such patterned actions and interactions, that 'international law' emerges as a socially-constructed reality, a reality of everyday life.[10]

As such dramaturgical reading of the Milosevic trial demonstrates, Part II claims that law's authority is produced as much by its explicit rejection as by acceptance, justification or obedience to its dictates.[11] Furthermore, the social reality of law resides as much in the self-*against*-others interactions that it fosters as in self-and-others interactions. Both types of interactions are facilitated by legal institutions and are captured, crystallized, in legal texts. Law is *conceptually* linked to communication and authority as a matter of social *fact* because law is socially constructed, is an emergent of, a process of communication and because the process is that very communicative process is then reflected in the resulting concept as one of its properties. And this particular communication process, as the ethnography shows, is one in which authority is embedded, as criminal courts so dramatically exemplify.

Authority is communicated not only by virtue of the direct and indirect content of adjudicative proceedings though, but also by virtue of the specific *forms* legal communication take since, as all semioticians insist and demonstrate, form *is* content. In fact, it is usually the most powerful content. The audiences of the ICTs learn not only what 'genocide' or 'sovereignty' currently mean under international law, but they also learn that international tribunals are the medium one should turn to in order to learn the meaning of such concepts. ("[P]erhaps the greatest of all pedagogical fallacies" wrote John Dewey, "is the notion that a person learns only what he is studying at the time… the most important thing one learns is always something about how one learns").[12]

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[10] On the construction of social reality in everyday life see the canonical Interactionist text: Peter L. Burger & Thomas Luckmann, *The Social Construction Of Reality: A Treatise In The Sociology Of Knowledge* (1966).

[11] *See also* Richard Sennett, *Authority* (1980).

[12] John Dewey, *Experience And Education* 48 (1963).

One of the ways in which the ICTs, like all courts, construct authority is by claiming not only to speak *to* a community but also *for* a community, to embody the community (in this case the so-called 'international community'). They position themselves as the voice of the Generalized Other thus sub-textually communicating that they are the place to turn to in order to participate in that community and in order to interact with the Generalized Other.[13]

Having provided some empirical backing to Raz's theory of law's claim of legitimate authority, the concluding Part III of the dissertation returns to the abstract level of legal philosophy in an attempt to go beyond that theory. It points out that the support of Raz's social-fact argument about law's claim to legitimate authority in the foregoing chapters was given from what is called in jurisprudential terminology, the 'hermeneutic viewpoint'.[14] The hermeneutic viewpoint is the concept that captures the *reflective* nature of legal philosophy as an endeavor of incorporating the viewpoints of participants in the theory (the viewpoint) of the theorist.

Part III reconceives Part II as a sociological account not only of Raz's social-fact claim but of the hermeneutic viewpoint itself. Seen as the social philosophy of inter-subjectivity underlying the dramaturgical methodology used to study the ICTs, the hermeneutic viewpoint helps explain the nature of the concept of law that emerges from the practice of law. Law is a negotiated reality and its concept is a product of a reflective process – a process in which each participant takes the viewpoint of specific and generalized others – mediated by, *inter alia*, courts.

The last chapter explores the implications of the sociological account of the hermeneutic viewpoint for a defense of legal positivism. Namely, its support of the proposition that law and morality are analytically (*not* sociologically) distinct and

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[13] *Compare*:

> In the process of punishing, penal institutions demonstrate (and give authority to) specific practices of blaming, holding accountable, and fixing responsibility. These institutions tacitly hold out their own practices as models or exemplars, showing how conduct and persons are to be held to account, *by whom*, and on which terms… It is literally the Law, *the authoritative voice of society*, using force and authority publicly to enact its basic terms and relationships and to impress them, like a template, upon the conduct of social life.

David Garland, *Punishment And Modern Society: A Study In Social Theory* 265 (1994) (emphases added).

[14] The "hermeneutic point of view", a term used by MacCormick in describing Hart's theory, is a central piece of Hart's positivist theory of law. It is "the viewpoint of one who without, or in scientific abstraction from, any volitional commitment of his own, seeks to understand, portray, or describe human activity as it is meaningful 'from the internal point of view'". Neil Maccormick, *H.L.A. Hart* 43 (1981).

that for this very reason legal positivism is the natural jurisprudential candidate to support critical study of the law as Raz's social-fact argument, a simultaneously conceptual and empirical claim, so beautifully illustrates.