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Exploring The Intersections Between International And Domestic Justice Efforts

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INTRODUCTION

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The 2015-2016 academic year marked the twentieth anniversary of the War Crimes Research Office (WCRO) at American University Washington College of Law. The Office was established in response to a request for legal assistance from the first Chief Prosecutor of the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), Richard Goldstone. Faced with bringing the first major international prosecutions since the Nuremberg and Tokyo War Crimes Trials following World War II, the *ad hoc* criminal tribunals found themselves at the forefront of international criminal law. The WCRO was originally created to assist these tribunals with the kind of specialized legal research and analysis that prosecuting cases of serious international crimes requires.

In the twenty years since, the WCRO has worked with over fifteen different courts, tribunals, and organizations involved in the investigation and prosecution of serious international crimes, both at the domestic and international level. With the participation of our international law faculty, former and current WCRO staff, JD and LLM students, and expert consultants, the WCRO has undertaken more than 170 major research projects, including 19 public reports analyzing issues that have arisen in the practice and jurisprudence of the International Criminal Court (ICC).[1] The WCRO has also

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1. *See* WCRO's ICC Legal Analysis and Education Project, https://www.wcl.american.edu/warcrimes/icc/icc_reports.cfm.

launched several projects that have emerged as a result of our work with the tribunals. For instance, the Gender and International Criminal Law Project,[2] created in partnership with WCL's Women and the Law Program, makes available, free of charge, an online collection of searchable documents from twelve tribunals dealing with the prosecution of conflict-based sexual and gender-based crimes.

During these past two decades, practitioners and scholars in this field have seen an incredible number of advances. Media executives have been held accountable for incitement to genocide.[3] High state officials – including, most recently, former Congolese vice-president Jean-Pierre Bemba – have been found guilty of crimes of sexual violence, both as war crimes and crimes against humanity.[4] Even heads of state have been prosecuted and convicted for atrocity crimes,[5] challenging traditional notions of head-of-state immunity. For victims and the people on the frontlines, these advances have been painstaking, but if we look back, the milestones of the last two decades have been tremendous.

At the same time, we have seen a perceptible shift in the field. The *ad hoc* tribunals created by the United Nations Security Council in the 1990s to deal with the atrocities committed during the Balkans conflict and the Rwanda genocide have closed or will be closing shortly.[6] Similarly, a number of the so-called "hybrid" tribunals –

2. *See* Washington College of Law, Gender Jurisprudence and International Criminal Law Project, http://www.genderjurisprudence.org/.

3. *See The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-A, Appeals Judgment, 28 November 2007 (affirming Trial Chamber's conviction of Ferdinand Nahimana and Hassan Ngeze for direct and public incitement to commit genocide).

4. *See The Prosecutor v. Jean Pierre Bemba Gombo,* Case No. Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016.

5. *See, e.g., The Prosecutor v. Charles Ghankay Taylor,* Case No. No. SCSL-03-01-A, Appeals Judgment, 26 September 2013 (upholding the Trial Chamber's conviction of former Liberian President Charles Taylor for aiding and abetting and planning war crimes and crimes against humanity carried out by the Revolutionary United Front (RUF) and Armed Forces Revolutionary Council (AFRC) in Sierra Leone).

6. The International Criminal Tribunal for Rwanda was officially closed in December 2015. *See* International Criminal Tribunal for Rwanda/United Nations Mechanism for International Criminal Tribunals website, http://unictr.unmict.org/. The International Criminal Tribunal for the Former Yugoslavia is scheduled to

such as the Special Panels for Serious Crimes in East Timor and the Special Court for Sierra Leone, set up with international support in the countries where the atrocities occurred – have come to the end of their respective mandates.[7]

Significantly, we also now have a permanent international criminal court. As a permanent institution, the ICC[8] will obviously play a critical role in the developing architecture of international justice. However, the ICC has significant limitations. First, the Rome Statute establishing the ICC does not yet enjoy universal ratification.[9] Second, the ICC can only deal with crimes committed after the Statute came into force in 2002.[10] Third, it has a potentially global mandate which it must carry out with finite resources,[11] meaning that it can only realistically handle a limited number of cases. While the ICC will sometimes be the *only* option for holding certain perpetrators accountable – particularly where debilitated national institutions or an absence of political will makes domestic justice impossible – it cannot alone effect meaningful change in

close in December 2017. *See President Agius addresses United Nations General Assembly*, Press Release, 9 November 2016, http://www.icty.org/en/press/president-agius-addresses-united-nations-general-assembly.

7. The Special Panels for Serious Crimes in East Timor ended its mandate in May 2005. *See* United Nations Security Council Resolution 1573 (2004) (extending the mandate for a final period of 6 months until 20 May 2005). The Special Court for Sierra Leone closed in December 2013. *See* Special Court for Sierra Leone/Residual Special Court for Sierra Leone website, http://www.rscsl.org/.

8. The International Criminal Court was established by the Rome Statute. *See* Rome Statute of the International Criminal Court, *adopted* 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force* 1 July 2002, U.N. Doc. A/CONF.183/9, Art. 61(1) (1998).

9. 124 of 195 states are parties to the Rome Statute. *See The States Parties to the Rome Statute*, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20 rome%20statute.aspx.

10. *See* Rome Statute, Art. 11 (giving the court jurisdiction "only with respect to crimes committed after the entry into force of th[e] Statute").

11. The Assembly of States Parties has approved an operational budget of €141,600,000 for 2017. *See* Resolution of the Assembly of States Parties on the proposed programme budget for 2017, the Working Capital Fund for 2017, the scale of assessment for the apportionment of expenses of the International Criminal Court, financing appropriations for 2017 and the Contingency Fund, ICC-ASP/15/Res.1, *adopted* 24 November 2016. The Court currently has ten situations under investigation and ten situations under preliminary examination. *See* ICC Situations under Investigation, https://www.icc-cpi.int/pages/situations.aspx.

countries where atrocities have occurred. For the ICC to make a difference, it needs to be part of a broader set of accountability efforts.

Thus, although much has been accomplished in the last 20 years, practitioners and scholars in this field face a number of critical questions. How can the ICC – and the international community more broadly – effectively support accountability efforts beyond The Hague? What do we need for "positive complementarity"[12] to work? What domestic or hybrid court models have worked best? What lessons can we learn from external engagement in these models? What are some of the cautionary tales? How can the ICC's engagement with states be leveraged to improve domestic prosecutions for crimes of conflict-based sexual and gender-based violence, which – until relatively recently – had been ignored or treated as secondary to other crimes? What are some of the unintended consequences of "positive complementarity"? How do we ensure ongoing and constructive engagement between the various actors involved in the prosecution of serious crimes at the domestic level, including not just justice system actors, but also donors and civil society groups? The WCRO organized this conference, *Prosecuting Serious International Crimes: Exploring the Intersections between International and Domestic Justice Efforts*, in collaboration with the American Bar Association Rule of Law Initiative, the American Society of International Law, the American Red Cross, and PluriCourts of the University of Oslo, to address these very questions.

The conference, held on March 30, 2016, brought together thirty-

12. While the term "complementarity" does not appear anywhere in the Rome Statute creating the ICC, the notion that the ICC should investigate and prosecute crimes within its jurisdiction only when there is no State able and willing to do so is one of the fundamental principles upon which the ICC was founded. *See* Rome Statute, pmbl. ("[r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"); *id*., Art. 17 (providing that a case will be inadmissible before the ICC if there is a State that is willing and able to genuinely prosecute the case in its own courts). Since 2006, the ICC's Office of the Prosecutor has embraced a more proactive interpretation of complementarity, one that envisioned the Court as not only abstaining from taking cases where a State was willing and able to prosecute, but as actively promoting the domestic prosecution of international crimes. *See* Int'l Criminal Court, Office of The Prosecutor, Report on Prosecutorial Strategy, 5 (14 September 2006).

four speakers, including former Ambassador-at-Large for Global Criminal Justice Stephen Rapp; International Center for Transitional Justice President David Tolbert; Senior Trial Lawyer at the International Criminal Court Anton Steynberg; former Norwegian Public Prosecutor of Organized and Other Serious Crimes Siri Frigaard; former Guatemalan Attorney General Claudia Paz y Paz; and American Bar Association Rule of Law Initiative Director Elizabeth Andersen, among others.[13]

Three speakers chose to contribute articles to this Symposium issue. In the first article, University of Pittsburg Associate Professor of Law Elena Baylis argues that internationalized criminal courts should seek to influence justice efforts in post-conflict states but in a more limited way than other proposals intended to expand the domestic impact of international courts. She argues internationalized courts should build on their core functions of investigating and trying atrocity cases by shifting some resources toward making their judgments more accessible and useful to national actors trying atrocity cases, while at the same time outsourcing other aspects of supporting national courts to the extensive rule of law networks that operate in post-conflict countries.

In the second article, Tulane University Assistant Professor of Political Science Geoff Dancy and University of Minnesota graduate student Florencia Montal conduct an assessment of the ICC's impact by analyzing both qualitative and quantitative data on the relationship between the ICC and two outcomes: the prevention of conflict and domestic legal change. With regard to violence prevention, they find that ratification of the Rome Statute is correlated with a higher probability that civil wars will end with negotiation and with less repressive violence, fewer incidents of mass killing of civilians, and fewer onsets of civil war. However, they also caution that the ICC's direct involvement in specific situations does not necessarily have "generalizable pacifying effects" and that the deterrence impact of its interventions varies by circumstance. On the second question, the authors conclude that while some degree of legal change is inspired by the Rome Statute

13. The full conference program is available here: https://www.wcl.american.edu/warcrimes/documents/WCRO20thAnniversaryConferenceProgramPublic.pdf.

itself, and by direct consultation and monitoring on the part of the Court, the effects that come from the Court's direct involvement in certain situations, such as in the cases of Colombia, Democratic Republic of Congo and Uganda, are restricted to those specific contexts and broader influence should only be expected "as [the Court's] place in the world's legal architecture solidifies."

Finally, in the third article, former ICTY prosecutor Daniela Kravetz offers a critical examination of the progress made in establishing accountability for sexual violence committed in the internal conflicts of Peru, Guatemala, and Colombia. Her study reveals that practitioners are increasingly applying international law in their efforts to seek justice for conflict-based sexual violence, not only by using international law to interpret domestic criminal provisions, but also by using international precedent to better understand the links between sexual violence and the broader context of violence in the affected society, as well as how different forms of sexual violence can be charged. She also observes that practitioners are making progress in holding high-level leaders accountable for sexual violence committed by their subordinates. Finally, her study indicates that while criminal trials remain a key demand of victims, truth-telling and historical memory processes that preceded trials were critical in "surfacing the gendered dimensions of the conflicts in each country, acknowledging neglected abuses and providing a forum for victims to share their experiences of conflict," which in turn strengthened the desire of victims to take their cases to court.

We hope that readers will agree that these articles make an important contribution to the debate of pressing issues in international criminal law, a field that is evolving rapidly in both legal scholarship and practice.