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THE INTERNATIONAL CRIMINAL COURT AT TEN: AN INTRODUCTION TO THE SYMPOSIUM

LEILA NADYA SADAT*

On November 11th and 12th, 2012, the Whitney R. Harris World Law Institute convened more than 250 participants at a major international conference to commemorate the 10th anniversary of the International Criminal Court's establishment and pay homage to the Institute's benefactor and namesake, Whitney R. Harris, former Nuremberg Prosecutor, who would have turned 100 earlier in the year. The first day of the Conference was, quite fittingly, held on Remembrance Day, and opened with a stunning and haunting artistic work entitled *Sustenazo (Lament IV)* choreographed and performed by Monika Weiss of the Sam Fox School of Design & Visual Arts. The program closed with a musical rendition of *When I am Silent*, performed by the Choristers ensemble of the St. Louis Children's Choir, in honor of the victims of the Holocaust. In between were two remarkable addresses by H.E. Stephen Rapp, U.S. Ambassador-at-Large for Global Criminal Justice, and H.E. Hans-Peter Kaul, Judge at the International Criminal Court. The opening program placed in context the technical, legal, and political issues raised by conference participants during the next two days, many of which are taken upon in this issue of *The Washington University Global Studies Law Review*.

This Volume contains articles addressing some of the key challenges facing the ICC as it celebrates its tenth anniversary, as well as some early fundamental jurisprudential and procedural issues raised by the Court in its work. Ranging from Judge Joyce Aluoch's first-hand and masterful

* Henry Oerschelp Professor of Law and Director, Whitney R. Harris World Law Institute, Washington University in St. Louis.

elucidation of *Ten Years of Trial Proceedings at the International Criminal Court* to the two terrific contributions on the relationship of the Court with the United States by Jordan Paust and Christopher “Kip” Hale and Maanasa K. Reddy, this collection of articles demonstrates both how far the ICC has come in its short ten years of existence and how far it has yet to go.

On a technical level, four articles highlight the interesting and unique procedural and substantive dimensions of “Rome Statute Law.” On the substantive side, Diane Marie Amann’s thoughtful piece entitled *Children and the Early Jurisprudence of the International Criminal Court*, explores how this new institution was tasked with—and took on—the problem of atrocity crimes committed against children, including their conscription and enlistment as child soldiers. As she notes, in March 2006, then Prosecutor Luis Moreno-Ocampo brought a case charging only offenses relating to child soldiers on the grounds that “[t]hese [were] extremely serious crimes. Forcing children to be killers jeopardizes the future of mankind.”¹ Amann underscores that although the prosecution was ultimately successful, the Court’s frustration with and desire to reprimand Prosecutor Ocampo may have resulted in a more narrow view of the harms inflicted by the accused and his co-perpetrators than one might have wished, concluding that this “diminished the expressive impact of the *Lubanga* trilogy.”²

On the procedural and quasi-procedural aspects of the ICC Statute, three articles by H.E. Judge Joyce Aluoch, Linda Carter, and Margaret deGuzman explore the trial proceedings of the Court, the principle of complementarity, and the gravity threshold in Article 17 of the ICC Statute, respectively. Judge Aluoch’s article, *Ten Years of Trial Proceedings at the International Criminal Court*, focuses upon several interesting and open questions of ICC procedure, and includes a particularly thoughtful discussion of the issues now raised by the use of Regulation 55 of the Statute, problems of evidentiary disclosure and the use of intermediaries during ongoing conflict situations, and the difficulties of State cooperation, which she notes is “critical for the successful functioning of the ICC.”³

1. Diane Marie Amann, *Children and the First Verdict of the International Criminal Court*, 12 WASH. U. GLOBAL STUD. L. REV. 411, 418–19 (2013).

2. *Id.* at 429.

3. Joyce Aluoch, *Ten Years of Trial Proceedings at the International Criminal Court*, 12 WASH. U. GLOBAL STUD. L. REV. 433, 444 (2013).

Linda Carter and Margaret deGuzman's articles both explore principles incorporated into the Rome Statute which were designed to filter out cases that the drafters of the Statute felt were not appropriately included therein, namely complementarity and gravity.⁴ Carter notes that the complementarity principle embedded in the ICC Statute is "strikingly different" than the regime governing the ad hoc international criminal tribunals.⁵ In her view, this principle of deference to national jurisdictions (under certain circumstances), is both a weakness of the Statute and a strength. A weakness insofar as it may undermine the authority of the Court *vis-à-vis* national jurisdictions, limits the number of cases it will ultimately hear, and creates difficulties of implementation.⁶ A strength in terms of building political support for the Court (by deferring to State sovereignty) and increasing national capacity to adjudicate international crimes.⁷ Carter's essay includes some interesting data suggesting that approximately 133 prosecutions for genocide, war crimes, and crimes against humanity have taken place world-wide,⁸ a number she suggests is likely to increase. This leads her to conclude that we must "re-conceptualize" the notion of success for the ICC so that it includes not just numbers of individuals tried, but its catalytic effect on prosecutions in national jurisdictions. She proposes the establishment of an Institute or Center which would be separate from the Court and take the lead in assisting with national capacity building.⁹

In a similar vein, Margaret deGuzman's essay, *The International Criminal Court's Gravity Jurisprudence at Ten*, surveys the early jurisprudence of the Court and argues that the ICC should interpret its substantive law to promote the notion of gravity contained in Article 17. At the least, she argues that the jurisprudence of the Court should contain more transparent discussions of the choices inherent in the application of the Rome Statute, but concludes "that the [gravity] threshold, while useful in garnering support for ratification of the Rome Statute, now seems destined to play a minor role in determining the reach of the ICC."¹⁰

4. For a discussion of these provisions, see LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* 112–14, 119 (2002).

5. Linda E. Carter, *The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?*, 12 WASH. U. GLOBAL STUD. L. REV. 451, 452 (2013).

6. *Id.* at 454–57.

7. *Id.* at 457–60.

8. *Id.* at 459.

9. *Id.* at 466.

10. Margaret M. deGuzman, *The International Criminal Court's Gravity Jurisprudence at Ten*, 12 WASH. U. GLOBAL STUD. L. REV. 475 (2013).

Three articles, by Noah Weisbord, Donald M. Ferencz, and Manuel Ventura and Matthew Gillett, focus on introducing the crime of aggression into the Rome Statute. Weisbord takes on the difficult issue of the *mens rea* for aggression, noting that it is likely that this crime will be activated in 2017 or soon thereafter when the Kampala amendments enter into force.¹¹ He concludes that it is possible under the Statute for “[a] leader who has knowledge of a military operation but does not intend to violate the UN Charter can still be punished under some circumstances.”¹² This, he argues, is troubling in “grey area scenarios,” including cyber attacks, imminent attacks, and humanitarian rescues. Of course, this might be exactly what the drafters of the amendments had in mind.

In his essay, *Aggression in Legal Limbo: A Gap in the Law that Needs Closing*, Donald M. Ferencz argues that the Court’s inability to exercise jurisdiction over the crime of aggression results in “a glaring gap in the enforcement of international law.”¹³ The essay also elaborates on why he and his father, Benjamin B. Ferencz, were motivated to sponsor an essay contest to explore whether the gap “might be narrowed using the Court’s existing jurisdiction over crimes against humanity.”¹⁴ The competition was hosted by the Institute and was held in honor of former Nuremberg Prosecutor Benjamin B. Ferencz.

Consequently, *The Fog of War: Prosecuting Illegal Uses of Force as Crimes Against Humanity*, by Ventura and Gillett, was written in response to the Institute’s sponsorship of the Benjamin B. Ferencz Essay Competition, and considered the possibility of prosecuting aggression as a crime against humanity before the International Criminal Court prior to entry into force of the Kampala amendments on aggression. Noting that an illegal use of force is not generally “an accidental event,” but one which would “inevitably be orchestrated at high levels of the State or of an organization,”¹⁵ the article asserts that the chapeau elements of Article 7 (on crimes against humanity) are likely to be fulfilled by such an attack. Moreover, as the authors note, “the unlawful nature of an attack could have a profound effect on whether it is conceptualized as an attack on a

11. Noah Weisbord, *The mens rea of the Crime of Aggression*, 12 WASH. U. GLOBAL STUD. L. REV. 487, 488 (2013).

12. *Id.* at 506.

13. Donald M. Ferencz, *Aggression in Legal Limbo: A Gap in the Law that Needs Closing*, 12 WASH. U. GLOBAL STUD. L. REV. 507, 507 (2013).

14. *Id.*

15. Manuel J. Ventura & Matthew Gillett, *The Fog of War: Prosecuting Illegal Uses of Force as Crimes Against Humanity*, 12 WASH. U. GLOBAL STUD. L. REV. 523, 526 (2013).

civilian population.”¹⁶ The essay concludes that using co-perpetration as a mode of liability, as the ICC does now, could be highly successful, and that aggression could also be considered at sentencing. They conclude that in instances in which crimes against humanity occur during the ordinary course of events of an aggressive war, ICC Prosecutors should not ignore the aggressive quality of the attack, as it may touch on establishing the elements of crimes against humanity, the mode of liability, and the ultimate sentencing of the accused.¹⁷

Four contributions to this volume leave behind some of these difficult and procedural questions regarding the current and future operation of the ICC Statute, focusing instead upon the political environment in which the Court operates. The first, by Richard Dicker, International Justice Program Director at Human Rights Watch, notes that the ICC has had difficulties during its first ten years of operation, and that all parts of the Rome Statute system including States Parties “need to up our game,” but observes that a fundamental area of concern is “the intersection of the court’s jurisdictional reach with the unevenness of the political terrain on which it carries out its judicial mission.”¹⁸ In particular, Dicker notes that the possibility of Security Council referrals may “advance accountability” but “reflect and reinforce unevenness.”¹⁹ This is compounded by the fact that three of the five permanent members of the UN Security Council—China, Russia, and the United States—have not joined the Court, allowing them to create “accountability-free zones” and sapping the Court’s legitimacy.²⁰ As remedies, Dicker proposes not only increasing the number of states ratifying the statute, but taking steps at the United Nations itself, and particularly in the Security Council, to enhance dialog with and support for the Court by funding future Security Council referrals and creating an ongoing body that can liaise between the Court and the Council.

Likewise, Allen Weiner notes that the Court operates in a difficult environment and concludes that the Court’s prosecutors simply cannot avoid the fact that they are working in a geopolitical environment.²¹ He proposes that prosecutors may “alter their position about which particular charges to bring, or to think carefully about potential domestic political impacts in determining *how* to draft an indictment so as to minimize

16. *Id.* at 527.

17. *Id.*

18. Richard Dicker, *The ICC at 10*, 12 WASH. U. GLOBAL STUD. L. REV. 539 (2013).

19. *Id.* at 541.

20. *Id.*

21. Allen S. Weiner, *Prudent Politics: The International Criminal Court, International Relations, and Prosecutorial Independence*, 12 WASH. U. GLOBAL STUD. L. REV. 545 (2013).

controversy or domestic backlash.”²² His thoughtful essay suggests that by “politics” and “political,” he means essentially “showing sensitivity to promoting the institutional well-being of the court in light of geopolitical context.”²³

Two important contributions to this Volume address one of the Court’s most difficult political problems—its fraught relationship with the United States. As I have written elsewhere, the ICC came into being over the objections of the United States, which voted against the Statute,²⁴ and this rejection at birth has scarred both the Court and the United States. In *The U.S. and the ICC: No More Excuses*, Jordan Paust systematically addresses each one of the legal and practical objections raised by U.S. negotiators in Rome and government officials since Rome, and concludes that whatever their earlier validity, given the now-ten year track record of the Court, “the prior excuses have become unfounded.”²⁵ He notes that there are now 121 ICC party states, and argues that “a desire to protect U.S. nationals from ICC prosecution is not a viable reason for not becoming a party to the treaty.”²⁶ In a similar vein, Christopher (Kip) Hale and Mannasa Reddy note four areas in which the Rome Statute System needs improvement, one of which is in the area of state cooperation, including its relationship with the United States. They agree with Professor Paust that the ICC is “not a threat to the United States,”²⁷ underscoring the “shadow” that lies over US-ICC relations, and the long-term negative consequences if the U.S. does not join.²⁸ They suggest that the “compelling argument for greater U.S. engagement with the Court is the added value it will have on a multitude of U.S. policy interests,”²⁹ and note that unless the U.S. re-engages with the Court, and joins it, “the U.S. government will simply have no human connection to the ICC.”³⁰ As a solution, the authors propose that the U.S. and the ICC take “incremental

22. *Id.* at 562.

23. *Id.* at 549.

24. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381 (2000).

25. Jordan J. Paust, *The U.S. and the ICC: No More Excuses*, 12 WASH. U. GLOBAL STUD. L. REV. 563, 563 (2013).

26. *Id.*

27. Christopher “Kip” Hale & Mannasa K. Reddy, *A Meeting of the Minds in Rome: Ending the Circular Conundrum of the U.S.-ICC Relationship*, 12 WASH. U. GLOBAL STUD. L. REV. 581, 598 (2013).

28. *Id.*

29. *Id.* at 599.

30. *Id.* at 607.

leaps of faith towards each other,” and towards the betterment of their relationship.³¹

Finally, it is fitting to conclude this foreword by evoking the essays in this Volume by two extraordinary individuals whose contribution to the International Criminal Court’s establishment and operation are beyond question, H.E. Ambassador Hans Corell, Former Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations, and Judge Hans-Peter Kaul, Judge at the International Criminal Court, and formerly the Head of the German delegation for the negotiation of the ICC Statute. Both men knew Whitney Harris and his work, and both have deep respect for him and for the commitment he had to the rule of law. Indeed, in their essays, they both invoked the importance of the rule of law in international affairs³² and, in particular, of the need for “Equal Justice under Law,” the words engraved above the main entrance to the U.S. Supreme Court building in Washington, D.C., in promoting international peace and security.³³ Both essays invoked the importance of continuing to work towards a future in which the rule of law replaces the law of force, and offered moving tributes to the work of Whitney Harris and the Harris Institute which bears his name and has been the benefit of his generosity.

It is easy to become cynical and disheartened by the difficulties that the ICC has faced in its first ten years of existence. Trials that take too long, states that refuse cooperation, states that spurn the Court entirely, budgetary difficulties, political problems including the cleavage of the United States and the Court, and so forth. Yet the spirit that animated the Rome conference—the intuitive voice that whispered in the ear of those present that establishing the Court was simply the right thing to do for the future peace and security of the world—regardless of whether it would be easy to accomplish—is still present. We see it in the artistic expression of Monika Weiss, we hear it in the voices of our children, we see it in the faces of the victims of atrocity crimes who realize they too are entitled to at least the possibility of justice, and we perceive it in the writings of the men and women who have contributed here, each of whom has offered not only a critique of current practice, but also thoughtful solutions that can illuminate the Court’s path as it moves forward into its second decade.

31. *Id.* at 609.

32. Hans Corell, *Reflections on International Criminal Justice: Past, Present and Future*, 12 WASH. U. GLOBAL STUD. L. REV. 621 (2013).

33. Hans-Peter Kaul, *The Nuremberg Legacy and the International Criminal Court—Lecture in Honour of Whitney R. Harris, Former Nuremberg Prosecutor*, 12 WASH. U. GLOBAL STUD. L. REV. 637 (2013).

Indeed, this collection of essays by some of the preeminent authors in this field stands as a tribute to the indomitable spirit that carried the Rome Conference to a successful conclusion and continues to animate those who are working so hard to make the Court a success. Let us hope that their wise counsel is heeded by those with the power to make a difference.