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Foreword: Law, Justice & Politics: A Reckoning of the International Criminal Court, 43 J. Marshall L. Rev. xxiii (2010)

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FOREWORD

LAW, JUSTICE & POLITICS: A RECKONING OF THE INTERNATIONAL CRIMINAL COURT

SHAHRAM DANA¹

“Dead on arrival” was how the former Senator from North Carolina, Jesse Helms, described the Rome Treaty, which established the International Criminal Court (ICC), at a hearing before the Subcommittee on International Operations of the Committee on Foreign Relations.² He strongly opposed the ICC and was not alone. For example, Senator Rod Gram stated that: “Should this court come into existence, we must have a firm policy of total non-cooperation, no funding, no acceptance of its jurisdiction, no acknowledgement of its rulings, and absolutely no referral of cases by the Security Council.”³ At that time, Helms was the Chair of the Committee on Foreign Relations, and Gram was the Chair of the Subcommittee on International Operations. They believed that without the support of the United States the ICC would not survive.

This stance against the ICC became official U.S. foreign policy when the Republican Party won the White House with the election

1. Associate Professor of Law, The John Marshall Law School. Former Associate Legal Officer of the United Nations International Criminal Tribunal for the Former Yugoslavia. My deepest appreciation goes to all the speakers and panelist for their contribution to the symposium; it is their scholarly efforts that made the symposium a success. I also thank Dean John Corkery and Associate Dean Ralph Ruebner for giving me the opportunity to Chair the symposium and for generously supporting it.

I have not attempted a summary of the contributions herein, nor have I sought to burden the reader with an ambulance of sources and references. Rather, I've sought to give the reader a sense of the themes and learning points that emerged from the presentations, comments, questions, and debates surrounding the topics by highlighting the key reflections of the panelists and making some observations.

2. *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on Int'l Operations, Comm. on Foreign Relations*, 105th Cong. 8 (1998) (statement of Sen. Jesse Helms, Chairman, Comm. on Foreign Relations).

3. *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on Int'l Operations, Comm. on Foreign Relations*, 105th Cong. 8 (1998) (statement of Sen. Rod Gram, Chairman, Subcomm. on Int'l Operations).

of George W. Bush as President. During a Senate recess, President Bush appointed John Bolton as the United States Ambassador to the United Nations.⁴ Bolton's policy toward the ICC and his objective were clear: "We should isolate and ignore the ICC. Specifically, I propose for the United States policy . . . the Three No's: no financial support, directly or indirectly; no collaboration; and no further negotiations with other governments to improve the Statute. This approach is likely to maximize the chances that the ICC will wither and collapse, which should be our objective."⁵ This campaign of aggressive opposition to the ICC has weakened our ability to safeguard our long-term security and bankrupted the integrity of US foreign policy. Moreover, it has been ineffective, fanciful, and sidelined by history.

Within four years, the Rome Treaty was ratified by sixty states and the Statute of the International Criminal Court ("Rome Statute") entered into force in July 2002, faster than the expectations of even the Court's most optimistic supporters.⁶ And the Court continues to gain ground rapidly. As of today, more than 113 countries have ratified the Rome Statute, and 139 countries have signed the ICC Treaty.⁷ What has lost ground, unfortunately, is United States (US) leadership in the area of international justice. Whereas the US was once the inspirer of the international trials against the Nazis following World War II and the engine powering the *ad hoc* tribunals after the genocides in Rwanda and Yugoslavia, the Bush Administration's anti-ICC campaign was contrary to our tradition and belief in basic human rights for all peoples.

But while US leadership failed in its support of the ICC, the American people did not. The outcome of the Rome plenipotentiary is distinctively characterized by the triumph of civil society over reluctant governments.⁸ Even if some governments did not want a

4. Jennifer Senior, *Bolton in a China Shop*, N.Y. MAG. (Jan. 1, 2006) <http://nymag.com/nymetro/news/politics/international/features/15457/>.

5. *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on Int'l Operations, Comm. on Foreign Relations*, 105th Cong. 8 (1998) (statement of John R. Bolton, Undersecretary of State for Arms Control, Dept. of State).

6. Honorable Richard J. Goldstone, *The Future of International Criminal Justice*, 57 ME. L. REV. 553, 563 (2005) (noting that "[m]any thought that getting the requisite number of ratifications would take a decade or more. It took less than four years.").

7. International Criminal Court, ICC at a Glance, <http://www.icc-cpi.int/menus/icc/About%20the%20court/icc%10at%20a%20glance/icc%20at%20a%20glance?lan=en-GB> (last visited Nov. 8, 2010); Coalition for the International Criminal Court, World Signatures and Ratifications of the Rome Statute, <http://www.iccnw.org/?mod=romesignatures> (last visited Nov. 8, 2010).

8. Zoe Pearson, *Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL

permanent international criminal court, peoples of the world did; supporting the Court's work are over 2,500 civil society organizations in more than 150 countries.⁹ This is not to say that the Court has not faced significant challenges to achieving its mandate in the first years of operation. Lack of genuine support from three out of five permanent members of the Security Council—China, Russia, and the United States—has hampered the Court's ability to prosecute perpetrators of genocide, crimes against humanity, and war crimes. Consequently, the Court has not been without its critics.

In light of both the hopes and concerns that surround the Court's mandate and operation, The John Marshall Law School (JMLS) hosted Judge Philippe Kirsch, the first president and a former judge of the ICC, to deliver the 2010 Belle R. and Joseph H. Braun Memorial Lecture, which addressed the challenges and achievements of the ICC. It was a privilege for JMLS to host Judge Kirsch. Few possess his depth of experience, knowledge, and skill relevant to advancing and reflecting on the process of international criminal justice. Given that the first review conference of the ICC was taking place a few short weeks after our symposium, Judge Kirsch was indeed in high demand as a speaker in light of all the events leading up to the gathering of States Parties in Kampala, Uganda. So we are honored that Judge Kirsch chose the JMLS symposium to share his reflections on the past, present, and future of the ICC.

The John Marshall Law Review must also be commended for its decision to devote its 2010 symposium to exploring important issues relating to the work of the ICC and international criminal law generally. This decision allowed us to compliment Judge Kirsch's keynote address with a variety of rich and thoughtful scholarship from leading academics and practitioners across the United States and the world who examined issues of profound importance for international criminal justice. Contributing to the dialogue were also experienced lawyers from national and international organizations committed to protecting victims of atrocity crimes and grave violations of human rights. Representing the Office of the Prosecutor of the ICC was one of its most senior legal advisors, Dr. Rod Rastan. Closer to home, Ms. Jeanne Smoot represented the Tahirih Justice Center, a US-based human rights organization focusing on the protection of women

INT'L L.J. 243 (2006); John Washburn, *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, 11 PACE INT'L L. REV. 361 (1999); M. Cherif Bassiouni, *Observations Concerning the 1997-98 Preparatory Committee's Work*, 25 DENV. J. INT'L L. & POL'Y 397 (1997).

9. Coalition for the International Criminal Court, About the Coalition, <http://www.iccnw.org/?mod=coalition> (last visited Nov. 8, 2010).

fleeing from gender-based persecution. The symposium was also enriched by the comments and reflections of Ambassador David Scheffer, the head of the US delegation to the negotiations on the Rome Treaty establishing the ICC.

The symposium, "International Justice in the 21st Century: The Law and Politics of the International Criminal Court", addressed four main themes: the ICC Prosecutor's discretionary powers and the selection of cases before the ICC; the Politics of International Prosecutions; the impact of the ICC on the development of international law; and the future of international criminal law.

In his keynote address, Judge Kirsch set the tone by challenging participants to supplement their constructive criticism of international criminal law mechanisms with a "true commitment to make international justice work."¹⁰ He opened the door to discussion on a number of issues critical to the success of international justice. In relation to the ICC in particular, several of Kirsch's observations deserve greater attention in scholarship.

For example, to counter certain new untested features of the ICC system, the States Parties compensated with a statute that is more detailed, more complex, and more rigid than that of any previous international criminal tribunal. Consequently, the system has more checks and balances and affords less discretion to its principal actors. In almost every aspect of the Court's operation—except for sentencing¹¹—the discretion of the Court's judges and Prosecutor is significantly curtailed and subject to detailed and specific rules under the Statute and the Rules of Evidence and Procedure.

The first panel examined the exercise of the Prosecutor's discretion in selecting situations for investigation, individuals targeted for prosecution, and crimes charged in the indictment. The ICC Prosecutor exercises discretion in the selection of cases for prosecution subject to judicial checks and oversight at various stages in the process, in particular the authority to open an investigation and bring charges that form the basis of an indictment.¹² Quite expectedly, the Prosecutor's decisions on these matters have been intensely scrutinized by states and other

10. Judge Philippe Kirsch, Keynote Address at the Belle R. and Joseph H. Braun Memorial Lecture Series symposium, International Justice in the 21st Century: The Law and Politics of the International Criminal Court, at the John Marshall Law School, April 23, 2010.

11. See generally Shahram Dana, *Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing*, 99 J. CRIM. L & CRIMINOLOGY 857 (2009).

12. MORTEN BERGSMO & JELENA PEJIC, *Article 15—Prosecutor*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 581-85 (Otto Triffterer ed., 2d ed. 2008).

observers.¹³

The unique potential contribution of the ICC Prosecutor—as a non-state actor—to law and order in international relations cannot be underestimated. As the chief steward of a permanent international criminal justice mechanism, the ICC Prosecutor has the power to shine the international spotlight on as of yet undetermined future violations of international crimes and call to account leaders of states that perpetrate mass atrocities. Unlike predecessors at the International Criminal Tribunal for the former Yugoslavia (ICTY), International Tribunal for Rwanda (ICTR), the Nuremberg Tribunal (IMT), or the Tokyo Tribunal (IMT-FE), the reach of the ICC Prosecutor is not narrowly confined to a predetermined and limited situation or atrocity.

Resource limitations dictate that not all violations of international crimes within the ICC's jurisdiction can be prosecuted. Thus, the Prosecutor must prioritize and select which situations get immediate attention. This has fueled a debate about what factors the ICC Prosecutor considers when selecting situations and cases for investigation and prosecution.¹⁴ The first panel of the symposium delivered an excellent discussion on this topic. How do we account for the Prosecutor's selection of situations and cases for investigation? What factors actually influence his decisions in this regard and what factors ought to influence them? Since the symposium, the Office of the Prosecutor has put out its policy paper on preliminary examinations that touches on many of the points discussed in the panel.¹⁵ This volume therefore arrives as a timely companion piece for the study of the policy paper.

Our two presenters offered different perspectives on this issue. Professor William Schabas, an eminent expert in international criminal law from the Irish Center for Human Rights at the National University of Ireland, Galway, argued that the ICC Prosecutor should target those situations for prosecution that find support in politics of states. The premise of his argument was that the Prosecutor's selection of situations for investigation,

13. James A. Goldston, *More Candour About Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court*, 8 J. INT'L CRIM. JUST. 383, 390-93 (2010); William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 734-36 (2008).

14. See generally, James A. Goldston, *More Candour About Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court*, 8 J. INT'L CRIM. JUST. 383, 390-93 (2010); William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 734-36 (2008).

15. See International Criminal Court, Policies and Strategies, <http://www.iccpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/>.

and consequently his non-selection of other situations, is inevitably politically motivated. Schabas argued that the success of the enterprise is better served when the Prosecutor openly acknowledges this political motivation in his decision making and takes political direction from States Parties in a transparent manner.¹⁶ Professor Brian Lepard, a leading expert on international legal theory, argued that fundamental ethical principles should be used to formulate a comprehensive policy to guide the Prosecutor's selection. Lepard identified a set of ethical principles, rooted in the principle of unity in diversity, that are not abstractly putted out of "thin air," but find footing in contemporary international law.¹⁷ These ethical principles are relevant to the exercise of the prosecutorial discretion, particularly when the ordinary meaning of statutory provisions pertaining to the Prosecutor's functions is indeterminate.

Responding to these arguments was Dr. Rod Rastan, a seasoned veteran of international human rights practice and a Legal Advisor in the Office of the Prosecutor for the ICC. The nearly one hundred participants and attendees of the symposium were fortunate to receive the frank assessment of an ICC insider on these difficult questions. Also lending her expertise to this topic was Professor Nancy Combs, whose scholarship is always on the cutting edge of issues critical to the operation of international criminal law.¹⁸

Rastan challenged Schabas' starting presumption that the ICC Prosecutor's situation selection is politically motivated. He points out that the mere fact that the decision of a judicial officer, such as the ICC Prosecutor, may have political consequences does not necessarily mean the decision was politically motivated.¹⁹ Rastan provides a thought provoking analysis of how law can influence politics and urges us to explore this avenue rather than

16. See generally William A. Schabas, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 J. MARSHALL L. REV. 535 (2010).

17. According to Lepard, the ethical principle of unity in diversity maintains that "all human beings should seek to be unified as members of one human family while respecting one another's right to diversity of language, religion, and culture and individual freedom of thought, conscience, belief, and expression." Brian Lepard, *How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles*, 43 J. MARSHALL L. REV. 553, 553 (2010).

18. See generally NANCY AMOURY COMBS, *FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS* (2010); NANCY AMOURY COMBS, *GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH* (2007).

19. See generally Rod Rastan, *Comment on Victor's Justice & the Viability of Ex Ante Standards*, 43 J. Marshall L. Rev. 569 (2010).

compromise law in the face of politics.²⁰ While acknowledging that enforcement of ICC decisions and rulings is subject to the decisions of states, Rastan maintains that the decision making process by the Court's judicial officers is guided first and foremost by legal criteria and the mandate dictated by the Rome Statute. Although this dependency on state cooperation places the Prosecutor in a delicate and vulnerable position, the bottom line for Rastan is that the response to concerns about politicization of the ICC "is not more politics, but more law."²¹

These three impressive contributions—Schabas, Lepard, and Rastan—together provide the reader with a thorough accounting of the legal framework, problems, nuances, and possible solutions to the debate surrounding the exercise of the Prosecutor's discretion and *proprio motu* powers. Reflecting upon their arguments, three observations came to mind as the panel's moderator.

First, it would be unfair to impugn to Schabas a desire to politicize the Court on the account of his thesis here. In my opinion, this would be a misreading of his contribution and it would be contrary to the spirit of his scholarship published in more than twenty books and 250 articles. Rather, Schabas appears to be resigned to the fact the Court is already politicized, and that this is an unchangeable feature of the present system in the foreseeable future. Operating from this premise, Schabas seeks to neutralize this political influence (of the "great powers" or "Permanent Five"²²) with more politics (from the States Parties to the Rome Statute or the boarder international community or regional inter-state organizations²³). But it is unclear whether fighting fire with fire will succeed here. And the downside is steep and dangerous.

Moreover, there is an alternative that could be the subject of further research. Schabas asks "[i]f the Court is already politicized, why should the Security Council have the monopoly?"²⁴ But how that monopoly is broken up is critical. We may consider two types of political involvement: political guidance and political control.

A political guidance approach recognizes that perhaps the United Nations General Assembly ("General Assembly") ought to have the power to refer situations to the ICC Prosecutor for investigation. Of course, this would require an amendment to the Rome Statute in order for the General Assembly's referral power

20. *Id.*

21. *Id.* at 602.

22. William A. Schabas, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 537 (2010).

23. *See generally id.*

24. *Id.* at 551.

to have a formal place within the statutory framework. But a formal power is not strictly necessary to effectuate political guidance. Political guidance from the General Assembly can be facilitated to some extent under the present framework. There is nothing preventing the General Assembly from passing a resolution that urges or recommends that the Prosecutor open an investigation in a particular situation involving violations of Articles 6, 7, or 8, assuming the Court has jurisdiction. Political guidance could also come from the Assembly of States Parties. A full evaluation of the merits and feasibility of this approach is beyond the scope of this contribution, but it appears to address, at least to a certain extent, the concerns of all three authors: it moves in the direction of demonopolization that Schabas desires; it appears to be absent of the type of political interference that Rastan finds objectionable; and it advances several of the ethical principles that Lepard identifies, including unity in diversity and consultation. At minimum, a General Assembly resolution recommending that the Prosecutor take action *vis-a-vis* a particular situation would signal direction to the Prosecutor regarding the concern of the international community; it may embolden the Prosecutor to act more urgently and decisively in relation to that situation; and it may encourage one or more of the States Parties to refer the situation to the Prosecutor under Article 13.²⁵ Thus, from the perspective of political guidance, “monopoly” may be too strong of a characterization of the United Nations Security Council’s (the “Security Council”) influence on the ICC Prosecutor. Any State Party can refer a situation to the ICC Prosecutor, not just the Security Council, albeit the former referrals are subject to the preconditions for the exercise of jurisdiction in Article 12 of the Rome Statute.²⁶

Political control, on the other hand, consists of the power to *defer* or suspend investigations and prosecutions in limited situations where it affects international peace and security. However, there is great risk that the power of political control may be improperly used beyond its intended limitation. Per Article 16 of the Rome Statute, this power is “monopolized” by the Security Council, and perhaps for good reason, too. Extending political control to other political bodies, such as the General Assembly, could paralyze the Court and prevent prosecution of atrocity crimes where the Court has jurisdiction. As Schabas explains,

25. Rome Statute of the International Criminal Court art. 13(a), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; See also Rome Statute, art. 14. See generally, ANTONIO MARCHESI, *Article 14—Reform of a Situation by a State Party*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 575-80 (Otto Triffterer ed., 2d ed. 2008).

26. Rome Statute, *supra* note 25, art. 12(2).

political control per Article 16 “was never intended to provide a scheme for the exercise of political discretion where a situation or a case is otherwise admissible.”²⁷ But this is precisely how political control will be used as evidenced by the African Union’s proposal to amend Article 16 and its refusal to co-operate with the ICC in the arrest of indicted war criminal Omar al-Bashir, President of Sudan. Moreover, extending political control could easily result in a yo-yo effect whereby one body, in this case the Security Council, refers the case to the ICC and another body, the General Assembly, suspends the Court’s prosecution.

My second observation is that Schabas’ position would effectively subject the Prosecutor’s discretion in the exercise of his *proprio motu* power to the inter-state politics. Do the States Parties to the ICC want this? Arguably, this is precisely what they rejected during the negotiations on the Statute in Rome in 1998.²⁸ Moreover, as Schabas’ question “why should the Security Council have the monopoly?” lingers in my mind, I realize that the monopoly he is concerned about is not the only one at stake. Until now, the Security Council has monopolized the power of stigma and punishment. Only the Security Council, and thus the Permanent Five, could point to situations and identify violations of international law so wrongful as to warrant intervention into domestic matters against claims of state sovereignty; and only they could brand a government or state as an outlaw. The Permanent Five has had the monopoly on finger-pointing the wrongdoers—but no longer. The ICC Prosecutor now has this power, at least to some degree. A non-state actor, outside the complete control of the Permanent Five, has power to identify wrongdoers and single out international criminals who act against the well-being and common interests of mankind. The Prosecutor now serves as the engine of a permanent international mechanism that has the power to stigmatize and punish, and to pierce through the shield of sovereignty in the face of mass atrocities; and the ICC Prosecutor’s *proprio motu* power is at the heart of this. It is the enduring legacy of the Rome delegates. It is among the chief reasons the United States, China, Russia, and others have opposed

27. *Id.* at 551.

28. MORTEN BERGSMO & JELENA PEJIC, Article 15, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 583, ¶ 4 (Otto Triffterer ed., 2d ed. 2008) (discussing states position that *proprio motu* power was necessary if the Court was to act in situations where, for political or other reasons, neither a State Party nor the Security Council were able or willing to initiate proceedings); See also, SHARON A. WILLIAMS & WILLIAM A. SCHABAS, Article 13, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 567-68, ¶¶ 11-13 (Otto Triffterer ed., 2d ed. 2008) (discussing how majority of delegations at Rome Conference were in favor of the *proprio motu* power).

the ICC to the point of extreme measures in some cases: they do not want to share this power.²⁹ To subjugate the Prosecutor's discretion to the will of any state or inter-state politics is to return this monopoly to the Permanent Five.³⁰

My final observation on the issues addressed by this panel pertains also to our second panel, which focused on the politics of international prosecutions. Professor Roger Clark and Professor Vincent Nmehielle, joining us from the University of the Witwatersrand in South Africa, provided thought provoking reflections on the political process culminating in the first review conference of the ICC and on the North/South debate. Commenting on their presentations was Professor Meg de Guzman³¹ and myself.³²

To date, the ICC docket consists of investigations and prosecutions in five situations, all on the African continent: Uganda, Democratic Republic of the Congo, Central African Republic, Sudan, and Kenya. Critics draw attention to this open case list with suspicion that the ICC has an agenda against Africa. Of course, this open case list does not account for all extant investigations or situation that the Prosecutor is monitoring, such as alleged crimes in Columbia. While it is important that the Prosecutor investigate allegations of crimes of sufficient gravity within the Court's jurisdiction from all regions of the globe, criticism of this nature unwittingly sides with African tyrants rather than African victims. These investigations and prosecutions

29. See, e.g., *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on Int'l Operations, Comm. on Foreign Relations*, 105th Cong. 8 (1998) (statement of Senator Gram, Chair of the Subcommittee on International Operations) explaining that "At present international law regarding peace and security is largely whatever the Security Council says that it is. With the creation of the International Criminal Court, that will no longer be the case. This is a great victory for the critics of the Security Council that have finally achieved their goal of diluting the power of the permanent five with the realization that their bids to increase the number of permanent members were destined to ultimately fail."

30. This should not be misread to suggest that the Prosecutor is not accountable to the political will of its constituents. The Assembly of States Parties (ASP) exercises oversight and acts as a check on the Prosecutor. Moreover, there are several legal checks on the Prosecutor's powers within the framework of the Rome Statute. The Prosecutor is accountable to both the judges and the ASP.

31. For scholarship on international criminal law by this panelist, see, for example, Margaret deGuzman, *Crimes Against Humanity*, in *HANDBOOK OF INTERNATIONAL CRIMINAL LAW* (Bartram S. Brown ed. 2009).

32. For scholarship on international criminal law by this panelist, see, for example, Shahram Dana, *Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing*, 99 J. CRIM. L & CRIMINOLOGY 857 (2009); Shahram Dana, *Genocide, Reconciliation & Sentencing in the Jurisprudence of the ICTY*, in *THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL* (Ashgate 2007).

are for Africa, not against Africa; they are in favor of African people and against those that oppress them. Now, I support the call of those who say the ICC should open up more investigations and cases wherever crimes of sufficient gravity are occurring that are within the Court's jurisdiction and such a call should also be accompanied by a call for greater support among states for the Court's work and more allocation of resources to the Court to carry out its mandate. But to characterize the present caseload profile as an agenda against Africa is to indulge in hyperbole.

It was not long ago that Africa leaders were calling, even demanding, that the international community devote resources and institutions to investigate crimes of genocide, crimes against humanity, and war crimes occurring on the continent. For example, faced with initial reservations by the Security Council to create an *ad hoc* tribunal for the Rwandan genocide, supporters of the initiative argued that African victims deserved justice and redress just as European victims in the former Yugoslavia received justice through the establishment of the ICTY.

At lunch, the audience was treated to an outstanding multimedia presentation by Ms. Jeanne Smoot, Director of Public Policy for the Tahirih Justice Center (TJC), a US-based legal advocacy organization serving women and girls fleeing violence. Smoot highlighted TJC's important work in protecting women from such human rights abuses as domestic violence, sexual assault, rape (including as a weapon of war), human trafficking, female genital mutilation, "honor" crimes, and forced marriage. Many of TJC's clients are from the very countries in which the ICC is active. Smoot drew attention to how the chronic lack of clarity in "gender-based asylum law" in the United States can deny safe haven to women and girls who are trying to escape persecution. She called for legislation or regulations to release women from the uncertainty and "legal limbo" in which many women asylum-seekers currently find themselves.³³

In the symposium's third panel, Professors Kenneth Gallant and Lisa Laplante addressed the impact of the ICC from international and domestic perspectives, and Professors William Mock³⁴ and Gregory Gordon³⁵ provided insightful comments on

33. For more on TJC's advocacy on this issue, see TJC's October 2009 report, *Precarious Protection: How Unsettled Policy and Current Laws Harm Women and Girls Fleeing Persecution* available at www.tahirih.org/2009/10/asylum-report.

34. For scholarship on international law by this panelist, see, for example, WILLIAM B.T. MOCK, *HUMAN RIGHTS IN EUROPE: COMMENTARY ON THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION* (Carolina Academic Press 2010).

35. For scholarship on international criminal law by this panelist, see, for example, Gregory Gordon, *Complementarity and Alternative Justice*, 88 OR. L. REV. 621 (2009).

their presentations. Professor Gallant discussed the impact of international criminal tribunals on the normative development of international law, particularly on the formation of customary international law. International criminal law shapes general international law as much as the latter shapes the former. Gallant's thesis provided fresh insights to this dynamic process that may call for a rethinking of doctrines at the foundation of the international law making process. Professor Laplante advanced a provocative argument for expanding the influence of the ICC domestically. She proposed widening the concept of proactive complementarity to include engagement with States Parties even with regard to matters that technically fall outside the Court's jurisdiction. While the current statutory framework would not accommodate such an ambitious project, and it would be unlikely to receive political support from States Parties especially the territorial state concerned, Laplante's analysis envisions a more fluid relationship between international and domestic legal orders. This is an idea that is arguably both ahead of its time and retrospective, recalling that prior to the Westphalian international order there was less of a strict dichotomy between international law and local law. The forward-looking nature of Laplante's contribution provided a natural bridge to the fourth and final panel of the symposium which focused on the future of international criminal justice.

Professor Jordan Paust, a leading authority on international law, addressed the customary definition of crimes against humanity. His main concern is that, going forward, we do not lose sight of the fact that the Rome Statute, an international criminal code if you will, is a particular codification of international crimes for the purposes of reaching agreement among states for the establishment of a permanent international criminal justice mechanism. Thus, the customary definitions of crimes against humanity and war crimes survive this codification process. These two crimes in particular, Paust argues, are broader in customary international law and free of several limiting requirements found in the Rome Statute. Moreover, he is critical of initiatives to codify crimes against humanity in a new treaty that merely copy the ICC definition because it could threaten or erode accountability for gross violations of human rights. Great symposiums and great speakers often spark ideas for new research. Paust's thesis invites a comparative research project to examine how states have codified crimes against humanity into their domestic law. Have they adopted the broader definition found in customary international law? Or have they transposed the ICC definition directly?

Professor Stuart Ford's presentation considered the possibility of the ICC holding future trials, or parts thereof, away

from The Hague and in closer proximity to the region or locality impacted by the crimes, that is, the *locus delicti*. Ford provided a comprehensive analysis of the statutory provisions and policy considerations relevant to the determination of establishing local or regional trial chambers. Ford concluded that the ICC could improve its impact by holding local or regional trials.³⁶ Although he admits certain obstacles to holding local trials—for example, witnesses are often opposed to testifying locally—it is not clear how these obstacles can be overcome in order to secure the benefits of local trials. Moreover, the only example we have of an international court exercising its authority to move a trial away from its seat is relocation of the trial away from the local setting or *locus delicti*, namely when the Special Court for Sierra Leone moved the Charles Taylor trial out of Freetown and to The Hague.³⁷ It is likely that the Charles Taylor trial will be moved again: this time to the seat of the Special Tribunal for Lebanon.³⁸ Ford concluded his presentation by proposing certain amendments to the Rome Statute to further facilitate the possibility of holding local trials.

The four panels contributed meaningfully to the advancing knowledge and debate on topics of vital importance to international criminal law. Each contribution is richer and deeper than what can be shared within the scope of this foreword. I attempt merely to glean a few points and reflections and leave it to the reader to discover the fullness of each author's scholarship. In addition to expressing my gratitude to authors and commentators, I would like to also thank Professors David Scheffer, Mark Wojcik, and Kim Chanbonpin for moderating the panels and contributing their own expertise to the topics under discussion.³⁹

36. See generally Stuart Ford, *The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit All of the ICC's Trials to Take Place at Local or Regional Chambers?*, 43 J. MARSHALL L. REV. 715 (2010).

37. Stephen Rapp, *The Compact Model in International Criminal Justice: The Special Court for Sierra Leone*, 57 DRAKE L. REV. 11 (2008); See also Peter Quayle, *Is the transfer of Charles Taylor's trial to The Hague an admission of failure or welcome flexibility?* (June 12, 2007) available at <http://business.timesonline.co.uk/tol/business/law/article1919833.ece>.

38. RADIO NETHERLANDS WORLDWIDE, <http://www.rnw.nl/internationaljustice/article/taylor-war-crimes-trial-moves-hariri-tribunal> (last visited Sept. 23, 2010).

39. For their recent scholarship on these subjects, see David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. INT'L CRIM. JUST. 333 (2005); Mark E. Wojcik, *False Hope: The Rights of Victims before International Criminal Tribunals*, 28 L'OBSERVATEUR DES NATIONS UNIES 1 (2010); Kim D. Chanbonpin, *'We Don't Want Dollars, Just Change: Narrative Counter-Terrorism Strategy, an Inclusive Model of Social Healing, and The Truth About Torture Commission* (The John Marshall Law School, Working Paper Series, 2010) available at <http://ssrn.com/abstract=1594269>.

In conclusion, I recall Judge Kirsch's comment in his opening address that "there is no question that the system could be improved, but its success depends more on the proper environment than on technical improvement."⁴⁰ What would this "proper environment" look like? In the immediate future, it would include a shift in attitude and foreign policy of states toward the ICC in a direction that provides more robust and genuine support for the work of the Court. In the long run, it may call for fundamental changes to our decentralized, horizontal system for international legal order, which too often leaves enforcement of international law to dynamics of inter-state politics. With this in mind, criticisms of the ICC are often symptoms of systematic problems in the extant international legal order. The criticisms point to something profound, requiring significant change, but are often pointed at the wrong target. Identifiable weaknesses in the ICC system are a reflection of deep deficiencies in the international system as a whole; other international institutions suffer comparable flaws, and no amount of internal technical improvements can completely remedy the problem. We must reshape the discourse. We must look outward to the international legal order as a whole, and we must dare to make profound changes if we wish to realize the improvements we advocate.

40. Judge Philippe Kirsch, Keynote Address at the Belle R. and Joseph H. Braun Memorial Lecture Series symposium, *International Justice in the 21st Century: The Law and Politics of the International Criminal Court*, at the John Marshall Law School, April 23, 2010.