



INTERNATIONAL CRIMINAL JUSTICE

STATE OF PLAY

March 19-20, 2015

Morris J. Wosk Centre for Dialogue
Simon Fraser University – Vancouver, Canada

Conference Report



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ACKNOWLEDGEMENTS

We, as the co-conveners, want first to express our gratitude to The Honourable Louise Arbour for her role as Chair of the conference. We also want to thank the many people who contributed to its success and to the production of this report. Izabela Steflja, Simons Postdoctoral Fellow at the School for International Studies, played a large part in organization of the conference and as a co-drafter of the report. Shayna Plaut was both Rapporteur and co-drafter of the Report. Elaine Hynes, of The Simons Foundation, took on major responsibilities in regard to the organization of the conference, and with great efficiency and wonderfully good humor ensured the success of the event. Ellen Siew Meng Yap and Dorris Tai, of the School for International Studies, provided critical support in the organization of the conference and preparation of the report. We are also grateful to Jerome Bacconnier for the cover of this report, and we thank him and Martha Snodgrass for their very thorough work in the final editing, design, layout and setting of the report.

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As we prepared this report we were deeply saddened to learn of the passing of Sheri Rosenberg. She brought great insight to our conversations, and will be sorely missed.

Jennifer Allen Simons and Alexander Dawson

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INTRODUCTION

Fifteen years after the passage of the Rome Statute of the International Criminal Court (ICC), we stand at a series of crossroads. Support for personal criminal responsibility for genocide, crimes against humanity and war crimes remains robust in many parts of the world, yet the ICC faces considerable obstacles and universal jurisdiction of national courts is in a period of retrenchment.

Accountability mechanisms in peace agreements are hard to come by. The ICC has faced sustained criticism from African leaders for its alleged selectivity, and elsewhere as well for its inability to address alleged violations by major powers, leaving the court open to the accusation that it only dispenses justice on weaker states. Even UN Security Council referrals, once thought to enhance the reach of the Court, are proving problematic. Along with the criticisms of the likes of Henry Kissinger attacking the principle of universal jurisdiction of national courts, major powers (notably China) have made repeated claims that the very notion of universal jurisdiction represents a “Western” imposition on non-Western peoples – effectively an act of 21st century imperialism. Finally, the simultaneous pursuit of peace and justice is proving more elusive than once thought.

And yet, the struggle for enhanced accountability continues in a variety of settings, from Spain (addressing military rule in Latin America and the Franco era), to Belgium, France and Canada (where the Crimes against Humanity and War Crimes Act precedes the establishment of the ICC). Avenues have opened up for civil society actors as well as jurists to seek justice for crimes that have otherwise gone unpunished by states either unwilling or too weak to enforce their own laws. This makes it possible for groups as varied as indigenous peoples in Canada and victims of violence in Guatemala to challenge traditional jurisdictional limits in their efforts to gain redress for their grievances. We have compelling evidence from Latin America, Africa, and elsewhere that the criminal prosecutions that have resulted from these pressures have significantly enhanced democratic practice and civil society in regions with long histories of political violence and authoritarian rule. Accountability for international crimes and its cognates thus create a complex alchemy. It became a new basis upon which global actors and international organizations have sought to enact the promise of the 1948 Universal Declaration of Human Rights (UNDHR), but it has also allowed local actors in a variety of contexts to seek new ways of addressing pressing concerns.

The goal of this conference was to assess the current state of international criminal justice through a close examination of the workings of International Criminal Court, related

tribunals and national courts exercising both their domestic and universal jurisdiction. We assembled a globally renowned group of experts, to consider criminal accountability for large-scale acts of political violence through a series of lenses, from those of legal practitioners, scholars, international actors and activists who seek to utilize or challenge the viability of the concept. In this sense our conference will both be about legal theory and the day-to-day workings of the law in a variety of contexts and jurisdictions.

Most importantly, our goal was not simply to understand how international criminal justice has evolved since the creation of the ICC. We aim to offer a vision of the future path for this concept, and its viability in a global context in which state-sponsored violence and the potency of non-state actors remain a significant challenge to accountability and justice. We also seek to explore its viability in a series of local contexts in which global networks of activists, jurists, and scholars continue to press the case for accountability: local efforts to prosecute former military and government officials in Argentina, Chile, Peru, Guatemala and elsewhere for human rights violations dating to the 1960s remain unabated. Meanwhile, general amnesties are no longer the standard fare of negotiated peace agreements while realistic accountability measures are difficult to enact, more so even to implement.

In the following pages readers will find a session by session narrative describing the presentations and discussions that comprised the conference, followed by a series of concluding remarks authored by the Honourable Louise Arbour. Wherever possible we used the precise words of the speakers, editing only in order to make the shift from the spoken to the written word comprehensible, and because of space limitations. The presentations are attributed to the speakers, but most comments in the discussions have been anonymized, as per the wishes of the participants.

The Honourable Louise Arbour, CC, G.O.C.
Simons Visiting Chair in Dialogue on International Law and Human Security
Simon Fraser University

Jennifer Allen Simons, CM
President, The Simons Foundation

Alexander Dawson
Director, School for International Studies
Simon Fraser University

OPENING REMARKS

To set the tone for the conference, the three co-conveners used their opening remarks to press the participants to address a number of the critical questions that confront International Criminal Justice today. Dr. Jennifer Allen Simons, President of The Simons Foundation, explained that the intent of this event was to bring the leading academic theorists and practitioners of international criminal justice together to assess the global effort to combat crimes against humanity and mass atrocities, with a particular interest in addressing the widespread problem of impunity. Quoting the Conference's Chairperson, The Honourable Louise Arbour, Dr. Simons asked one of the core questions that haunts endeavors to prosecute war crimes. "Are we too ambitious about changing the world?" Simons' answer to this question was a resounding "no!", offering that "it is essential that we surpass the ambitions of the power-hungry and the greedy... those who disregard human lives in their decision-making... We must accept it will always be an uphill struggle, but we must strive for universality of all human rights and human lives... We are here today to further the goals of true universal justice." Dr. Simons ended her opening remarks by linking universal justice to the need for perpetrators to be brought to justice.

Alexander Dawson, Director of the School for International Studies, took a more pessimistic approach, commenting that he is "still struggling with questions about victor's ideas imposed on vanquished." Prof. Dawson noted that from Adolf Eichmann to the present, the question remains: "can powerful heads of state in victor nations be held accountable?" He continued by contemplating the 2011 visit by former US Vice President Dick Cheney 2011 to Vancouver, during which protestors kept him sequestered in a downtown private club for several hours. Those protestors insisted both that Cheney was a war criminal, and that Canadian law and treaty obligations required that he be detained. In the end, Cheney was inconvenienced, but that was the sum total of his punishment. Dawson ended his opening remarks by asking a key question: "how do we take concepts of international justice and truly make them universal?"

The Honourable Louise Arbour, SFU Simons Visiting Chair in Dialogue on International Law and Human Security and Chair of the Conference, then took the microphone. "I hope our conversation," she said, "will position itself somewhere between habitual cheerleading, which has taken place for a long time, and the increasing heavily negative commentaries that risk playing into the hands of those who may share our assessment but may want to sabotage the entire enterprise. There is in between a need for sober criticism."

Dr. Arbour continued, commenting that although she has not directly engaged in international criminal justice for a while, her interest and commitment has not waned, and she

believed that Dr. Simon's optimism was not misplaced. "As a criminal law professor 30 years ago, I would have never believed criminal law would take root in the international sphere in my lifetime. But it has."

When she left the Office of Chief Prosecutor for the International Criminal Tribunals for Former Yugoslavia and Rwanda (ICTY and ICTR) in 1999, Arbour told her colleagues that "the international criminal justice process is irreversible." Over twenty years later, she still believes in its irreversibility, but conceded that she has "a lot less clarity on the shape and form it will take." Her hope for the conference was to explore core doctrinal assumptions regarding universal jurisdiction and institutional frameworks. The current events surrounding Palestine's engagement with the ICC show that the Court's legitimacy has increased, according to Arbour. She hoped that we could "celebrate the expansion of accountability while also recognizing how this will probably contribute to an increased hostility toward the International Criminal Court in the US."

Dr. Arbour concluded her opening remarks by noting that, "although this movement is irreversible it needs sober encouragement, not cheerleading." She argued that there is a "need to articulate pathways to assist our efforts in the fight against impunity, and the expansion of a reasonable system of accountability. We need an ambitious but realistic agenda – both highly desirable while eminently deliverable."

PANEL I

CRITICAL EVALUATIONS OF THE UNDERLYING ASSUMPTIONS OF INTERNATIONAL JUSTICE

Stephen Toope, A Critical Analysis of the Concept of ‘Fragmentation’
and the Normative Legitimacy of International Criminal Justice

Richard A. Falk, The Long March to End Impunity for State Crimes of
Aggression and Crimes against Humanity

James Stewart (ICC), Prevention: Will it ever be realizable?

Overview: The first panel of the conference highlighted several competing views on the nature of the accomplishments of the ICTR, ICTY, and ICC. Stephen Toope presented a wide range of evidence in support of his position that the embrace of fragmentation and legal pluralism were not only pragmatic approaches to the problems of international criminal law, they were also largely positive steps toward an improved human rights regime globally. James Stewart, the practicing prosecutor on the panel, clearly saw the deficiencies and incapacities of the ICC, but argued that the accomplishments of the Court were significant, and that the positive effects of the ICC on domestic contexts were not yet fully understood or accounted for. Richard Falk observed that many of the most profound issues of international criminal justice seem to be beyond the scope of the ICC, and in the discussion reminded participants that these issues must remain on the public agenda.

The panel began with a sweeping analysis by Stephen Toope of the theoretical and practical problems facing the implantation of International Criminal law. Framing his talk as a meditation on the of embracing “fragmentation” as a workable legal principle, Prof. Toope noted that, although Canadian and American scholars express unease about the concept, as it seems to indicate weak systems and imperfect justice, European scholars tended to have a more positive view. Moreover, fragmentation is not just found in international law (IL) and international criminal law (ICL) but in domestic settings as well. “I want to say that we should stop worrying about fragmentation in IL and ICL.” Prof. Toop’s presentation follows.

From a theoretical perspective, fragmentation is best viewed as a value-free concept in relation to any given institutional setting. It is inherently neither good nor bad. Even in

domestic law settings a multiplicity of adjudicative mechanisms or jurisdictions can produce diversity in approaches and outcomes. We are certainly familiar with that reality in Canada. When I studied criminal law in Quebec – and remember that criminal law is within the federal heads of jurisdiction – I soon learned that even the cases cited by Quebec courts were often different from those cited in Ontario or BC. Some of that was language, meaning mostly that many Ontario and BC judges did not read in French. But it was also interpretive temperament: Quebec judges tended to be gentler with young offenders, for example. General approaches to sentencing were often different.

While it is true that in domestic legal systems there is usually more capacity for coordination and supervision, differences in approach are not invariably settled simply through the assertion of authority within a judicial hierarchy. Often, courts engage in what Peter Hogg has described, drawing on Supreme Court of Canada cases starting with *Vriend*, as a “dialogue” amongst themselves and also between the courts and the legislatures, finally settling at a point of temporary equilibrium.

The dialogic metaphor is apt internationally as well. Courts speak with one another. Interpretive friction is a constant because legal principles are worked out in different legal and factual contexts. Stable approaches in law tend to be iterated over time with the accretion of practice. The dispute on the right test for imputability for war crimes (“overall control” vs. “effective control”) between the *Tadic* tribunal of the ICTY and the ICJ in the *Nicaragua* and *Genocide* cases is the most famous and pointed example.

“The international legitimacy of international criminal law is threatened – not by fragmentation and pluralism – but by inability to deliver on its promises because of institutional ineffectiveness. Our focus needs to be on political, economic and institutional will.” — Stephen Toope

But international criminal courts also speak to states and states speak back to international courts. One of the ICC Statute’s fundamental principles, complementarity, is an expression of the dialogic relationship between international and national justice. International courts can establish and interpret key definitions of international crimes, and try the most senior offenders. National courts should treat the international court interpretations as persuasive authority, and pursue justice in relation to lower-level offenders.

While there is never likely to be what some writers have called a “master procedural model” of international criminal justice that ensures conformity amongst all tribunals, international and national, there can nonetheless be a “common grammar” that shapes decisions in similar directions.

This idea of a generative dialogic relationship connects to a second theoretical reason why we should not worry about fragmentation. International law has long recognized the need for some degree of normative pluralism. From the now weak persistent objector rule related to the formation of customary international law, to the possibility of reservations to treaties, the idea that not all rules are truly universal or entirely uniform has been accepted. This translates into the essentially practical point that international criminal law, like all public international law, has never been an entirely unified field. So there is no fundamental coherence that is being lost.

Indeed, the framework of relative normative pluralism may be a helpful way to conceive of international criminal law. Not only does ICL have to interact with a remarkable diversity of regulatory spaces (national jurisdictions around the world), but it has to engage with many different socio-cultural frames and political contexts. If the world is, as I think it is, “morally pluralistic” (to adopt the great liberal theorist, Judith Shklar’s term), then ICL may be best understood as a set of overlapping but not necessarily uniform concepts of individual criminal responsibility overseen by a relatively loose network of judicial actors.

In other words, fears around fragmentation were always overstated, even at a conceptual level. Interestingly, one of the most powerful voices who decried the development of a fragmented international law has recanted. Martii Koskeniemi now suggests that “fragmentation did not turn out to create the chaos that was feared.”

In practical terms as well, we have nothing to fear from relative pluralism in ICL. In fact, it is that very pluralism that may actually produce the effects that we seek to achieve in the promotion of international criminal responsibility.

If we begin with the proposition that ICL continues to face what some commentators have called an “identity crisis” because of the inherent conflict between the demands for “due process” and “an end to impunity,” it seems more likely that the right balance will be struck closer to the ground, so to speak – in the societies where criminal activities were committed.

The fundamental principle of complementarity found in the Rome Statute speaks to this reality; it runs parallel to the EU’s concept of subsidiarity. Decision-making should take place as close as possible to the people affected by the decisions. The decisions are more likely to hit needed balances and may be assimilated into society more easily. The difficulty that the ICC has had in dealing with the Kenyan situation is an example of what does not work.

There is also solid evidence that decisions rendered in situ are more likely to lead to understanding by the population and to social learning. The dialogic metaphor is

reinforced because states and their institutions can learn and recalibrate in the light of localized ICL decisions. Studies of the ad hoc international criminal tribunals indicate that local people have known little about them and that the results are often experienced as foreign impositions. Local learning does not take place. The International Criminal Court has been criticized because it has done little to help support national-level prosecutions. What is more, in dealing with the traumatic after-effects of situations that rise to the level of ICL, court adjudication of individual perpetrators is only part of a wider set of processes at different policy levels within and between states. Learning should take place in these varied processes as well.

Recent research has demonstrated that ICL can be implemented by a variety of institutions, not only by international criminal courts. National courts can play an important role, of course, but ICL was built in part because of the recognition that states may fail to act when they should for complex social and political reasons. They may need a push. But that push can be made by human right tribunals as well as by international criminal courts.

A brilliant recent study of the Inter-American Court of Human Rights by Alexandra Huneeus shows that the Court has ordered prosecutions for gross human rights offenses in roughly 51 cases across 15 states since 1996. It has then actively monitored, even supervised, prosecutions at the national level, resulting in 39 convictions as of 2013. The supervision can be quite detailed, telling national prosecutors what lines of investigation to explore, naming specific individuals, and suggesting analytical connections between related cases. This results in powerful “teaching opportunities” for national-level justice officials.

If one links this study of the Inter-American Court to recent analyses of the effectiveness of international courts generally, one is forced to the conclusion that the ICC, with its two convictions and a budget of roughly \$130 million per year is not meeting its objectives. Of course, the objectives of ICL are diverse and complicated: retribution and punishment of individuals; satisfying victims’ need for closure; further developing the framework for legal liability; meeting the psychological need for memorialization of traumatic events and to remember victims; promoting social stability and security; creating opportunities for reconciliation; and reinforcing legal values outside the direct criminal context such as fairness and equality. It is hard to meet them all. But goal uncertainty is a notorious indicator of likely institutional failure. Normative legitimacy is undermined by ineffectiveness. When there is an almost complete failure to deliver in practice on the normative promises of the law, the law itself is degraded.

I offer five specific solutions. First, we should stop worrying about fragmentation in international law, and particularly in international criminal law. Second, some degree of normative pluralism is inherent in an international society marked by moral pluralism.

Third, complementarity is the correct approach for pursuing effective ICL. In fact, we should look to a diversity of institutions to instantiate and develop the law, not only domestic courts and international criminal courts. The role of human rights tribunals is under-explored and under-promoted. Fourth, the educative role of ICL, and its ability to help positively shape the future of fractured and fragile national societies, is best pursued through local-level actions – national prosecutions and other policy instruments that are grounded in criminal responsibility but that are targeted to meet specific goals of international criminal justice, such as reconciliation and memorialization. Last, the normative legitimacy of ICL is threatened today, not by fragmentation or pluralism, but by the ineffectiveness of central institutions like the International Criminal Court.

• • •

In the second presentation on this panel Richard Falk focused on the lengthy and often tendentious struggles to address the impunity that state actors often enjoy in committing crimes against humanity. Prof. Falk suggested that our desire for a just world order must be tempered with realism about the world as it actually is. As it works now, international criminal law “is a voluntary system for the powerful, and an obligatory system for the others.” Inasmuch as without equality before the law we really do not have the rule of law, we need “a profound transformation in political consciousness. Even the most powerful countries should welcome the constraints of international law to govern their practices.”

The text upon which his talk was based is reproduced below.

Under pressure from the usual sources William Schabas has resigned as Chair of the expert commission of inquiry into war crimes allegations arising from the Israeli military operations in Gaza during July and August of 2014. These issues relating to international criminal accountability have also received recent prominence due to Palestine’s adherence to the Rome Treaty making it a party to the International Criminal Court, an initiative that generated a furious reaction on the part of Israel as well as an angry denunciation by Washington. On display in these instances is the struggle between extending the rule of law to international state crimes and the geopolitical resistance to such an effort.

Imposing international criminal responsibility upon political leaders and military commanders possesses a dual character from a geopolitical perspective: to vindicate major military undertakings of liberal democratic states and to ensure impunity for the leaders of these same states in the event that their behavior or that of their allies are alleged to be international crimes. These efforts at vindication are associated with strengthening the global rule of law, while impunity is invoked to insulate powerful individuals from

criminal accountability. The resulting pattern is one of double standards and hypocritical rhetoric about the importance of the rule of law.

“International criminal law is a voluntary system for the powerful, and an obligatory system for the others... What is needed is a profound transformation in political consciousness. Even the most powerful countries should welcome the constraints of international law to govern in their practices.” —Richard Falk

Contemporary experience with these issues is grounded in the aftermath of World War II – especially in Nuremberg, where the legal prosecution of surviving Nazi leaders began with great fanfare in 1945, but also at Tokyo, where a series of prominent Japanese personalities who had headed the imperial government and commanded its military forces were accused of international crimes. These sophisticated “show trials” were generally endorsed in the West as a civilized alternative to the favored Soviet approach, which was to arrange summary mass executions of all Germans deemed responsible for international crimes without making any effort to assess the gravity or accuracy of the charges directed at specific individuals. What was done at Nuremberg in 1945 was for prosecutors to prepare carefully evidence of alleged wrongdoing as well as developing arguments about the legal relevance of the international crime while giving those accused an almost free hand to offer legal defenses and mitigating evidence as prepared by competent lawyers appointed to render them assistance.

In most respects, Nuremberg in particular continues to be viewed as a landmark success in the annals of the progressive development of international law. It is also significant that the outcomes of parallel Tokyo prosecutions of Japanese leaders are virtually unknown except in Japan, where they are decried as “victors’ justice”, and among a few specialists in international criminal law.

There are several reasons for the prominence of Nuremberg. First of all, the disclosures of the Holocaust at Nuremberg were so ghastly that some sort of punishment of those responsible seemed to be a moral imperative at the time.

Although the crime of genocide did not yet exist in law, the revelations of the Nuremberg proceedings documented as never before the systematic extermination of Jews and others in Europe. Beyond this, the war was widely believed to have been just and necessary. The Allied victory was viewed as decisive in overcoming the fascist challenge to liberal democracy, with the Nuremberg Judgment providing an authoritative rationale for a war so costly in lives, devastation, and resources. Finally, the claim to be establishing a structure of legal accountability that took precedence over national law seemed integral to the post-war resolve to keep the peace in the future and deter aggression by

threatening leaders with criminal accountability for initiating a war or abusing people under their control. The advent of nuclear weaponry reinforced the moral and political conviction that major wars must now be prevented by all available means, including this warning to leaders and military commanders that their actions could become the subject of criminal prosecution.

At the same time, this Nuremberg/Tokyo experiment was tainted from the outset. It was clearly victors' justice that incorporated double standards. The evident crimes of the winners in the war were not even investigated, including the atomic bombings of two Japanese cities, which were viewed around the world as perhaps the worst single acts of wrongdoing throughout the course of the entire war, and only the Nazi death camps were in some way equivalent in relation to legality and morality. There were official statements made at Nuremberg that those who sat in judgment of the Germans would in the future be subject to similar procedures of accountability if they committed acts that seemed to be crimes under international law, implying that the rule of law would replace victors' justice. In effect, the claim made on behalf of moral credibility and political fairness was that this Nuremberg/Tokyo approach would take on the attributes of the rule of law by treating equals equally. Such expectations, if scrutinized, seemed to reflect the hopes of "liberal legalists", but were never realistic given the structure and nature of world politics.

In effect, this Nuremberg promise could not be kept because geopolitical primacy continues to set the limits of legal accountability. Although there has existed an International Criminal Court since 2002, and ample grounds for believing that some major sovereign states have committed international crimes, there have been zero prosecutions directed at dominant political actors, and no investigations have been launched. Such a pattern results from a *normative gap* in world order that is not likely to be closed soon. It is a gap that is most visibly expressed by conferring a right of veto upon the five permanent members of the UN Security Council, which amounts to constitutional grants of exemption from any legal obligation to comply with the UN Charter on matters of peace and security. In this regard, the UN Charter is itself a product of what might be called "geopolitical realism" which takes precedence over the aspirational goals of "liberal legalists".

And yet, the impulse to hold accountable those who commit crimes against the peace, war crimes, and crimes against humanity remains strong among moderate democratic governments and in global civil society. As a result there is some further development of the Nuremberg idea, although the fundamental tensions between hard power and establishing a credible rule of law remains. During the 1990s the UN Security Council established ad hoc international tribunals to assess criminal responsibility associated with the breakup of former Yugoslavia and in relation to the genocidal massacres in Rwanda. In these North/South settings, there was more willingness to allow all sides to bring forth their arguments about the criminal behavior of their adversary since there

were no allegations against geopolitical heavyweights. That is, the approach of liberal legalists can be practical in situations where no high profile geopolitical actor is being accused.

The International Criminal Court was itself brought into being in 2002 by an unusual coalition of forces, joining governments with NGOs around the world in a joint project. What exists is an international institution with a mandate to investigate and prosecute, but lacking the participation and support of the dominant states, and operating within a framework that up to now has been deferential to the sensitivities of sovereign states in the West. Operating in such a limited way has led the ICC in its first decade to focus its attention almost entirely on African leaders, while looking the other way with respect to geopolitical actors. Liberals conceive of this as progress, doing what can be done, and beneficial to the extent that it apprehends some persons who have been responsible for atrocities and crimes against humanity. Critics of the ICC view it as another venue for the administration of victors' justice and Western moral hegemony that entails a cynical expression of double standards. Both interpretations are plausible. The ICC is currently facing an identity test as to whether it will undertake investigations of alleged Israeli criminality made at the request of Palestine. Its institutional weight is being demonstrated by the degree to which the Israeli leadership reacts with fury, punitive policies, and intense anger directed at the Palestinian Authority for raising such a possibility, and Israel's backlash is supported by the United States.

For centuries there has been recognized the capacity of national courts to act as agents of law enforcement in relation to international wrongdoing. Such a judicial role was long exercised in Western countries in relation to international piracy, which was viewed as a crime against the whole world and hence could be prosecuted anywhere. Such an extension of international criminal law is based on ideas of universal jurisdiction, strengthening the capacity of international society to address serious crimes of state. This kind of approach received great attention in relation to allegations of torture made against the former Chilean dictator, Augusto Pinochet, after he was detained by Britain in response to a 1998 request for extradition by Spain where a court stood ready to prosecute on the basis of indictments already made. After a series of legal proceedings in Britain the House of Lords, acting as the country's highest judicial body, decided that Pinochet should be extradited, but only for torture charges relating to a period after torture became an international crime *within* Britain. In theory, national courts could become much more active in relation to universal jurisdiction if so empowered by parliamentary mandate, but again doing so without challenging geopolitical red lines. When Belgian courts threatened to proceed against Donald Rumsfeld because of his alleged authorization of torture in Iraq, political pressures were mounted by Washington, including even threats to move NATO headquarters. In the end, Belgium backed down by revising its national criminal code so as to make it much more difficult to prosecute

international crimes that occurred outside of Belgium and for which Belgians were not victims or perpetrators.

Civil society has also acted to close the normative gap created by patterns of geopolitical impunity. In the midst of the Vietnam War, motivated by a sense of moral outrage and the paralysis of official institutions when it came to challenging American behavior, Bertrand Russell organized a symbolic legal proceeding that investigated charges of criminality in 1966 and 1967. Prominent intellectuals from around the world who were invited to serve as a jury of conscience heard evidence, issuing their opinion as to law and facts at the end. Inspired by this Russell Tribunal experience, the Permanent Peoples Tribunal was established a decade later by citizens, operating out of Rome, holding sessions on issues where there existed moral outrage, legal prohibitions, and institutional paralysis, symbolically challenging geopolitical impunity. In 2005 there was organized in Istanbul by a dedicated group of female activists an independent tribunal to investigate war crimes charges against British and American political and military leaders, as well as corporate actors associated with the Iraq War. The Iraq War Tribunal relied upon a jury of conscience chaired by Arundhati Roy to pronounce upon the evidence. Of course, such a tribunal can only challenge impunity *symbolically* by influencing public opinion, and possibly through encouraging boycotts and other moves that delegitimize the claimants of power and possibly alter the political climate.

In summary, it is still accurate to observe that geopolitical primacy inhibits the implementation of international criminal law from the perspective of a global rule of law regime that treats equals equally. At the same time, ever since Nuremberg there have been efforts to end the impunity of those guilty of international crimes in war and peace situations and national settings of oppressive rule. These efforts have taken several main forms: 1) the establishment by the UN of ad hoc tribunals with a specific mandate, as with former Yugoslavia and Rwanda; 2) the establishment of a treaty-based international institution, the International Criminal Court, with limited participation and disappointing results to date; 3) reliance on universal jurisdiction to activate national courts to act as agents on behalf of international society with respect to enforcing international criminal law; and 4) the formation of civil society tribunals to assess criminal responsibility of leaders in situations of moral outrage and global settings that render unavailable either inter-governmental or governmental procedures of accountability.

In the end, there is posed a choice. One possibility is go along with the one-eyed efforts of liberal legalists, most notably mainstream NGOs such as Human Rights Watch, silently acknowledging that the rule of law cannot be expected to function in relation to many serious international crimes due to the hierarchical and hegemonic structure of international society. The other possibility is to insist there can be no international justice so long as there exists a regime of “geopolitical impunity”. In both instances, the contribu-

tions of civil society tribunals are needed, both for the sake of symbolic indictment and documentation of wrongdoing, and to acknowledge civil society as the moral and legal conscience of humanity. It must be admitted that only among liberal democracies are such self-critical initiatives of civil society tolerated, although these undertakings are derided and marginalized as the work of a “kangaroo court”. Obama’s refusal to look back at the international crimes alleged against leading members of the Bush presidency is one awkward admission of the limits on legal accountability; such reasoning if generalized would invalidate any concern with past behavior, and hence any notion of accountability for all crimes. In other words, without kangaroo courts there would no courts at all to assess the severe criminality of the most powerful political actors on the world stage.

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The third presentation on this panel was made by James Stewart, Deputy Prosecutor at the International Criminal Court. [Editor’s note: the conference included two participants named James Stewart. The other James Stewart is currently a Law Professor at the University of British Columbia.] Mr. Stewart focused on the question of whether or not the prevention of mass atrocities is a realizable goal of international criminal justice. His notes are excerpted below.

The investigation of mass atrocities and the prosecution and conviction of the perpetrators of such crimes may punish criminals and bring some measure of justice to victims and communities affected by the crimes, but will they deter future crimes? Such a question has pre-occupied the administration of criminal justice – not just international criminal justice – since the beginning.

The framers of the Rome Statute of the International Criminal Court had as a goal the deterrence of mass atrocity crimes. Prevention is an objective expressed in the preamble to the Rome Statute as a reason for the Court’s creation. This goal is to be achieved, under the Rome Statute, through the effective prosecution and punishment of the perpetrators of such crimes.

The ICC was established to “put an end to impunity” and “thus to contribute to the prevention” of genocide, crimes against humanity and war crimes. Future reduction in mass atrocities, however, may be due to factors other than just the punishment of perpetrators, factors such as restoration of peace, better security, increases in prosperity, the development of inclusive political institutions, enhancement of a culture of respect for basic human rights, and so on.

“In my current role as Deputy Prosecutor at the ICC, I must work on the basis that this is a valid assumption and do all I can to help the ICC achieve success. Certainly, effective prosecution of the perpetrators of mass crimes serves a valid purpose – and it may contribute to the evolution of a broader culture of deterrence” —James Stewart (ICC Prosecutor)

The process will be a complex one, and many factors will come into play. It is also a process that may be very difficult to measure with any confidence in the accuracy of any inferences we care to draw. The key factor may be the development of respect for basic human rights the world over and of a global culture of shared values that discourages the commission of mass atrocities. Human civilization is obviously very far from achieving such goals, yet an underlying assumption of international criminal justice, as framed in the Rome Statute of the ICC, is that effective prosecution will contribute to the prevention of war crimes, crimes against humanity and genocide.

In my current role as Deputy Prosecutor at the ICC, I must work on the basis that this is a valid assumption and do all I can to help the ICC achieve success. Certainly, effective prosecution of the perpetrators of mass crimes serves a valid purpose – and it may contribute to the evolution of a broader culture of deterrence.

The massacres that ensued from the fall of Srebrenica in July 1995 occurred after the UN International Criminal Tribunal for the former Yugoslavia was established and functioning. The existence of the ICTY and the possibility of prosecution did not prevent that tragedy from happening.

Yet, after convictions of key actors in the Srebrenica atrocity ; the prosecution of others, including Slobodan Milošević, Radovan Karadzic and Ratko Mladić; and the work of other courts, such as the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, it must now be clear: those responsible for mass atrocities face a far greater risk that they will eventually be called to account for their actions.

This leads me to believe that the investigation, prosecution and conviction of perpetrators will serve to break the cycle of impunity and help deter the commission of future crimes – such is the objective and the hope. Nevertheless, prevention as an objective will be, as I have mentioned, difficult to measure and it will very likely be uneven in its achievement.

And still, it is worth the effort. Certainly, in is in that spirit that we work at the ICC – with the objective of bringing a measure of justice to victims and affected communities, and strengthening respect for human rights and the rule of law.

The Office of the Prosecutor of the ICC pursues the goal of prevention through its own operations and by encouraging national responses to international crimes. The ability to deter crimes will depend upon the success with which the ICC does its work – and I put the focus especially upon the Office of the Prosecutor. We have to put setbacks behind us and build on the successes we are beginning to achieve.

This means that we must accomplish those actions over which we have control with the greatest possible skill and address, and manage as well as we are able, those many factors that are beyond our control but which impinge on our ability to operate effectively. Such factors include the willingness of States Parties to the Rome Statute and others to cooperate with us, behavior we can attempt to influence, but have very limited ability to compel; the security situation on the ground, which presents risks we can manage, but cannot control; and so on.

We can only strive to diminish disadvantages we encounter entering a situation, and to capitalize on opportunities we are able to generate. Successful investigation and prosecution of Rome Statute crimes will be the most obvious and public vindication of the values the Court exists to support.

That said, the whole prevention effort goes well beyond investigation and prosecution, and includes the Preliminary Examination (an information-gathering process to determine issues of jurisdiction and admissibility). Because the ICC is a court of last resort (states have primary responsibility for investigating and prosecuting Rome Statute crimes), one focus of a preliminary examination is to determine whether there are genuine national proceedings in existence that relate to substantially the same case we would bring. Only if national authorities have either proven unable or unwilling to exercise their jurisdiction can the ICC intervene in a situation.

This need to determine whether genuine national proceedings have been undertaken relates to the concept of complementarity of jurisdictions that is a fundamental premise of the Rome Statute. We take what we call “a positive approach to complementarity” in that our jurisdiction is supposed to be complementary to national jurisdictions. Thus, at the preliminary examination stage, we often find ourselves encouraging national authorities to exercise their jurisdiction, and if they do, there is no need for the ICC to intervene.

There are many advantages to an effective local response to mass atrocity crimes: justice is delivered in the community where the crimes occurred, the rule of law and respect for human rights are strengthened at the national level, and the objectives of the Rome Statute system of international criminal justice are advanced. Furthermore, the commitment of states to conduct investigations and prosecutions may itself signal a stronger commitment to the protection of human rights and the prevention of mass atrocities.

(In a paper entitled “[Credible Commitments and the International Criminal Court](#)”, available online Beth Simmons’ website at Harvard University, Simmons and Allison Danner suggest that adherence to the Rome Statute in and of itself may be a signal by a state that it is voluntarily abandoning the option of engaging in unlimited violence, so as to create incentives for other actors to alter their behavior as well.)

There is a belief in many quarters – on the part of civil society in situation countries, human rights NGOs, and even governments – that the mere presence of the ICC in a situation country through the preliminary examination process will have a preventive effect upon potential violence. Our own [Policy Paper on Preliminary Examinations](#) highlights this “positive approach to complementarity” objective.

An example of positive complementarity at work is Guinea. The authorities there are dealing with a politically motivated massacre and other crimes that occurred in September 2009. We have not intervened to investigate, but continue to keep a preliminary examination of the situation open, and this reinforces the ability of the Minister of Justice, I believe, to push forward with the cases as he wishes to do.

Another expressly stated objective of preliminary examinations is prevention. In this respect, the intention of the Office of the Prosecutor is to perform an early warning function, by reacting promptly to information it collects on upsurges in violence and by engaging with states, international organizations and NGOs to verify information about alleged crimes and encourage genuine national proceedings as a preventive measure.

The Prosecutor will occasionally issue public statements in connection with situation countries to caution against violence in the hope that the reminder about possible investigation and prosecution will serve to deter crimes.

There is research being conducted on the preventive impact of the ICC, but my sense of it is that opinion is divided on whether the Court is doing any good – and, in any event, it’s just too early to tell. Anecdotally, it has been said, for example, that the convictions for the use of child soldiers that the ICC Trial Chamber delivered in the *Lubanga* case, arising out of the armed conflict in eastern Democratic Republic of the Congo (DRC), influenced the mass demobilization of child soldiers in faraway Nepal.

On a panel in Switzerland last year, a Member of Parliament from the DRC related that this ICC decision had heightened awareness about the problem of the use of child soldiers in the country and he was adamant that it had had a deterrent effect on the ground.

Recently, there have been some transitions in power, the relative peacefulness of which some say may have been due to the involvement, or potential involvement, of the ICC.

Was the involvement of the ICC in Kenya a factor in the peaceful elections of 2013? Did the possibility that political leaders who instigated electoral violence might be held accountable influence reactions to the results of a closely fought election? Or did the coalition of two political groupings that were previously opposed – sometimes violently so – explain the peaceful election? It is perhaps worth noting that the results of that election were challenged by the opposition, but there was no descent into the street – the challenge was made in court and the decision of the court in Kenya was accepted.

Did potential involvement of the ICC explain the relatively peaceful transition of power in Burkina Faso recently? No one can really say in any of the situations.

There is, of course, the wonderful story reported in the *New Yorker* magazine about Christian militiamen in Central African Republic releasing Muslims they were abducting when a nun told the militiamen that the Muslims were under the protection of the International Criminal Court and, if any harm came to them, the militiamen would be arrested and taken to the Hague.

Such anecdotal evidence offers encouragement respecting the ability of the ICC to have a preventive impact. The challenge, of course, is far greater than one such incident, even if the outcome there was a happy one.

Positive results will generate credibility for both the Prosecutor and the ICC itself. Credibility, based on solid achievements, will allow the Court to have a greater deterrent impact, in my view. We are seeking to achieve these outcomes in a variety of ways, by building better understanding about the Court and its processes, securing better cooperation from States Parties and others, diversifying our evidence collection, subjecting our cases to rigorous internal review so that we present cogent cases that are supported by the evidence and are well thought through legally, engaging in strategic planning in a realistic and pragmatic way, and securing the resources we require to meet the demands placed upon us.

In an often volatile, violent and dangerous world, the ICC offers the promise of an independent, impartial and fair administration of international criminal justice. The ability of international criminal justice to prevent the occurrence of mass atrocities will be imperfect. Reducing mass atrocities, if this can ever be achieved, may be due, as I have said, to factors other than the punishment of perpetrators, such as the development of inclusive political institutions, economic development, and the enhancement of a culture of respect for basic human rights.

Nonetheless, in the effort to end impunity for genocide, crimes against humanity and war crimes, the application of international criminal law will have a vital role to play in the matter of prevention.

DISCUSSION

Picking up from James Stewart’s provocative position on the role of the ICC as an agent of deterrence, our discussion began with a number of participants asking the presenters to elaborate on this issue. Our conversation began with a consideration of whether or not normative pluralism can undermine deterrence.

One respondent indicated that the real question here was not the theoretical challenge of pluralism, but the actual effectiveness of the rule of law. This, he believed, is in part tied to the development of legal norms and their broader acceptance in society through a process he referred to as “social learning.” In the end, “If the norm lacks reality then legitimacy is undermined and capacity is diminished.”

On a more practical level, a number of discussants suggested we should make a distinction between the ad hoc tribunals and the ICC because in the case of the latter complementarity was a negotiated product of the Rome Statute. According to one speaker, the ad hoc tribunals needed primacy over national courts. “In Rwanda it was clear that the Rwandan government had no interest in yielding to the ICTR [International Criminal Tribunal in Rwanda], they wanted to do it all domestically. But they didn’t, nor would they have, surrendered the death penalty without primacy. Similarly, complementarity (without primacy) would have led to the ICTY defeat in former Yugoslavia.”

The conversation then turned to a number of specific cases. One speaker noted that in Kenya “Initially, I understand over 80 percent of the population in Kenya was in favor of the ICC. But the accused who came before the ICC were extremely successful at using nationalism and the memory of colonial atrocity and domination to turn the populace against the ICC.” He continued, noting that, although the Kenyan courts recognized that the ICC is part of the Kenyan legal system, this is not commonly referred to in the mass media, “rather they use the remoteness of the Court to turn people against it thus making it difficult to do effective work...I find a frightening tension between demands placed on [the ICC and] its our ability – especially resource-wise – to deliver... it does create challenges... “Working in any conflict situation is very difficult and this can be seen in the presumed lack of focus of the prosecution in Kenya.” There are other models. For example, the Special Court on Sierra Leone had a very aggressive outreach program built into its work and thus the court won a great deal of support. “We should not be afraid to get out there and talk about we are doing.”

Another speaker insisted that this was not always possible, arguing that “complementarity must also be understood in terms of nationalism – primacy to a national judicial process

often results in minimal punishment or releases the criminal altogether.” His other concern was that real perpetrators often act with impunity because they know they will not be pursued. As an example he invoked the case of William Calley (for the My Lai Massacre), which took place in the midst of the Vietnam War. Although guilty of killing 22 civilians, he was celebrated in the US and served only three years under house arrest before being pardoned by President Nixon. In short, “nationalism is too strong for complementarity to be a positive contribution.”

The same speaker also criticized Israel’s “pseudo investigations and prosecution in the name of complementarity,” arguing that, “complementarity is part of liberal legality – it allows for acceptable dissent to obfuscate what the real distribution of power is in the world.”

“Complementarity is part of liberal legality – it allows for acceptable dissent to obfuscate what the real distribution of power is in the world”
— discussion participant

Others sought to rescue complementarity, either because it reflects the real-world context in which international criminal law functions and may in some cases be productive, or because in specific cases both the Criminal Tribunals and the ICC have had positive impacts on judiciaries at the national level. Among the examples given were the work of the ICTR, which helped improve judicial processes in Rwanda, influenced the elimination of the death penalty, and helped “build capacity” to the extent that many of its cases were transferred to domestic courts. He also believed that the mere threat of intervention had spurred the domestic proceedings in Guinea and Columbia.

The same speaker suggested that the record in Kenya was not entirely dismal. Here the ICC was greatly assisted by the Waki Commission, which gave information and legitimacy to the ICC so that it may take up cases against involved politicians. While it is true that after the rise of William Ruto and Uhuru Kenyatta the ICC was blocked, local civil society attacked, local processes stalled or rolled back, and jurists stifled, this did not entirely negate the work of the court. According to this speaker “we are beginning to learn some very important lessons from Kenya. We need to be clearer about what we are doing. We have an outreach problem. Nationalism was mobilized to exacerbate the distance and thus delegitimize. The Ruto case doesn’t seem to attract the same electricity as the Kenyatta case – we don’t necessarily steal oxygen from civil society, but supply oxygen to it. To be effective you need to trust and you need to work with state mechanisms, culture and politics.”

Continuing, this speaker also suggested that the legacy of the ICC in Uganda was also more ambiguous than some suggest. The crux of the debate is whether the ICC interrupted or undermined local justice processes in the north (including amnesty programs, which some saw as productive), whereas others say that the ICC brought attention and funding to local and traditional judicial practices.

Elaborating on this theme, one speaker brought up the role the ICC plays in supporting non-government actors. “It’s important to human rights activists in the world to know they are not alone – the way they turn to the ICC provides examples – the fact that people turn to the ICC as an ideal may influence how people think about human rights. The ICC can be a moral force and can be pedagogical.”

Another speaker was less sanguine about civil society groups, noting that one sees enormous variability in their roles and actions. In Chile, for example, civil society organizations played a significant role in making leaders criminally accountable for atrocities. In these situations “civil society is an active ally. But if there is a situation, like in Sudan, where the leader for all his criminality continues to enjoy support of established powers in the country, then nationalism precludes civil society.” This in turn obviates the possibility that the ICC will have an impact in those contexts.

Complicating these issues further, another speaker insisted that we distinguish between “laws created on paper and that which arises from political and social mobilization.” He offered the torture debate in the US and the diversity of political and legal actors working together on these issues as an example.

This seemed to serve as a reminder of dynamic civil society groups advancing a human rights agenda that affirmed the value of complementarity, leading to another participant to recall Dr. Arbour’s intervention in 1999: “Now that all NATO members subjected themselves voluntarily to primacy of the ICTY, none seem to have any objections to submitting themselves to the complementarity of the ICC.” In other words, the ICTY led the way for the ICC and thus a rethinking of the relationship between nationalism and international criminal justice.

This speaker offered two specific examples: one is the decision of the ICC to reopen the investigation of the situation in Iraq, including over UK nationals regarding detainee abuse. In response, there have been changes in the British investigation, which apparently has more investigators (non-military) than all of the ICC’s Office of the Prosecutor. Through this investigation they have found thousands of incidents of alleged abuse. If the UK takes this seriously and does a national process, that is a great contribution – and one that only came because of the ICC announcement to look into the issue. Second, Israel does not want to be taken to the ICC. That is why they established an independent

fact-finding commission. It may or may not work and may or may not be genuine, but the possibility is encouraging.

Our final speaker was not convinced that this is a bellwether moment. “This all sounds good – but are they pacifying the possibility of international justice or are they rendering an appropriate response? The devil is in the detail... We must look not only at what the ICC is doing but what it is not doing.”

PANEL II

EMPIRICAL EVIDENCE ON THE FUNCTIONING OF INTERNATIONAL JUSTICE

Diane Orentlicher, “The Impact of the ICTY on Domestic Prosecutions in Bosnia and Serbia”

Bridget Marchesi, “International Criminal Justice: Recent Empirical Studies on the Impact of Justice Mechanisms on Human Rights and Conflict” (paper by Marchesi and Kathryn Sikkink)

Izabela Stefića, “Lessons from Yugoslavia and Rwanda: How International Criminal Tribunals Can Empower Anti-Reform Forces”

Overview: This panel offered three striking examples of the varied forums through which victims of mass atrocities have pursued justice. In the three presentations and the discussions we were asked to consider not just the formal practices of the prosecutors, but the way those actions intersected with a variety of groups pursuing distinct justice agendas. Prof. Orentlicher examined in detail how a human rights system can evolve through ongoing processes of mobilization and supranational prosecutions, and reminded the participants that ICTs, although operating outside of domestic settings, can stimulate transitional justice programs in ways that were unforeseen when the ICTY was created. Aside from providing important and encouraging insights into the overall effects of transitional justice for human rights, Ms. Marchesi’s presentation reminded us that the effects of transitional justice shift significantly over time. She also brought us back to the question of complementarity, insisting that the future of international criminal justice will depend on both formal complementarity and unintended complementarity. By contrast, Dr. Stefića’s findings in the former Yugoslavia and Rwanda reminded participants that ICTs can inadvertently undermine political and democratic reform – at least in the short term. She argued that at the very least we should not assume a positive relationship between ICTs and democratic consolidation.

Diane Orentlicher began this panel with a presentation that sought to shift our focus to practice at the local level. Her work on the ICTY considers what people in the former Yugoslavia who support the ICTY originally hoped it would achieve, and their own assessments of the degree to which their expectations were realized. Based on interviews with Bosniaks, Serbians and Croats (in Bosnia and Serbia, respectively), Prof. Orentlicher found that one of the most significant positive effects of the Tribunal was

an unintended one: the creation of domestic war crimes institutions. Her presentation is excerpted below.

My remarks draw upon on a book I am writing, which explores the impact of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the two countries most affected by its work, Serbia and Bosnia-Herzegovina. To assess impact, one must of course first determine what criteria or benchmarks will be used. In this regard my own work has taken as its starting point the hopes and expectations of citizens of Serbia and Bosnia, so I will begin by noting several dimensions of “impact” individuals from these countries *hoped* would result from the Tribunal’s work, as expressed during interviews I conducted in Bosnia and Serbia over an eight-year period, as well as their perceptions of how well their hopes have been fulfilled. I will devote the rest of my remarks to the ICTY’s impact in one sphere – stimulating domestic prosecutions of wartime atrocities – because I believe this aspect of the Tribunal’s experience offers particularly instructive lessons for the further development of international justice.

“Grafting international procedures and law wholesale into domestic law can compound a post-conflict society’s challenges and diminish local communities’ sense of ownership” —Diane Orentlicher

Among Bosnians I have interviewed – and here, I will focus on the views of Bosniaks in particular – by far the most important goal they said they hoped the ICTY would achieve was providing justice for its own sake. Measured against their original hopes, most Bosnians are *immensely* disappointed in both the quality and quantity of justice that has been dispensed in the Hague. In their view, the ICTY’s sentences are too short; the Tribunal has prosecuted too few defendants; proceedings in the Hague are too complex and take far too long; ICTY judges have done a poor job controlling several high-profile defendants, who have transformed the courtroom into a platform for nationalist propaganda; the ICTY’s work has not stimulated widespread acknowledgement of responsibility for wartime atrocities; and some of the Tribunal’s judgments appear to be politically motivated. Yet every Bosniak I have interviewed has told me he or she was nonetheless glad the ICTY was created because without it, they are convinced, they would have received no justice at all.

Beyond the promise of justice for its own sake, two other, interrelated, expectations were frequently mentioned in my interviews with Bosnians: first, that the ICTY’s judgments would lead members of *other* ethnic groups, including the political and social elite of those groups, to acknowledge the full extent of atrocities committed by members of their group and to condemn them without equivocation; and second, that the Tribunal’s work would foster reconciliation among Bosnia’s major ethnic groups. On both of these counts,

Bosnians are *hugely* disappointed in what has transpired. Many Bosniaks in particular nonetheless attach great value to the wealth of facts and evidence generated by the ICTY, which they hope will lead to greater acknowledgment in the future and which, in the meantime, they value as validation of what so many victims endured.

“We raised the bar of expectations too high. We must manage expectations about what a tribunal can and cannot do.” —Diane Orentlicher

Turning to Serbia, according to numerous opinion surveys the ICTY is deeply unpopular among most of the country’s citizens. But a sturdy minority has supported the Tribunal. Among the reasons for their support, the following loomed especially large in my interviews in Serbia.

First, Serbians who support the ICTY hoped the Tribunal would prevent wholesale impunity for wartime atrocities – and for the most part my Serbian interlocutors believe the ICTY has achieved this goal. Their principal disappointments in this regard are that former Yugoslav President Slobodan Milošević died before his marathon trial was completed, and that a series of controversial verdicts starting with a final judgment in November 2012 exonerated several top suspects on grounds many perceive as politically motivated.

Second, many Serbian supporters of the ICTY believe that, by prosecuting senior Serbian officials like Slobodan Milošević, the Tribunal removed from the political landscape individuals who would have been an unbearable burden for the fragile, democratically elected government that succeeded Milošević. For those who assess international criminal tribunals primarily in terms of consequentialist criteria, this aspect of the ICTY’s record is noteworthy.

Third, Serbian supporters of the ICTY told me they hoped the Tribunal’s work would spur their society to acknowledge that atrocities were committed in its name and to condemn them unequivocally. To these citizens’ profound disappointment, the Tribunal’s work has not dispelled widespread equivocation in Serbia’s public discourse about Serbs’ roles in wartime atrocities. Even so, many hope and believe the ICTY’s archives will provide a foundation for a more robust reckoning in the future.

Despite a litany of disappointments in the ICTY, in my interviews in both Serbia and Bosnia the ICTY received high marks for a contribution it was neither designed nor initially expected to make, but which now counts as one of its most important legacies. It spurred the creation of domestic war crimes institutions in countries of the former Yugoslavia, including Serbia and Bosnia.

In Bosnia, this came about for reasons of expediency rather than enlightened vision. Several years into its work, the ICTY came under mounting pressure to complete its work more efficiently, and its leaders concluded they could do this only by offloading some of their cases to domestic courts. But this could happen only if they had confidence in local courts' capacity to render impartial justice in accordance with international standards. Focusing on Bosnia because the majority of wartime atrocities occurred there, ICTY officials concluded that its judiciary did not yet meet relevant standards, and engaged with other key actors to strengthen Bosnia's domestic capacity. The result of these efforts was the establishment of a state-level war crimes chamber, which began operating ten years ago, and a special department for war crimes within the State Prosecutor's office. International personnel participated in both, as well as in the court's registry, for a transitional period.

Although the ICTY's efforts to develop a credible domestic partner focused on Bosnia, the Tribunal unintentionally helped spur the creation of a domestic war crimes chamber and a war crimes prosecutor's office in Serbia, both of which began operating in 2003. This development was not solely a response to the ICTY; crucial as well was the democratic transition in Serbia following the collapse of the Milošević regime.

Even so, officials who served in the first post-Milošević government say the very existence of the ICTY provided crucial inspiration. In the words of one former official who was involved in creating the Serbian war crimes institutions, the post-Milošević government found the ICTY "very useful" in helping open a space for Serbia to deal with "the burden of war crimes in all its dimensions." The Tribunal's influence had a positive dimension – as the first president of Serbia's war crimes chamber put it, Serbians learned from the Hague Tribunal "as an idea" – as well as a negative dimension: Serbians who otherwise had scant interest in prosecuting wartime atrocities far preferred to see their countrymen prosecuted domestically than before the much-reviled ICTY. While neither Bosnia's nor Serbia's war crimes institutions have performed flawlessly, they are widely seen as one of the ICTY's most significant legacies in both countries.

With a view toward identifying lessons learned from these experiences, let me note a few respects in which the ICTY and the states that support it could have done an even better job stimulating sustainable improvements in domestic prosecutions in the Balkans, as well as elements of the models that emerged in Bosnia and Serbia that are worth emulating.

First, in retrospect it is clear that the international community waited too long to focus on strengthening Bosnia's domestic judicial institutions, and one reason for this was donor states' commitment to the ICTY. Second, I would suggest that the international community should not automatically assume that *national* war crimes laws work best when they copy wholesale provisions in the statute of an international tribunal or borrow uncritically from

such a tribunal's jurisprudence. The experience in Bosnia provides a cautionary tale: Bosnian courts' attempt to follow international jurisprudence with respect to sentencing ultimately led to significant problems involving retroactivity. Grafting the legal framework governing an international court onto domestic law can compound the challenges already faced by many countries' post-conflict judiciaries, and may also diminish local communities' sense of ownership over their country's process of establishing accountability. By equal measure, it is important to acknowledge that judges in both Bosnia and Serbia have found invaluable guidance in several aspects of ICTY jurisprudence, and the Bosnian chamber's judges are proud that they have been able to contribute to the further elaboration of international humanitarian law, and not be solely on the receiving end of jurisprudence enunciated by international courts.

Third, in countries that have faced grave challenges mounting independent war crimes trials, embedding domestic prosecutions in a credible, independent, and public monitoring process can play a vital role in ensuring the effectiveness of those proceedings, particularly when the monitoring process is linked to meaningful incentives. In Serbia, independent monitoring has been performed by a robust civil society organization, the Humanitarian Law Center (HLC), whose work has helped spur Serbia's war crimes institutions to improve their performance.

In Bosnia, the Organization for Security and Cooperation in Europe (OSCE) Mission performed a monitoring role on behalf of the ICTY prosecutor in respect of cases transferred from the Hague to Bosnia. Because the ICTY had the power to recall transferred cases, the OSCE monitoring process was particularly influential during the early years of the Bosnian war crimes chamber's operation, when it focused on cases transferred from the Hague. More recently, with less robust monitoring processes in place, Bosnia's war crimes institutions regressed in some respects. Starting three years ago, for example, those institutions adopted a practice of anonymizing verdicts and indictments, a practice that has more recently been corrected, at least in part. For victims, this was seen as perpetuating a cycle of silence about the grievous crimes they endured.

A fourth lesson is relevant in situations where the international community may decide to support a national war crimes chamber and prosecution office that incorporate international personnel for a transitional period, as happened in Bosnia. Bosnia's experience suggests that it makes more sense to identify benchmarks that should be met before international personnel are fully withdrawn than to fully nationalize personnel in accordance with a rigid, pre-set deadline.

Turning to more affirmative lessons learned, the ICTY's transfer of evidence to prosecutors in Bosnia and Serbia provided an invaluable boost to their early prosecutions in particular, and it is important to anticipate and plan for similar evidence-sharing by the ICC. ICTY investigators gathered crucial evidence that simply would not be available to

Bosnian and Serbian prosecutors if they had not obtained it from the Hague Tribunal. While local conditions in some countries may not allow ICC prosecutors safely to share evidence with domestic prosecutors, the ICTY experience highlights the importance of developing and archiving evidence with a view to maximizing their *eventual* use in domestic proceedings.

Sixth, although capacity-building initiatives form a tiny portion of the ICTY's programmatic activities, the Tribunal has undertaken several initiatives that are worth emulating when feasible and appropriate in light of relevant local conditions. For example, in 2004 the ICTY prosecutor established a transition team to liaise with domestic prosecutors, and in 2009, with EU assistance, she established a liaison prosecutors' program to enhance local prosecutors' access to ICTY evidence while in residence at the Tribunal during six-month rotations. In addition, in 2008 the ICTY established a project to bring interns from the former Yugoslavia to the Hague for six-month periods, followed by an internship in their home institutions. My impression is that the ICC's own internship programs could be more robust with reliable funding – and the ICTY's experience suggests this kind of program is an important investment in the future.

Finally, in situations where a country has experienced horrific atrocities on a massive scale and reached a point where it is feasible for its judiciary to mount credible prosecutions, it is particularly important to encourage domestic prosecutors to: 1) develop an overarching prosecutorial strategy from the outset; 2) communicate that strategy to the public in part with a view to managing expectations; and 3) to stay on track in implementing the strategy. Otherwise, it is all too easy for local prosecutors to be overwhelmed by the sheer volume of potential cases and to focus on low-hanging fruit – cases against direct perpetrators – and frustrate the expectations of many victims.

Despite the limitations to which I have alluded, the process of devolving responsibility for justice from the ICTY to national courts has been, on the whole, a success story. Indeed, it was this process that moved Serbia and Bosnia's post-conflict justice experience beyond the relatively passive experience of international justice into the more enduring space of transitional justice.

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The second presenter on this panel was Bridget Marchesi, who for the past three years has been a core member of a team of researchers collecting new data on all international, foreign and domestic human rights prosecutions as well as data on a multitude of other transitional justice processes. Her presentation is excerpted below.

In the late 2000s, two scholars finished data projects focused on transitional justice. Kathryn Sikkink's team collected data on international, foreign and domestic prosecutions and truth commissions. Sikkink authored *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*. Using her team's data, she empirically shows the emergence and spread of the norm of individual criminal accountability and tests the impact of human rights prosecutions and truth commissions on physical integrity rights. She found that human rights prosecutions improve physical integrity rights under transitional and conflict conditions, and that truth commissions improve physical integrity rights. Leigh Payne and her team authored *Justice in Balance: Comparing Processes, Weighing Efficacy*. They found that combinations of transitional justice mechanisms – domestic prosecutions, truth commissions, and amnesties – improve human rights. They also found that none of the mechanisms have a stand-alone effect – and perhaps the most surprising finding of all – that domestic criminal prosecutions and amnesties, when used together, have a positive impact on physical integrity rights.

In order to build a better database and resolve some of the different findings – which the teams hypothesized were the result of using different definitions, coding procedures and statistical approaches – the two teams formed the Transitional Justice Research Collaborative, which over the last five 5 years has built the most comprehensive publically available database on transitional justice mechanisms in the world.

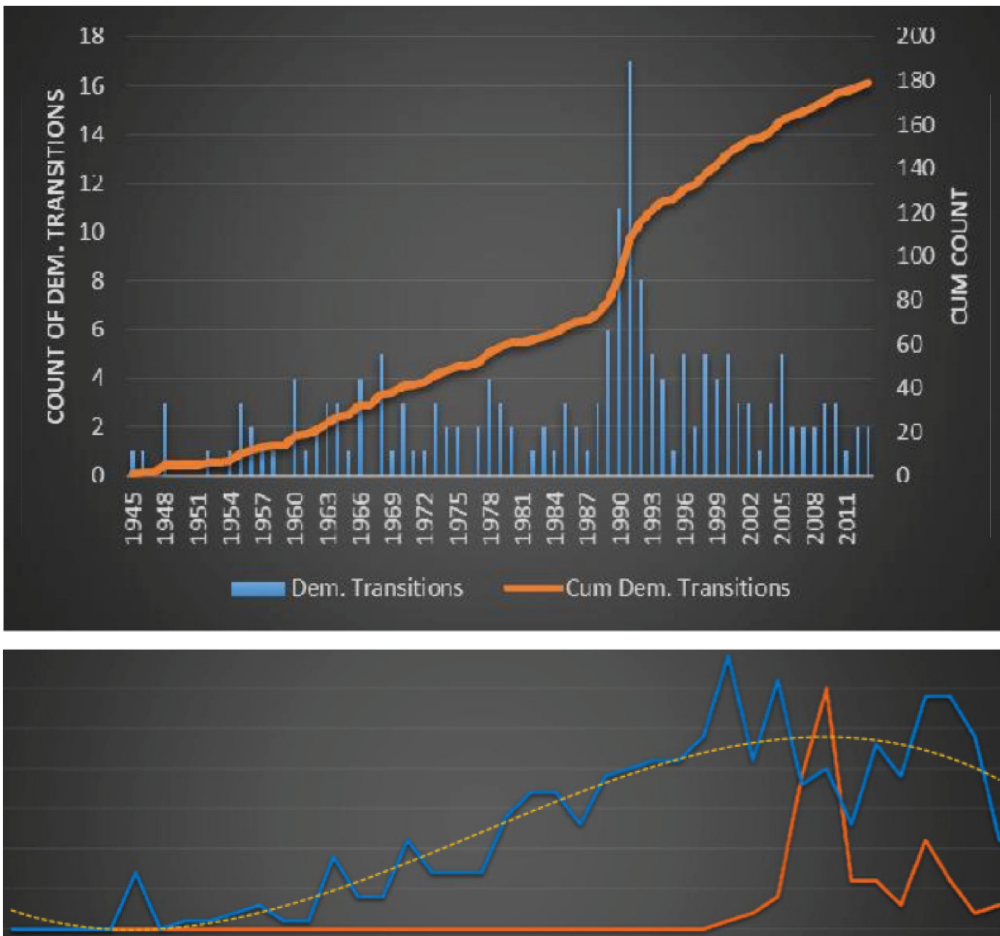
For all mechanisms, they collected highly disaggregated and detailed data. So, for example, they collect data at the level of the trial, capturing data about the different phases of the judicial process, including court-level data. They also collect data at the level of the accused, data about individuals including their membership, their rank, charges and more. They also are counting things differently compared to the predecessor projects. For example, all of the well-known transitional justice data projects and empirical studies – including Post-Conflict Justice data – rely on binary counts for each country year. In the past, researchers asked if any trial started in a given country-year and coded a 1 for yes and a 0 for no. But hiding behind each one of those binary variables are literally hundreds of new human rights prosecutions.

How do these innovations change what we know about human rights prosecutions? Because we code both the process of prosecution – the indictment, the arrest... all the way through to verdicts, sentencing and appeals – we can test the impact of the judicial process and the impact of the sanction separately and together. We find that all prosecutions – those with and without verdicts – positively impact physical integrity rights. We also find that when guilty verdicts are rendered, the magnitude of the impact is bigger. This finding suggests that in some cases – for example, when politically necessary to secure the peace – policymakers might be able to combine judicial processes with alternate sentencing or reduced sanctions.

Perhaps most relevant to this audience, these innovations allow us better to understand how a decentralized but interactive global system of accountability works. For example, using sophisticated statistical techniques, members of our research team show that ICC investigations increase the count of domestic prosecutions for a multitude of human rights crimes including those under the jurisdiction of the ICC but also other human rights crimes such as torture and rape.

One of the significant results of this work simply lies in their ability to detail the extent of new international and transitional domestic criminal prosecutions during the democratic transitions.

Figure 1. Criminal Prosecutions, 1970–2010.



Note: The blue line represents the count of new transitional domestic criminal prosecutions. The dashed yellow line is a smoothed trend line of the blue line. The orange line are new international criminal prosecutions.

The huge peak of international trials in the early 2000s is driven by prosecutions in East Timor and Sierra Leone, and ICTY cases. Another interesting and somewhat illuminating peak occurs in 2007 and 2008. The most recent peak of domestic criminal prosecutions is mainly driven by domestic prosecutions in the Congo and Argentina. Our data confirm what most people know – there are many domestic prosecutions in Argentina – and what most people have overlooked – domestic prosecutions are also taking place in unlikely and unexpected places.

For new transitional domestic criminal prosecutions (DCP), almost half of prosecutions take place in the Americas. This is especially interesting because our data show that the vast majority of amnesties are also adopted in the Americas. Except in a few cases, like Brazil, amnesties have not been an insurmountable barrier to prosecutions.

For new international prosecutions, there is much more activity in Asia than previously thought. Much of this is tied to East Timor, where we used three sources to triangulate data: Special Panels for Serious Crimes, Serious Crimes Unit, and War Crimes Study Center at UC-Berkeley.

We collected data on over 80 new international criminal prosecutions in 2000–2010. These include only the 37 new international criminal prosecutions that occur in 2002–2010, after East Timor was recognized as a sovereign state. Almost all trials in 2002–2010 do not progress beyond indictment.

As for the larger findings, the team found that domestic prosecutions do improve physical integrity rights. The most significant impacts come with the sustained, consistent use of domestic prosecutions over time. There are really no effects in the short or immediate term. We can also distinguish between the effect of the process of prosecution – here operationalized as trials without verdicts – and the punishment – here operationalized as trials with verdicts and trials with guilty verdicts.

The team includes all prosecutions, amnesties, and truth commissions in our models, and our findings suggest that the justice cascade is not being neutralized by amnesty policies or an impunity cascade.

Just as important as what these processes do is what they do not do. This might be the one case in social science where a null finding is exciting! Domestic and international prosecutions do not worsen physical integrity rights – in the short or the long term; and domestic prosecutions actually improve physical integrity rights in the long-term. I'll later discuss their impact on peace but it's the same story. Domestic and international prosecutions are not, as predicted by neo-realists, a destabilizing factor in the post-conflict period.

Controlling for levels of violence and other relevant factors, two other researchers associated with the Collaborative, Geoff Dancy and Florencia Montal, have shown that African states under ICC investigation are more likely to prosecute state agents for past human rights abuses compared to other African states that are in conflict. They call this “unintended complementarity.” It is still unclear as to whether this has a preventative effect, but it certainly has a restorative effect.

Dancy’s research in particular shows that international prosecutions do not have an impact on peace in the short term, but they do in the long term. Amnesties in turn have a positive effect in the short term, but not in the long term. Trials, however, show little positive effect in the short term but a notable effect in the long term.

There are very mixed findings in the literature about the impact of transitional justice mechanisms on peace. The Justice Balance team shows that amnesties have positive impacts on peace. In contrast, the Post-Conflict Justice team shows that amnesties have negative impacts on peace. They find, instead, that prosecutions and restorative measures play a role in preventing conflict recurrence.

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Izabela Steflja, the third presenter on this panel, offered a somewhat more troubling account of the experience of transitional justice in Rwanda and Serbia. Her presentation is excerpted below.

In this presentation I examine the assumed positive relationship between international criminal trials and democratic consolidation via rule of law, judicial independence, and diffusion of democratic norms. I do that by analyzing the relationship between international criminal trials and key domestic factors – mainly, domestic politics and dominant discourses on the ground. In particular, the presentation looks at the International Criminal Tribunal for Former Yugoslavia (ICTY) in Serbia and the International Criminal Tribunal for Rwanda (ICTR) in Rwanda. The research was part of my dissertation fieldwork, which is now a book in progress and concerns on-the-ground perceptions of international criminal tribunals (ICTs).

Understanding the complexities in the relationship between ICTs and democratization is important because in post-conflict countries where mass atrocities and mass violations of human rights occurred political transitions toward democracy are an additional objective to (and equally as important as) ending impunity. Prominent scholars in the field argue that promoting and strengthening democracy is a final goal of transitional justice institutions such as ICTs. In fact, in much of the literature there is an underlying assumption and a normative expectation that ICTs are supportive of democratization,

contributing to institution-building, assisting norm diffusion, and forging the basis for a democratic political order that respects and protects human rights.

“Can courtrooms work as classrooms to teach democratic values? ...The findings show that legal events do not, on their own, create democratic norms rather political and cultural contexts affect the perception of legal events.” —Izabela Steflja

My data indicate that if we look at the relationship between ICTs and key domestic factors, dominant discourses and national politics, in the cases of Serbia and Rwanda we find that in certain ways ICTs can inadvertently empower anti-reform forces and discredit liberal democratic reformers.

The evidence comes from fieldwork that I conducted from 2010 to 2013, which was framed in comparative politics and qualitative methods and involved building up networks and adopting an ethnographic sensibility for the purpose of semi-structured interviews. My interviewees included a diverse set of local actors, such as community leaders and opinion makers ranging from university professors and civil society to military generals and political prisoners.

The central argument is that ICTs interact with domestic perceptions and domestic politics in counterintuitive ways to produce unintended outcomes, including harming local attempts to advance human rights and democratization and empowering ultranationalist and authoritarian anti-reform forces. The comparison of the ICTY in Serbia and the ICTR in Rwanda allows us to address the scope of this argument. Data from two very different cases indicate that the outcomes were similar: the tribunals weakened the support for domestic pro-reform actors and strengthened nationalist and authoritarian actors when a tribunal allied with the opposition, the weaker faction in terms of control of power and security forces, in Serbia, as well as when a tribunal allied with the ruling, stronger, faction in Rwanda.

The study draws attention to powerful discourses at the domestic level, mainly perceptions of injustice and lack of judicial independence, foreign intervention and meddling in politics, and selective global justice. I argue that these real grievances discredited and divided reformist coalitions and created the political space that nationalist and authoritarian factions seized, resulting in serious impediments to political transitions.

First, my data suggest that skepticism about the independence of the ICTY and ICTR judiciaries was prevalent in Serbia and Rwanda, which is problematic as confidence in judicial independence is key in democratization processes. The ICTs failed to establish legitimacy in the eyes of domestic actors because justice was not localized.

Second, my data point to the fact that the perception of norm forcing by external actors was counterproductive, lessening support for domestic reforms that strengthen human rights norms and democratization by antagonizing political coalitions and instigating nationalist and authoritarian backlashes.

Third, local populations argued that international trials were being carried out in a context where state sovereignty and interests of the most powerful states, rather than universal liberal institutionalist norms about the rule of law and respect for human rights, are the dominant forces shaping international institutions. For this reason, interviewees across political spectrums in both cases emphasized that international justice is unequal and unfair, and its selective character makes it not supportive of democratic values and a more just world order.

In Serbia the ICTY process inspired resurgence in defensive nationalism and contributed to the split in the liberal democratic coalition, therefore disrupting attempts at democratic consolidation. While donor aid freezes and selective funding in civil society and media, as well as foreign policies such as the 1999 NATO bombing of Serbia, set the stage for defensive, anti-reform, anti-democratization sentiment, over its 20-year span the ICTY contributed to the elimination and marginalization of the most reformist actors.

First, the tribunal inadvertently provided a propaganda platform for nationalist elites on trial in the Hague while at the same time failing to ensure an effective outreach campaign. All of us here are familiar with the performances put on by Slobodan Milošević, Ratko Mladić, Vojislav Šešelj and others. My interviewees emphasized that the audience perceived the leaders on trial as victims of a plot where a single Serb was being pitted against the world and, even if they did not support that particular leader's domestic and wartime agenda and did not adequately understand ICTY proceedings, they preferred to be in solidarity with a member of their nation over supporting the international community. Many of my interviewees agreed that in its attempt to ensure Šešelj's right to defend himself, the ICTY failed to limit his freedom even in circumstances when he ridiculed judges, publicly exposed witnesses under protection, and destroyed the dignity of the court. This diminished the authority of the international court and transformed it from an instrument of the rule of law into a tool for defensive nationalism and ridicule.

Second, key international actors made cooperation with the ICTY a condition for foreign aid and EU membership which local actors perceived as blackmail, resulting in further popular support for extreme nationalists and reduced support for reformists. Instead of triggering a normative shift toward accountability and democratization, ICTY's push for fast deliverance of alleged war criminals and political transition, combined with threats of international isolation and feelings of blackmail on the ground, meant that the ICTY was successful in obtaining the alleged war criminals but it also meant that the narrative

which identified the ICT as an imperialist institution of selective justice prevailed among right-wing nationalists, many moderates, and left-wing post-colonialists.

Third, the demands of the ICTY threatened not only the political success but the safety of certain reformists, and antagonized reformist coalitions, leading to their break up. My interviewees in Serbia most often pointed to the negative impact the ICTY exerted on the reformist coalition between Serbia's Prime Minister Zoran Djindjić and Yugoslavia's President Vojislav Koštunica (because the two actors and their supporters did not agree on the delivery of Milošević), as well as the assassination of Zoran Djindjić in the aftermath of Slobodan Milošević's delivery to the Hague.

This created a situation where pro-reform politicians wanted to cooperate with the ICTY in order to avoid marginalization from donors and the international community, but they were also concerned with a backlash from the electorate, which largely bought into the defensive narrative. These pro-reform domestic actors thus spent more time balancing the demands of the international community and the electorate than focusing on reforms required for the political transition.

My interviewees in Rwanda repeatedly expressed the belief that ICTR allied with Paul Kagame and his faction in the ruling party, the Rwandan Patriotic Front (RPF), via American and British administrations. Their perception was based on the ICTR decision to try only one party to the conflict – extremists from the former regime – while failing to indict members of the ruling party. Such perceptions suggest that the ICTR inadvertently reaffirmed the Rwandan government's narrative of the civil war and genocide.

Interviewees on different sides of the political spectrum perceived the ICTR as an institution that acted out of Western guilt (for failing to prevent and stop the genocide) and gave international support and legitimacy to the new authoritarian regime, deterring and impairing opposition forces on the ground. This perceived failure of the ICTR did not only upset the families and friends of the Hutu who were the main victims of RPF crimes. My Tutsi interviewees who were in Rwanda before and during the 1990s, who were adults with established careers during the Habyarimana and the Kagame regimes and who survived the genocide, most often argued that the ICTR should have tried everyone accused of any war crime or crime against humanity. A professor who has lived in Rwanda his entire life, was 44 at the time of the genocide, and went to Arusha three times to testify against accused *génocidaires* was truly disappointed with ICTR's decision not to try the RPF. He argued that justice "is not for a category of people, justice is for everyone. You cannot just deal with one side." While ICTR's relationship with the Rwandan regime contributed to the country's political stability (because the tribunal helped eliminate political opposition), this relationship did not significantly alter the human rights record of the authoritarian government. Selective amnesty to the RPF was thus perceived as a dangerous route rather than a good foundation for justice and reconciliation.

My interviewees perceived the ICTR as part of a larger Western coalition of “Friends of the New Rwanda” – that is, post-genocide Rwanda led by Paul Kagame’s government and the RPF party. Among other actors, Friends of the New Rwanda include Bill Clinton and Tony Blair (and the American and British administrations more generally). Sentiments such as “the ICTR is being run by the invisible hand of the US and the UK who feel ashamed for not helping when they should have” were common among interviewees (Interview, December 14, 2011). Thus, similar to my findings in Serbia, my interviewees in Rwanda did not perceive the ICT to be an independent institution grounded in judicial independence and the rule of law, which diminished the tribunal’s function as a foundational pillar in Rwanda’s efforts to democratize.

The comparison of the empirical findings in Serbia and Rwanda allowed me to examine cases where the relationship between international efforts and domestic actors was strikingly different, yet there were certain negative effects on democratic transitions in both countries.

Simply put, in certain and significant ways, international criminal trials may not support democratic transition, at least not in the short term. Thus, we should not assume that there is a positive relationship; instead we should turn to sound empirical research on this subject. The broader take-home lesson is that how international justice affects the domestic balance of powers may contribute to peace and democratic consolidation but may also result in resurgence of interethnic grievances and authoritarianism, with serious implications for political transitions in post-conflict societies.

DISCUSSION

The discussion began with several speakers focusing on the issue of amnesties, in particular picking up on Ms. Marchesi's earlier finding that amnesties are correlated with long-term improvements in civil and political rights and under some conditions can play a role in long-term peace. [Editor's note: Marchesi emphasizes that amnesties are never correlated with improvements in human rights. They do, however, play a role in building and keeping bargains, which is needed for democratic development and peace.] Several speakers agreed that the impact that amnesties have needed considerable research – both in terms of the nature of different types of amnesties and their specific long and short term effects.

Several speakers also picked up on the issue of time-frame, given that all three papers indicated that the impacts of the ICTs need to be measured in both immediate results and the long-term impacts, and that the differences in the papers suggested that there was no clear and single long-term impact. This prompted one participant to suggest that it was too soon to assess the impact of the ICTY.

The panelists did not agree that it was too early to assess the ICTs. Several indicated that short-run impacts were in fact critical, and that the ways in which the work of the ICTY were linked to political and social processes need to be understood. One panelist also suggested that “there are striking parallels between attitudes of Germans right after Nuremburg and the Serbs after the ICTY began operating.” Some noted that there is a difference between the reaction to the institution of Nuremburg and the norms of Nuremberg. While one presenter suggested that Djindjić was assassinated because of his cooperation with the ICTY, another noted that there was a broader context for his assassination – Djindjić was cracking down on organized crime.

The discussion then turned to a question about the extent to which satisfaction with the ICTs or lack thereof are a result of people having unrealistic hopes, or alternatively, was this the product of an ambiguous mandate or ambitious goals.

One panelist thought it was a combination of both, saying “Yes. We raised the bar too high. We must manage expectations about what a tribunal can and cannot do.” As to the rhetoric of transitional justice/international justice raising expectations, she provided a detailed explanation: “Part of disappointment in victims was due to goals and expectations set too high by internationals and other ITC supporters... the ICTY started prosecuting lower-level people, so local populations thought the ICTY would prosecute everyone who is guilty, but, in the end, that wasn't possible.” This speaker added that

justice is seen differently in different contexts, thus “in Bosnia, people really want criminal justice,” whereas other societies have different demands.

The panelists also noted that a great deal of misinformation circulated in these settings about the precise responsibilities of the ICTs – their scope, powers, and mandate, sometimes out of ignorance and sometimes out of malice – and called for more research on this specific subject. One suggested that “social science methods can reveal that different processes regulate different things; they can disaggregate some of the data. For example, showing that trials seem to improve physical integrity rights but not political and civil rights.”

Several participants agreed with this suggestion, but others also believed a much larger implication of these presentations lay in reconsidering the mandates and powers of the ICTs. Some indicated that by their very design they were deeply flawed from the start, while others pointed out that there were profound communication issues. Potential allies were not adequately cultivated, and either a lack of information or conscious distortions played a significant role in undermining the work of ICTs, particularly because of their perceived impositions on national sovereignty.

Our final commentator offered some specific insights to close the discussion. While agreeing that the ICTY did in fact engage in norm coercion, she argued that it played an absolutely critical role as an “international” institution, as local institutions simply had no ability to avoid mistrust at the time the ICTY was created. Another important consideration is “the realities of time frames.” Although the local appetite for justice “is huge, it often has to be delayed for it to happen at all.”

PANEL III

THE POLITICS OF OPPOSITION TO INTERNATIONAL JUSTICE

Rex Brynen, “The Politics of Palestinian Accession to the ICC”

William Schabas, “Victors’ Justice and Double Standards: The Politics of International Justice”

Ali A. Rizvi, “From Root Causes to Reform: The Challenges of Ushering Islam into the 21st Century”

Overview: These presentations offered much insight into the complex challenges of applying the principles of international criminal accountability in highly polarized and politicized settings. Rex Brynen suggested that in spite of the political motivations of the Palestinian state, accession to the ICC could have important and in some ways unintended consequences. William Schabas concurred, and instead of warning against the dangers of the ICC intervening in the Gaza crisis suggested that a full-throttled approach could be a path to much greater global legitimacy for the ICC. Ali Rizvi complicated these matters further, reminding us of the challenges and opportunities for human rights within highly repressive societies where such concepts are often derided by powerful actors as foreign impositions.

Rex Brynen began this panel with a presentation on the issue of Palestine and the ICC. According to Prof. Brynen, Palestinians have all but given up hope on direct negotiations or US-backed negotiations with Israel, an assumption validated by the re-election of Benjamin Netanyahu. This in part informs the efforts by representatives of the Palestinian state to secure accession to the ICC.

Palestine gained observer status at the International Criminal Court (ICC) in 2014, and on April 1, 2015, it formally became the newest state party to the ICC treaty. Palestine “accidentally” joined UNESCO but by and large they have avoided joining international organizations, and have tried to avoid this kind of conflict. In this case, they have decided there is no alternative.

According to Brynen, the Palestinian Authority (PA) is arguably “trying to use the ICC as an instrument of conflict resolution rather than accountability.” Because of “the profound frustration on the side of the Palestinian Authority to try and change Israel’s behavior,

Palestinians are strategically committed to using the ICC.” Palestine has two goals: 1) to change Israel’s military conduct and 2) to cease the ongoing transfer of population of Israel (there are three times more Israelis in the Occupied Territories since the peace process began in 1990s).

Prof. Brynen also indicated that accession to the ICC may be linked to PA leader Mahmoud Abbas’s efforts to discredit Hamas, but said this interpretation was complicated by the fact that Hamas itself has to approve the decision of Palestine to join the ICC. Although he offered no firm conclusions about Abbas’ motivations, he did suggest that the PA leadership might have underestimated the implications of the Rome Statute and their own culpability, or that they believed they would be protected by the principle of proportionality.

“What are the pre-existing structural conditions? What are the framing effects? What people think about international tribunals is affected not only by international tribunals but rather lots of other conditions. There are genuine tensions!” — Rex Brynen

There have been significant political and economic consequences as a result of the ICC referral, such as “unprecedented economic coercion and Palestinian Authority public employees getting only 40 percent of their salary,” according to Brynen. He noted that this is quite worrisome and “could be a model of trying to prevent even Rome Statute signatories from pursuing global justice.” Israel’s response has been to attempt to delegitimize the court and encourage a new wave of aggressive anti-ICC language in the US, argued Prof. Brynen. Western critics of the ICC on the Israel case will only add to the claims that the ICC practices selective justice.

All of this, indicates Brynen, could provoke an internal political crisis down the road. While the ICC might gain greater international legitimacy for going after Israel (and not yet another African case), he fears that the court will become caught in a political quagmire if it indicts anyone in Israel. “I think all hell will break loose if the ICC gets past the point of investigation to indictment,” he argued.

These matters are complicated by the fact that in both the issue of the settlements and the actions of the Israel Defence Forces (IDF), it is not the facts but the legality of the facts that are in dispute. Are the settlements a violation of international humanitarian law? As for the IDF, given the care with which the force takes to avoid civilian casualties, and the fact that there are domestic processes in place to pursue atrocities, Prof. Brynen thought it highly unlikely that the fact pattern alone would lead to prosecutions.

According to Brynen, the most sensitive issue is settlement. An ICC finding that Israel was in violation of international humanitarian law, when combined with the ICJ ruling and mass public opinion, would become a major global issue. “Settlement policy is incontrovertibly a violation of international humanitarian law... so if this is found to be a war crime the indictment would be of the prime minister himself.” [Editor’s note: the reference is to the [ICJ’s July 2004 Advisory Opinion on Israel’s construction of a wall/barrier around settlements on Occupied Palestinian Territory](#).] Prof. Brynen predicted that this would provoke great defensiveness on the part of Israel, which would point to double standards in the world of international criminal justice as a whole. Israel would argue that “there are a quarter million dead people in Syria and you are indicting us for building a playground outside Ramallah?” Even worse, there could be an attack on the ICC as an existential threat to Jewish people and mobilization within the Jewish diaspora to defend itself. Again, Brynen pointed out that there was a lot of attention being paid to this issue in the US, and predicted that this political contest would overshadow all other ICC issues.

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William Schabas picked up on a number of similar themes in his presentation. He began by explaining that he chose to use the term “victor’s justice” in the title to provoke and to underscore that one side was being prosecuted but the others were not. This form of selective prosecution “is a political decision... a decision by political creators of international military tribunals not to prosecute their own side.” According to Prof. Schabas, “we have lots of evidence that prosecutors at Nuremberg took instruction from their governments.”

The same is true of the international criminal tribunals, which have always been political in the way they were established as well as in their methods, according to Schabas. The ICTY’s jurisdiction was also designated by political forces. The prosecutor was more independent, but selected by governments every four years and faced constraints. The ICC was supposed to be the perfect non-political court. But on what basis are decisions made? Complementarity and gravity, two concepts that play an important role in the selection of cases at the ICC, are concepts that are often defined according to political criteria. In short, “there is a rhetoric of objectivity but that’s not true.” He offered two examples of inaction: the UK in Iraq, and [Israel in] Palestine. In both cases the first ICC prosecutor (Luis Ocampo) did not take up the case but the second prosecutor chose to take it up. Based on evidence from Wikileaks, “we know Ocampo told US officials that he wouldn’t pursue them in Iraq.”

He continued: “I don’t like either of those decisions of the first prosecutor. The problem with the ICC is that when we look at situations, all seem justifiable, but when look at the

pattern it is unjustifiable.” According to Prof. Schabas, the pattern is political calculation embedded in a public denial of this fact. “The prosecutor should not be concerned with whether the people will be mad...I accept that there is an element of political judgment in all of this. We should not deny it, and just confront it...”

“The problem with ICC is that when we look at situations, all seem justifiable, but when we look at the pattern, it is unjustifiable.”
— William Schabas

In calling for a direct engagement between the political realities of the Court and the Court’s place within the geopolitics of the world, Schabas argued that “the ICC shouldn’t be afraid of geopolitics but say ‘we’ve spent a decade going after the weak, and we should now try to take a bite out of the powerful.’” Echoing the concerns raised by Prof. Falk earlier in the day, he insisted: “Don’t be afraid of the hard cases – this is what will mobilize legitimacy. Justice for the powerful as well as the weak.”

Turning his attention to the Palestinian case, he argued that there will be considerable resistance from the US and Israel should the Palestinian case be taken up by the ICC, but that the rest of the world will see it as a positive step. Global leaders will say “Ah, that’s the Court we’ve always wanted!” Such a move to confront geopolitical power will build legitimacy for the ICC.

By way of conclusion, Prof. Schabas offered an analogy to the ICJ. Its first contentious case, in 1949, led to the decision that the UK violated the sovereignty of Albania and this built legitimacy for the ICJ. During the following decade the ICJ was swamped with work, a trend that slowed only after it issued a judgment in support of South Africa and “all around the world states decided they couldn’t trust the ICJ, and courts decided they couldn’t trust ICJ.” Not until 1986 was this trend reversed, when the ICJ ruled against the US in favor of Nicaragua. “There needs to be trust in the court and then there will be legitimacy,” said Schabas. Once the teams on both sides trusted the court at ICJ “there was confidence that it is a fair court to get justice.”

“We’ve spent a decade going after the weak, and we should now try to take a bite out of the powerful. Don’t be afraid of the hard cases – this is what will mobilize legitimacy. Justice for the powerful as well as the weak.” — William Schabas

Concluding that this was a model for the ICC, he suggested that “the ICC has had a disappointing performance in its first decade, for a number of reasons. Now it’s not

sparking as it should...not dealing with burning issues of the day... I think that what will save it will be taking on some of these hard cases.”

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The final presentation on this panel, by Ali Rizvi, took the discussion in a different direction. Dr. Rizvi offered a series of comments on the waves of violence in the Middle East that inform the larger concerns of the conference. His presentation is excerpted below.

I was raised in a Muslim family, in the Muslim cultures of three different countries – Libya, Saudi Arabia, and Pakistan. I grew up in Riyadh, Saudi Arabia, a US ally with almost unconditional Western support, living there for close to twelve years. This land is the birthplace of Islam, its Prophet Muhammad, and its holy book, the Quran, elements that are revered universally by all 1.6 billion Muslims in the world, regardless of sect or denomination. The monarch holds the title “Custodian of the Two Holy Mosques,” referring to the two holiest sites in Islam, Mecca and Medina. It is the land that Muslims all over the world face when praying five times a day.

As I grew up there, I felt that something wasn’t right. To this day, Saudi Arabia carries out public beheadings. In Riyadh, this is done at a public square that we expatriates referred to as “Chop-Chop Square.” For perspective, in the same month that the world was reeling with shock at the beheading of James Foley at the hands of ISIS – August 2014 – Saudi Arabia beheaded 19 people, including some for the crimes of sorcery and smuggling cannabis.

The Saudi government, claiming the Quran and Sunnah (traditions of the Prophet Muhammad) as its constitution, also amputates the limbs of those charged with theft. Religious minorities are not allowed to practice their religion. The women in the country suffer some of the most egregious human rights abuses of any in the world. They are banned from driving. They require the permission of a male guardian simply to work or travel. Victims of rape are often charged with fornication or adultery and sentenced to flogging if unable to produce four male witnesses to “prove” the crime.

To my disappointment, I found endorsement for almost all of the Saudis’ actions in the Quran – the beheading of disbelievers in Verse 8:12; the amputation of hands for theft in 5:38; the practice of fighting Christians and Jews until they either convert or pay the jizyah tax – as ISIS does in Mosul, Iraq – in 9:29-30; domestic violence in 4:34; and so on. I was dismayed. When I asked my elders to explain this, they seemed just as taken aback as I did. As it turns out, very few of the moderate Muslims I knew had even read the holy book. That did not, however, stop them from trying their best to defend it. They would tell me not to read it “literally.” They questioned the authenticity of the translations,

despite being shown several of them. They would explain that the fundamentalists were misinterpreting it, or taking it “out of context,” yet were at a loss to explain what the correct interpretation or context was. They would insist that any inaccuracy or flaw was somehow a metaphor for something more palatable.

So, like many people living in the countries I grew up in, I lost my faith. I became an apostate. As many of you may know, this simple declaration – that I’ve changed my mind – is not one I could make in Saudi Arabia or Pakistan as easily as I just made it here. I saw my parents’ religion’s scripture being used to justify everything from child marriages to the lashing of rape victims who could not produce four male witnesses to prove the crime. And the biggest victims of all this were Muslims themselves. It wasn’t just me – there were many like me who wanted to speak up about these issues – but couldn’t. I promised myself that when I was in a country where I had the freedom to speak, I would.

I arrived in North America permanently in my twenties. Two years after I settled in Toronto with my family, the September 11 attacks happened. Suddenly, the conversation I had been having with myself for years was out in the open. The Internet was now here, and soon enough, everyone had a voice. This is where I found myself caught between two narratives, neither of which I could relate to.

The first was driven by anti-Muslim bigotry, what I call the “Fox News narrative”: all Muslims were closet terrorist sympathizers, we must implement stricter immigration policies to keep them out, and we must profile people with brown skin. These brown-skinned people, of course, included myself and much of my family and friends – never mind that the underwear bomber was black, Jose Padilla was Hispanic, and the Boston bombers came from the Caucasus mountains, which is literally where the word “Caucasian” is derived from. Most of those spewing out this prejudice happened to be very religious, right-wing Christians and Jews, which didn’t give them much credibility in my eyes. I had read their books as well, and they didn’t seem much different from mine.

The second narrative, somewhat more disappointing to me personally, was from the liberal left, which I consider myself in alignment with. This was the narrative of apologism, where any criticism of Islam was conflated with bigotry. Criticizing Islamic beliefs or the contents of the Quran would promptly earn one the label of “racist,” “Islamophobe,” and in my case, “sellout” or “Uncle Tom.” Many liberals also seemed to excuse the atrocities committed in the name of Islam as some kind of reaction to Western imperialism or US foreign policy. Of course, they weren’t completely wrong – the causes of unrest in the Muslim world are complicated and varied – but I also knew first-hand that claiming these deeply held religious beliefs had nothing to do with the behavior they clearly engendered was disingenuous at best, and at worst gave cover to the fundamentalists, even if inadvertently. Fundamentalists in Muslim-majority countries thrive on this narrative. Often, it’s the only good thing they have going for them.

This was my conflict – I wanted to be able to criticize Islam as one should be able to criticize any set of ideas – but I didn’t want to be seen to demonize an entire people – the people I was raised by and grew up with. Neither narrative made this distinction between ideas and people. It is crucial to emphasize the difference between the criticism of Islam and anti-Muslim bigotry: the first targets an ideology, and the second targets human beings. This is obviously a very significant difference, yet both are frequently lumped under the unfortunate umbrella term, “Islamophobia.”

Here’s the thing: human beings have rights and are entitled to respect. Ideas, beliefs, and books don’t and aren’t. The right to believe what one wants to believe is sacred; the beliefs themselves aren’t. If anything, it was precisely *because* of the horrific abuses I had witnessed ordinary Muslims suffer under theocratic policies and Sharia law that I wanted to start a dialogue to help shatter the taboo of criticizing religion.

Now, we’re not going to be able to resolve the problem of bringing about a reformation in the Muslim world in this 15-minute time slot. But my message to you is this: There are many, many out there with stories similar to mine. There is an alternative narrative reverberating within these Muslim-majority countries that is quite different from the one we get here after it’s been filtered through their state-endorsed blasphemy laws and speech restrictions. Unfortunately, we don’t hear them – because most are silenced before they get to us.

A lot of them identify as liberals, yet feel betrayed by their Western liberal counterparts, who, sometimes for fear of being seen as Islamophobic (what I call “Islamophobia-phobia”) will overlook great *illiberal* injustices like the subjugation of women, or discrimination against gays, the moment they are endorsed in a holy book. Then, it’s hands off – because it is part of “their” religion, or “their” culture, which simply must be respected at all costs. “They” are held to a different standard – what is known as the soft bigotry of low expectations.

My good friend, Raif Badawi, is currently in a prison in Jeddah, Saudi Arabia. He has been sentenced to ten years’ imprisonment and 1,000 lashes, the first 50 of which he received in January, just three days before the Saudi ambassador to France attended the free speech rally in Paris after the *Charlie Hebdo* attacks. His crime, as many of you know, is blogging – the official charges were “adopting liberal thought,” “starting a liberal website,” and “insulting Islam.” Now, he is possibly facing death by beheading for apostasy.

President Obama did not bring up Raif Badawi’s case in his last visit to Saudi Arabia. Prime Minister Harper – who has constantly been railing against the *niqab* and Islamist extremism – has been silent about Raif’s case despite the fact that his wife and children are living right here in Canada and campaigning tirelessly for his release.

This isn't an issue that will be solved militarily. Each time one militant group is defeated, another emerges that is even more brutal, exploiting a new set of grievances to expand its recruiting power. This is not a regional problem anymore, as evidenced by the Western passports held by thousands of ISIS members. This is also an ideological battle. We can keep trimming the branches, but there is an underlying ideology that has always been at the heart of it. We saw it two centuries ago in Jefferson's Barbary wars. And we still see it today with ISIS.

DISCUSSION

The discussion began with some speculation about the potential African responses to the Palestine/Israel question. Would Israel be able to capitalize on anti-ICC sentiment in Africa? In addition to problems with US, Canada, Australia, would this not be very problematic?

One commenter suggested that because the Court is in the UN system, we can assume a poisonous environment around Israel. It's sui generis. It's not like taking on the UK or the US. He said "I do not think that Israel is a good case to take because the consequences can be very severe even if it may be legally necessary. For that reason, the UK in Iraq may be a better situation – it would have a very visible effect on the wheels of justice opportunity."

Another sought to challenge both Schabas and Brynen on the issues of politics and the ICC, saying "it appears that the more one tries to be transparent, the more one is accused of hiding something." The speaker reiterated that one of the ICC's key considerations in determining whether to take up a case is: "what is a reasonable prospect of conviction?" According to this speaker, that is why Chief Prosecutor Fatou Bensouda decided not to continue to prosecute Kenyatta, and in his estimation this is largely how case selection in the ICC worked.

This speaker also insisted that, while "a lot of noise is made against the ICC in Africa, (it also) gets lots of support, though it is quieter." He specifically noted Senegal. "There's a lot more support in civil society and also among governments than one might think, when listening to certain state governments..." Other speakers reiterated that there is significant support for the ICC in Africa, particularly in cases where the Court provides clear information about atrocities.

From here, the discussion shifted to a focus on whether or not the Palestinians were in fact attempting to use the ICC to resolve the conflict with Israel. One speaker said that indeed, the Palestinians were hoping that an ICC decision on settlements could shift the paradigm away from the way it has been handled for the last 20 years – and that this is a strategic calculus. The use of the ICC is a strategy to put pressure on the normative justification of settlements politically. So although the facts of settlements are clear, the law is unclear. This differs with Gaza, where the intervention was much less clear but the law is clearer.

One participant raised the question of selectivity and whether or not it had stained the ICC. A panelist had the final word on this. "The cases come when the cases come. It's not

possible to choose small cases now and big cases later. But it is important to note that for some people, the ICC is seen as the only institution to uphold international law – the only possibility for redress.” He laughed noting that, when the institution itself feels like it is crumbling, the hopes of these aggrieved people who believe that the ICC can bring justice, “may be comfort when bricks are falling on you.”

PANEL IV

CHALLENGES OF ENFORCING INTERNATIONAL JUSTICE

Castro Wesamba, “Africa and Challenges of International Criminal Justice”

Tim McCormack, “The Challenges of Applying Article 8 of the Rome Statute”

Hyeran Jo and Beth A. Simmons, “Can the International Criminal Court Deter Atrocity?”

Sheri Rosenberg, “The Audacity of Hope: Mass Atrocities, International Justice and Prevention”

Overview: This panel offered four different but quite positive assessments of the challenges and opportunities opened by the International Criminal Court. Castro Wesamba reminded participants that the ICC and ICTs have found significant constituencies in Africa, and are not simply viewed as external impositions on sovereignty. His comments were reinforced by the longitudinal study undertaken by Hyeran Jo and Beth Simmons, which suggests these institutions have played a far stronger deterrent effect than most assume. Tim McCormack brought a close reading to Article 8, suggesting that some of the more challenging problems that the ICC has faced in terms of prosecutorial decisions could be resolved more easily than we might think. Last, Sheri Rosenberg reminded us of the important role that atrocity prevention should play in our deliberations, and suggested that a more robust, rather than a more cautious approach to these issues was merited.

The first panelist, Castro Wesamba, who spoke on behalf of the United Nations Special Office on the Prevention of Genocide, began by contextualizing the problem as he sees it. His remarks are excerpted below.

There is no doubt that the African continent has a long history of atrocity crimes – from the time of colonialism, through the periods of dictatorial regimes in one-party states, such as so-called Red Terror in Ethiopia, Idi Amin’s regime in Uganda in the 1970s and Sani Abacha’s brutal regime in Nigeria in the 1990s.

The advent of multi-party politics in the 1990s ushered in new challenges, one of them being how to deal with a proliferation of armed non-state actors in many countries, mostly posing as rebel movements. These armed groups, acting independently or sometimes

with the complicity of the state, committed serious abuses of human rights, some of which could constitute atrocity crimes. This phenomenon has continued to pose a challenge. For example, we are all familiar with the crimes committed by the Lord's Resistance Army, commonly known as the LRA, in northern Uganda, as well as those committed by rebel movements in the Democratic Republic of Congo, and the liberation movements and militia groups in the Sudan, among others.

Most notorious of the atrocities committed on the continent is of course the 1994 Rwanda genocide, in which over 800,000 people, mostly of them Tutsis, were exterminated. The effects of the Rwanda genocide are still being felt to today in the Great Lakes region, especially in the eastern part of the Democratic Republic of Congo, where rebel groups, militia and other armed elements continue to commit serious violations and abuses against the civilian population, including sexual violence against women and children.

For too long, the world simply looked the other way while generation after generation of Africans had their lives cut short by violence. Impunity for this violence has reigned on the continent, as authoritarian leaders and warlords killed without repercussions or accountability. Informed by this culture of impunity, ordinary Africans had to press their leadership to create institutions that would safeguard human rights, protect hard-won freedoms and deal with the dragon of impunity at regional and national levels.

At the continental level, African citizens were very critical of the Organization of African Unity, which was increasingly viewed as a club of some old folks who just met and chest-thumped about everything and about nothing. The organization was not keeping up with the aspirations of the people on the continent. Africans could not just accept that they would continue to be brutalized and exploited by their own leadership without anyone on the continent lifting a finger and without recourse to justice.

Eventually, there was a paradigm shift on the continent from the Organization of African Unity's position of "non-interference" in the internal affairs of its member states to a principle of "non-indifference" to the suffering of one another. This led to the creation of a successor organization to the Organization of African Unity – the African Union – whose aspirations are supposed to be driven by the people and not just by the political leaders on the continent.

This was followed by the African Charter on Human and Peoples Rights, the Constitutive Act of the African Union and the African Charter on Democracy, Elections and Governance, among others. These instruments are ground breaking in many ways. They not only reflect universal values already enshrined in various international instruments but they also demonstrate the willingness of African countries to reaffirm the right of African people to enjoy fundamental human rights and freedoms within the African setting.

“The African Court on Human and People’s Rights not only reflects international law but also the willingness of Africa to address forms of justice... This includes the right of a state of the African Union to intervene if there are atrocity crimes against populations.” —Castro Wesamba

In fact, it can be observed that in 2000 the African Union was a pacesetter in codifying the obligation to prevent and protect populations from the serious crimes of genocide, war crimes and crimes against humanity. Later, at the 2005 United Nations World Summit, world leaders committed themselves to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This principle is commonly referred to as the Responsibility to Protect principle.

The negotiations and eventual adoption of the Rome Statute establishing the International Criminal Court perhaps stand out as one of Africa’s major contributions to the development of international law and international criminal law in particular. Not only are the highest number of States Parties to the ICC from the African continent, but the continent continues to serve as a critical partner of the Court.

Twelve years after the Rome Statute that established the Court came into force, all its investigations have been in Africa and all defendants in custody are African. This has led to the accusation against the ICC that it is biased against Africa. Although such an accusation does not bear scrutiny, it is easy to see why there is a perception of bias in light of the fact that all of the eight situations currently before the Court concern Africa. This perception poses, to some extent, a challenge to the progress that had been made so far in international criminal justice on the continent.

As one leading African scholar, Lyal Sunga, recently asked, “Has the ICC unfairly targeted Africa or has Africa unfairly targeted the ICC?”

On May 27, 2013, the African Union expressed its concern over what it referred to as the “misuse” of indictments against African leaders, while Ethiopia’s Prime Minister Hailemariam Desalegn accused ICC investigations of conducting some kind of “race-hunting”. The African Union went ahead with the adoption of a declaration urging its members not to cooperate with the ICC until demands they had made were heeded, including the demands to drop charges against President Omar el Bashir of Sudan and to defer the cases against President Uhuru Kenyatta of Kenya and his deputy William Ruto.

In spite of the criticism of the ICC by some African leaders, the ongoing situations of serious violations and abuses of human rights and humanitarian law in the Central African Republic, Eastern Democratic Republic of Congo, South Sudan and Sudan (Darfur,

Southern Kordofan and Blue Nile) are evidence of the challenges that the continent continues to confront. In fact, even after the African Union's declaration on non-cooperation with the Court, we have seen requests by African states for investigations, including by the Central African Republic and Ivory Coast. This is a testimony both to the complex politics of the region and to a genuine commitment to international criminal justice.

At the same time as we support the work of the ICC, we continue to support the development of appropriate national and regional mechanisms to investigate and prosecute serious crimes. Our Office has been working closely with the African Union's first Commission of Inquiry, which was established last year to investigate the causes of the violence, serious violations and abuses as well as making recommendations on accountability, including criminal accountability in South Sudan. We have also been working with various partners to support the national authorities in the Central African Republic to establish judicial mechanisms to address the long-standing impunity there.

If competent national, regional or international courts succeed in prosecuting individuals for the ongoing atrocities in this country, would the narrative that such prosecutions constitute a sort of conspiracy on the part of Western countries against Africans persist?

My boss, Special Advisor Adama Dieng, has always posed the following question – and I quote: “We may take issue with the selective prosecution policy of the ICC, but... are we going to say that to avoid the judicial activism of the North we prefer to put up with the impunity of our criminals?”

Would the suffering of a victim of mass rape in any part of Africa be lessened by knowing that women are being equally brutalized elsewhere in the world? As the Chief Prosecutor of the ICC Fatou Bensouda pointed out, “You say that the ICC is targeting Africans, but all of the victims in our cases in Africa are African victims.” This is the reality that we cannot run away from.

In June 2014 at the 23rd Summit of the African Union, in Malabo, Equatorial Guinea, the heads of State and Government significantly adopted an additional protocol to expand the jurisdiction of the African Court of Justice and Human Rights to include the crime of genocide, war crimes and crimes against humanity (atrocity crimes) – which are part of the Rome Statute of the International Criminal Court.

They also went a step further and expanded the list of crimes beyond the four crimes that fall within the jurisdiction of the ICC. The Protocol covers an additional ten crimes that are of serious concern to the African continent, namely: Unconstitutional change of government; Piracy; Terrorism; Mercenarism; Corruption; Money laundering; Trafficking in person; Trafficking in drugs, Trafficking in hazardous wastes; and Illicit exploitation of natural resources.

While many of us were outraged about what we saw as African leaders voting to protect themselves from prosecution by including language on immunity in the African Court protocol, we should acknowledge that they also broke new legal ground in international criminal justice by adopting a holistic approach to the prosecution of serious crimes. Of course, we cannot support immunity from prosecution of any perpetrator of atrocity crimes but, at the same time, it would be a mistake to turn our backs on those Africans who have worked very hard to see codification of these crimes and are committed to fight for justice on the continent because of the Article on immunity. Some observers on the continent who are closely associated with this process think that to do so would be like throwing out the baby with the bath water.

They have expressed optimism about the Court on several grounds. First, they argue that it will take time before the Protocol takes effect. At the moment, only three or four countries that have signed onto it. The protocol requires 12 signatories before it comes into effect. There are continued consultations on Article 41, the article that grants immunity to sitting heads of State and Government and other senior government officials. There is some hope that an amendment will be made to the article, particularly if we take into consideration the nature of the additional ten crimes covered by the Court – it would be almost unimaginable to protect from prosecution a senior government official suspected of terrorism, drug trafficking or money laundering. The inclusion of these additional crimes could provide the opportunity to amend the immunity clause in the protocol.

Second, the immunity clause violates international and national obligations. As a result, many national courts or legislative assemblies will find the Article inconsistent with domestic law and hence would not be able to implement the Protocol in its current form. And even if the immunity clause were applied, it would only provide immunity to those in office and would not stop any competent body or institution from investigating government officials after they have left office.

Finally, in response to the criticism that such a court would undermine the ICC and the existing international legal regime, many legal scholars on the continent argue that the relationship between the African Court and the ICC is not necessarily conflictual. They argue that complementarity and judicial cooperation is well provided for in the protocol, including judicial cooperation with the ICC and the International Court of Justice.

But let us not be under any illusions that the African Court will be set up in the near future, anyway. Putting in place a credible criminal justice system is a daunting task. It takes immense resources, planning and organization, which the continent may not fully possess. The success of these institutions no doubt hinges on the support and collaboration of the international community. We all want to see Africa and Africans take responsibility for their issues. The mantra of “African solutions to African problems” sounds good to the

ear, but Africa cannot afford to exclude her international partners on this journey ; we have to continue our collaboration within the existing international framework.

On this basis, Special Adviser Adama Dieng has called on the international community several times, including in this forum, to nurture and support regional institutions created to further international law in Africa. Our Office strongly believes that it is only through empowering these institutions, submitting to their jurisdiction and respecting and carrying out their decisions that they can meaningfully contribute to the articulation of their founding ideals. Empowering institutions like the African Court of Justice and Human Rights and sub-regional courts will not only reaffirm the importance and role of international law in Africa ; it will also demonstrate the commitment and belief of Africans to a global order based on justice, equality and respect of international human rights values.

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The next presentation, by Tim McCormack, took a narrower approach to one of the critical problems faced by the ICC, the application of Article 8 of the Rome Statute (this is the Statute outlining War Crimes). Prof. McCormack asserted that that international humanitarian law (IHL) and war crimes are both bound by Article 8 and the ICC is bound by the terms of the statute and must always prove that a conflict is either an international conflict or a non-international conflict. The two cases for intervention are laid out in the table below.

Table 1. Two Cases for Intervention, under Article 8 of the Rome Statute.

International Armed Conflict	Non-International Armed Conflict
Article 8 (2) (a) (1-8) Grave breaches of the Geneva Convention	Article 8 (2) (c) (1-4) Severe violations of article 3 to the Geneva convention
Article 8 (2) (b) (1-26) Other severe violations of laws and customs applicable to international armed conflict	Article 8 (2) (e) (1 – 15) Other severe violations of the law and customs of war applicable on non-international armed conflict

According to McCormick, the distinction between international and non-international armed conflicts is accepted by all parties and is codified under Article 8. The problem is that in the case of non-international conflicts, one can perpetrate substantial Human Rights Violations without violating Section 8 as long as these violations are inflicted in pursuit of legitimate military goals, while with international conflicts these violations can place a party in violation of Section 8 independent of military goals.

This creates uneven and unequal justice, noted McCormack, a problem that could be addressed through a variety of means. Article 8 2A/2C are treaty-bound, and thus virtually impossible to change. However, Articles 2B/2E could be collapsed, and adding to Article 2E to 2B would strengthen it and cover the 11 points that are not international-specific and not already in 2B.

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Hyeran Jo and Beth Simmons' presentation [delivered by Alexander Dawson] considered the deterrent power of the ICC, both in terms of prosecutorial deterrence and in terms of social deterrence. The former can include direct impacts (jurisdiction, indictments, investigations, prosecutions do change perceptions of certainty) and indirect ones (complementarity). According to the authors there is general agreement that the ICC has produced some clear prosecutorial deterrence, impacting local prosecutions, state and non-state actors. There is also growing consensus in the deterrence literature that suggests that the swiftness and especially the *likelihood* of punishment may more effectively deter crime than severity of punishment. The paper thus focused on the socially deterrent aspects of the ICC.

The paper by Jo and Simmons, [available in full online at the SSRN](#) (Social Science Research Network), is excerpted below.

Few issues in international relations are more urgent than improving the life-chances for civilians who become pawns in civil war violence. Since the end of the Cold War, the international community has been groping toward a way to end impunity with respect to the worst human rights violations in intrastate conflicts. The tribunals in Yugoslavia and Rwanda were important milestones in this regard, but the most ambitious effort to date has been the International Criminal Court. Few institutions have inspired such high hopes, while stimulating so much controversy. Even though the Court has been operating for only 12 years, it is time to supplement anecdotal speculation with careful study of its effects. As realists Jack Goldsmith and Stephen Krasner remind us, "ideals can be pursued effectively only if decision-makers are alert to...the consequences of their policies."

This study is an attempt to at least address the "chasm between theory and practice" noted by ICC skeptics. First, we have been careful to specify exactly what it is we might expect the ICC to do: to deter a significant crime category within its jurisdiction. This is not the *only* consequence one might want to explore relating to the ICC, but it is one of its primary goals.

While the impact the court has had through prosecutorial deterrence seems relatively clear, the social deterrence produced by the ICC is less clear, largely because its impact

is exceedingly difficult to measure. Although the two phenomena are linked, social deterrence is more dynamic and likely has greater impact, in part because prosecutorial deterrence has relatively little effect on non-state actors, including rebels and secessionist groups.

Using a cross-national dataset on civilian casualties in civil conflicts, we tested the effect on levels of violence of a range of country variables, such as: ratification of ICC or not; in-country actions by the ICC; strength of the rule of law; and number of human rights organizations in operation. *ICC Actions* represent new information, available to all actors, demonstrating that the ICC is operational, authoritative, and that the prosecutor means to take action. The ICC may have varying effects on different categories of actors, depending on their exposure to 1) the risk of prosecution and 2) the importance they attach – or the vulnerability they believe they have – to the social costs of criminal law violation.

Quite aside from its formal power to prosecute, the Court's legal mandate signals the nature and strength of community norms. When community norms are challenged in a clear way (signaled for example by ICC actions or statements), there is significant potential for a social reaction to law violations.

The concept of social deterrence has largely been missing from accounts of how and why the ICC is a potentially powerful institution. This relative silence is ironic since one key purpose of the ICC is to set expectations, thereby placing some tactics outside the boundary of acceptable behavior. As the world's first permanent and global criminal court, the ICC is especially central in defining international society's response to international crimes.

We note that prosecutorial and social deterrence do not necessarily generate completely independent influences. Prosecutorial deterrence can shape social deterrence over time as investigations, arrests and convictions reinforce broadly shared values, which sharpens the *focal power* of an institution such as the ICC. Social deterrence is likely to be less tangible. Than prosecutorial deterrence. They theorize through a number of means, including those below.

Social deterrence has clearly been connected to an intensification in mobilization by human rights organizations (HROs). Increased pressure from HROs has been shown to decrease civilian killings by approximately two to eight deaths per year, or about a 20-percent reduction in the violence level. This civil society effect is substantially magnified by the focal power and jurisdiction of the ICC: the slope for ratifying states is steeper and more negative than that of non-ratifying states. In states that ratify, adding one human rights organization is estimated to reduce intentional killing by between four and six 6 civilians. In states that do not ratify, the effect of increases in HROs is flat.

The ICC has also been linked to new domestic crime statutes, which as we have shown are themselves influenced by the presence of the ICC, and are also associated with reduced civilian killing. We see a link to the development of a more robust *Rule of Law*, suggesting that it is not merely the capacity to enforce but substantive legal change that is critical to the result. One categorical shift toward stronger ICC-consistent domestic legal reform reduces civilian killing by about 60 percent. Knowing the ICC may step in where domestic institutions fail seems to have encouraged domestic legal change, which in turn helps to deter at least some intentional violence against civilians by government forces.

At the international level, social deterrence may also be supported through aid relationships. Our results show that while aid *itself* is not systematically associated with a reduction of violence, governments that ratified the ICC Statute in fact were subsequently much more likely to reduce or to refrain from intentional civilian violence the more aid they received.

Increasing aid also reduces violence more in states that ratify the statutes. In contrast, without ratification, increasing aid does little to change the marginal effect on the civilian killing count. We found no interactive effects between ratification and foreign trade relationships, possibly because trade is minor for many of these countries, does not clearly benefit government officials, and flows mostly from the decentralized decisions of private actors. If governments are socially deterred by extralegal material relationships, the risk of losing aid appears to loom much larger than trade relations.

Importantly, when all the ICC-related variables as well as several alternative policy interventions are accounted for, social deterrence effects survive while prosecutorial deterrence effects are muted. This is largely because prosecutorial deterrence and social deterrence truly are mutually reinforcing. The effect of *ICC Actions* does not reach traditional significance levels in the full model, but recall that it is based on a restricted sample in order to deal with the endogenous effects of ratification. Since there is no reason to use the matched samples to test the effects of *ICC Actions*, and such actions are robustly associated with reduced civilian killing for all the countries in the sample before matching, we remain fairly confident that investigations, warrants and prosecutions help to deter government atrocities.

We have theorized two broad and mutually reinforcing channels of potential deterrence – prosecutorial and social deterrence – and specified the conditions under which we might expect them to hold. We have argued that the ICC contributes directly to prosecutorial deterrence by investigating and prosecuting war crimes on its own authority. It also encourages member states to improve their capacity to reduce, detect and prosecute war crimes domestically, and indeed the evidence shows that ratifying states are much more likely than non-ratifiers to do so. There is strong evidence of a reduction

in intentional civilian killing by government actors when states implement ICC-consistent statutes in domestic criminal law which we can reasonably attribute, at least indirectly, to the ICC's influence. Such domestic statutes magnify the ICC's prosecutorial deterrent effect by bolstering it with the added possibility of punishment at home. Finally, it is critical to understand that legal rules interact with social pressures, both tangible and intangible. The ICC also deters because it mobilizes the international community as well as domestic civil society to demand justice. In this sense, our view of the ICC is fully consistent with broader trends in human rights prosecutions at the local, regional and global level.

We want to stress that our claims are modulated. Persons who intentionally terrorize civilians for their personal or political purposes are difficult to deter under any circumstances. But the ICC has raised the risks of consequences for violations, through the channels discussed above. We illustrate the plausibility of these channels but also demonstrate their limits. Governments that depend on aid relationships are easier to deter than the more self-reliant. We also show that rebels are harder to deter than governments. Nonetheless, even rebels appear to have significantly reduced intentional civilian when the ICC has signaled its determination to prosecute. Debates over the effects of the ICC have been sterile, largely because they have failed to specify the conditions under which they might expect the Court to “work.”

“We need to address the chasm between theory and practice... We are not pushing the point that one prosecutor, acting alone and without significant backing by the international community or local support, could have brought about these consequences merely by issuing a decision to investigate or signing a warrant. ICC interventions are powerful because they are part of a package of efforts to rally support for ending impunity.”
—Hyeran Jo and Beth Simmons

It is also important to put our claims into perspective. We are not pushing the point that one prosecutor, acting alone and without significant backing by the international community or local support, could have brought about these consequences merely by issuing a decision to investigate or signing a warrant. The ICC interventions are powerful because they are part of a package of efforts to rally support for ending impunity. Moreover, part of the package has taken time to unfold – a redoubling of *domestic* efforts to develop the legal capacity to prosecute war crimes, which is precisely how the ICC's complementarity is intended to operate. The evidence suggests these efforts contributed to what we have analyzed as an indirect prosecutorial effect of the ICC itself, although only for government officials. But the evidence suggests that the ICC's demonstrated

determination to investigate and issue warrants has contributed to the reduction of violence by convincing rebel leaders that impunity is a waning option.

At the same time we are under no illusions that the Court has positive impacts in all cases. The Bemba trial in relation to the situation in the Central African Republic did not stop violence by the Seleka faction, which reminds us that the Court cannot solve deep-rooted social problems in a short period of time. The Prosecutor prioritizes cases where violations are “grave” and these are precisely cases where violence is prone to recur. We therefore are analyzing some of the most protracted cases of conflict in the world – a fact that makes the modest positive consequences we document all the more remarkable.

The ICC had its ten-year anniversary in 2012. Many challenges are ahead. The Court has yet to gain consistent support from major powers like the US, China, India and Japan which would boost its resources and legitimacy. Although the ICC enjoys the support of 121 countries, observers note that the Court faces many practical challenges in its day-to-day operations, such as gathering evidence and conducting quality fact-finding. In many respects we agree. But its willingness to prosecute has contributed to perceptions that impunity for egregious war crimes is a diminishing option. The evidence suggests that this role has potential to save at least a few lives in some of the most violent settings in recent decades.

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The panel’s final presentation was given by Sheri Rosenberg, who returned to the preventative power of international justice. Insisting that international criminal justice is only one part of atrocity prevention, Prof. Rosenberg suggested that there might be a way to mobilize the preventative aspects of R2P around “a consolidation of norms around prevention.” Although noting that skepticism about international criminal law develops at about the same rate as criminal law itself, she believed that the Office of the Prosecutor should undertake more research into how it might act as part of a broader atrocity prevention agenda.

According to Prof. Rosenberg, atrocity prevention is a multi-stakeholder process that is much broader than the criminal justice theories of deterrence, which tend to be simply cost-benefit analyses of individual perpetrators. The larger question is both how can atrocity prevention be measured, and how can international criminal justice contribute to atrocity prevention? She continued, “We need to bifurcate deterrence and prevention. We must move from deterrence only to a broader understanding of atrocity prevention.”

In order to do this, scholars and prosecutors needed to both consider how a focus on atrocity prevention might narrowly affect specific prosecutorial strategies, and how international criminal justice as a whole could embrace atrocity prevention. Atrocity prevention involves many more actors and theories than the narrow prosecutorial mandate of the ICC seems to allow.

“We need to bifurcate deterrence and prevention. We must move from deterrence only to a broader understanding of atrocity prevention.”
—Sheri Rosenberg

In an effort to move this dialogue forward, Prof. Rosenberg borrows from the expressivist theory of international criminal law to address atrocity crimes (which she reminded the participants were overwhelmingly identity-based). Expressivist legal theory asks us to imagine forms of international criminal law that can be strategically mobilized in specific contexts in order to enhance the value of equality. In order to do this we must examine the theoretical underpinnings of punishment in international and domestic law, and acknowledge that “there is an imperfect fit between international and national punishment theory.” Both recognize that deterrence is based on balancing a credible threat and severity of punishment but, according to Rosenberg, “the ICC lacks this. A rational actor is suspect in international context even more than a national context, and, in the case of atrocity crimes the collective nature of crimes – rather than individual – becomes an issue.”

Domestic law tends to focus on aberrant behavior whereas international law focuses on obedient behavior. What occurs with mass atrocities is that such atrocities become normalized, whereas crimes in national jurisdictions are aberrant from the norms of society. This inconsistency (characterized as fragmentation by Rosenberg) is one of the phenomena that has weakened the legitimacy of international criminal law. What expressivist theory offers is a focus on the constructivist socializing role played by laws, their capacity to create norms and foster new forms of socialization.

Prof. Rosenberg implored the participants to test empirically some of these ideas, to contribute to a larger debate about the role that the ICC might play in atrocity prevention. Although acknowledging the resistance these ideas might face, she concluded that, just as many in the international community had embraced the Responsibility to Protect, it might be time to advance a Responsibility to Prosecute.

DISCUSSION

The discussion began with a question about the relationship between the African Criminal Court (ACC) and the ICC, and particularly whether or not ACC might undermine the work of the ICC due to sovereign immunity. Our speakers were unsure of the full implications (in part because negotiations are still ongoing), but noted that for those who ratified the Rome Statute, sovereign impunity is inconsistent with many domestic criminal laws in Africa. Moreover, within the African Criminal Court statute, only Article 41 is inconsistent with Rome Statute, making it very likely that many of those who support the ICC in Africa will still support the African Criminal Court with the understanding that Article 41 will be reformed at some point in the future.

This evolved into a further consideration of the problems with Article 8 of the Rome Statute, as discussed by Prof. McCormack. Several individuals with experience in ICTs and the ICC indicated that prosecutors are hamstrung by the wording of Article 8, trying to parse its meanings on an almost daily basis. One said: “Why do I have to prove it is an international armed conflict? Because of the very law in which it is written.”

Going further, the speaker argued that “law is about compliance, not coercion... evolution of norms... law moves at a glacial pace... It will take a century before we look back on this process.”

And yet in spite of these limitations the ICTs had produced significant results, including the guilty plea of Jean Kambanda, the Rwandan Prime Minister. The same speaker indicated that the significance of the event was that “an insider of the system acknowledged his guilt within the parameters of the system. Of course it turned out to be a non-event, because it took five minutes.” This speaker conceded that larger goals were more elusive. “The early expectations of the ad hocs were ridiculous... including national reconciliation... we were overly ambitious – we were hoping for deterrence and national reconciliation too. Really? It was too much. It’s about calculating!”

Keeping with the theme of reconciliation, another speaker asked about the value of victim participation, especially given the amount of money it costs and the negligible impact. There was no clear answer to this question.

Finally, several speakers expressed both surprise and skepticism about the findings of Profs. Jo and Simmons, in part because of reservations they felt about relying too much on deterrence as a justification for the work of the ICC and other tribunals. As Jo and Simmons were not present to explain their paper further, Dr. Dawson indicated that the

larger work seemed to have produced a robust amount of data with striking results, and that the paper itself acknowledges that this represents a project that is not yet complete. Indeed, instead of offering sweeping theoretical claims, the work suggests that there is a great deal of concrete evidence out there that links changing social behavior by a variety of actors to the work of the ICTs and ICC, and that these sometimes subtle shifts in behavior need to be accounted for in any careful evaluation of the working and impact of international criminal justice.

PANEL V

POSSIBILITIES FOR REFORMING THE CURRENT SYSTEM OF INTERNATIONAL JUSTICE

Jennifer Quaid, “The Next Frontier of International Criminal Law: Holding Organizations to Account as Distinct Responsible Actors”

James Stewart (UBC), “Avenues of Accountability for the Most Egregious Corporate Offending in War Zones”

Overview: The two presentations on this panel introduced new venues in which international criminal law seems increasingly relevant. Jennifer Quaid’s meditation on introducing organizational accountability recognized the significant challenges such an initiative faces, but made a forceful argument in favor of this as a new direction for prosecution. James Stewart offered concrete examples of how truly pressing this issue is, advocating a much more expansive reading of the mandate of the ICC than has heretofore been the case. Participants expressed enthusiasm for the values that informed both Quaid’s and Stewart’s presentations, with most of the questions centering on the difficulty that these initiatives face in gaining buy-in in the Global North.

Jennifer Quaid picked up on the ambitious agenda outlined in Panel IV by Sheri Rosenberg, and moved the conversation in a new direction in her presentation on organizational accountability in international criminal law. Ms. Quaid, whose background is in corporate criminal liability, used her paper to consider how we might integrate organizations into international criminal law. Her presentation is excerpted below.

[Editor’s note: In Quaid’s written presentation she was able to make a much more extensive argument about the implementation of her proposals. The excerpt below is based on the portions of the paper she was able to present at the conference.]

My initial intention was to focus my talk today on a different way of thinking about organizational responsibility – the subject of my on-going doctoral work – one which I believe holds organizations to account in a way that better connects to their fundamentally collective nature while still respecting the basic principles of criminal responsibility. Over the past months, as I have started to think about how my research could be applied to the international context, I ran into a number of preliminary questions that caused me to

examine critically the points of intersection between organizations, criminal responsibility and international law.

These questions, I discovered rapidly, were not only important to establishing a convincing foundation on which to present my ideas, they also raised important issues about the role of international criminal law and the directions the community of scholars and practitioners who work actively in this field may want to take when embarking on the path of organizational liability.

In my work, I study organizational criminal liability primarily as a form of personal jurisdiction. From among the labels that are commonly used, I prefer the term “organizational criminal liability” because this places the emphasis on how we apply the criminal liability to *collective entities*, regardless of legal form. I believe it is keenly important to tie organizational accountability under the criminal law to the attributes of organizations. This being said, I should stress that focusing on the characteristics of organizations as a way of identifying who is a subject of criminal law, does have a bearing on how we might think about subject matter jurisdiction within organizational criminal law liability. By this, I mean that having a sense of who – or what – is the organization necessarily shapes our view of the kind of blameworthy conduct the organization is capable of engaging in. This affords the opportunity of framing blameworthy conduct differently, i.e., an organizational way, which opens the door to uniquely organizational forms of misconduct (such as grossly negligent or willfully mismanaged systems).

References to corporate criminal liability are directed, for the most part, at the activities of large commercial organizations. As such, any discussion of extending liability to these entities should be focused on their collective nature, as this is the characteristic that distinguishes them from individuals and is the main driver for this basis of liability. Although it has been challenging for scholars to develop theoretical frameworks to support a truly organization view of liability, I believe that on the ground, most people understand intuitively that organizations have the potential for greater good and greater harm because they bring together the individual contributions of members such that the sum is greater than the parts. Moreover, I do believe that there is a role for organizational criminal law at the international level, but not necessarily a lot of consensus on what this would look like, nor on what the overarching objectives would be.

At least some of the impetus for the interest in integrating an organizational basis of liability into international criminal law is being able to hold economic power to account. There is no question that there is a group of very large multinational players who wield sufficient economic power and influence to be, at least to some extent, beyond the reach of most individual states (with the exception of some OECD countries, in some specific areas). This comes as no surprise when one considers that there is a global competition for capital and resources which encourages states to offer legislation and regulation

weighted to favor organizational interests in the hopes of securing the economic benefits that organizations are believed to bring. The ability of multinational organizations to exploit jurisdictional differences with regard to the extent of organizational liability has tended to undermine efforts by individual states seeking to impose criminal liability on organizations.

I believe that the chorus calling for some form of accountability at the international level as a means of overcoming the limits of national enforcement is growing bigger and stronger and that perhaps we are finally at a point where the idea of some kind of liability for organizations might get off the ground. Beyond the question of finding a way to make multinationals accountable, there is also some recognition that for certain kinds of wrongful conduct that are truly organizational in nature (large-scale environment degradation, systemic problems of corruption/subverting of state regulatory controls over industrial/commercial activity, use of organized, coordinated campaigns of violence/intimidation to advance/protect commercial interests), the international arena may be the best place to situate accountability. Moreover, this accountability must go beyond holding natural persons to account for their personal actions as this is likely to underrepresent or misrepresent the nature and extent of the essentially collective or systemic character of the source of the wrongful conduct.

In thinking about the drivers behind the push for extending international criminal law liability to organizations, an obvious one is closing the so-called accountability gap. One can think about the accountability gap both in terms of who can be called to answer for crimes and what kinds of things are considered crimes. In organizational liability at the domestic level, both of these gaps exist to varying degrees. In the international arena, as there is no accountability at all for organizations, there is obviously an accountability gap because only individuals can be called to answer and only for their personal conduct.

The more important part of the accountability gap is the sense that some kinds of wrongful behavior slip between the cracks of the current individually focused offence definitions. If, however, we think about the accountability gap in terms of the kinds of things for which we might call organizations to account, then I think there is the potential to do much more than simply say organizations are subject to criminal law. As my Venn diagram slide on corporate mens rea crimes shows, crimes are seen as corporate for different reasons. Some fit within the confines of traditional criminal law better than others, but all present challenges to the conventional individual liability model. First, traditional crimes can be committed by individuals but for corporate reasons (e.g., murder, intimidation, assault). Although the corporate reason is not necessary to prove the offence against an individual, awareness of the corporate motive typically changes how we perceive the behavior – its gravity, in particular. What might under an individual model be seen as a discrete instance of wrongful behavior takes on a different hue when understood as one of a pattern of instances unified by a collective “corporate”

goal the benefit of which accrues principally to the organization not to the individual who engages in the physical conduct that constitutes the crime (e.g., threats and violence to intimidate local people to cease lawful opposition to commercial development).

Figure 2. Corporate mens rea crimes.



The second category of crimes is related to the first. These are crimes that cannot easily be separated from the business context in which they arise. The actual conduct is not illegal per se. What makes it criminal is either the circumstances in which the conduct occurs (or wrongful ends being pursued under the guise of what would otherwise be legal conduct) or the prohibited consequences that ensue. These crimes are often economic in nature – bid-rigging, price-fixing, accounting misrepresentations – although they may also arise where there has been gross negligence or recklessness in managing the foreseeable risks associated with running the business (an oil spill from a pipeline that is poorly maintained, a derailment of a runaway tanker train that is was improperly secured ; an explosion at a mine where safety protocols were not followed or there is lax oversight of compliance, etc.).

The final category overlaps with the second, particularly with regard to negligent or reckless risk management, but is more specifically focused on those situations that are the result of the cumulative effect of the conduct of more than one person (who may not, on their own, be sufficiently blameworthy to merit criminal accountability. These are

crimes caused by systemic failures that typically have at their source a policy or culture premised on an unacceptable tradeoff between private profit and other important values (whose benefits cannot as easily be reaped solely by the business, such as environmental protection and safety) In domestic criminal law, accountability for such crimes is in its infancy because they require a locus of analysis that is different from the natural person. A handful of jurisdictions have tried to incorporate crimes that can be based on an enabling corporate culture. It is still too early to pass judgment on these experiments, although a significant challenge to date has been convincing prosecutors to bring cases.

It goes without saying that broadening our notion of crime beyond the limits of what is recognized for individuals presupposes that we are upholding important values. I am aware that human rights protection is the dominant value in individual international criminal law, but in the context of organizations, I think it may be helpful to consider the advancement and protection of other values as well, such as honesty and integrity in the provision of government services, environmental stewardship and establishing the outer limits of commercial freedom (legitimate commerce). And while it is not explicitly stated in the document, many of the new crimes that are included in the African Protocol reinforce the protection of human rights while also upholding values like the ones I have mentioned.

There is a further – interstitial, if I may use that word – enforcement gap that could be remedied by international criminal law. This is the gap that emerges from either an unwillingness or an inability of an individual state to enforce existing criminal law against organizations, regardless of whether they are multinational or not. In my view this is certainly one of the objectives of the African Protocol, where a multinational instrument would be available to provide enforcement where the national state is unable to do so.

From my work in this area I believe the strongest case for treating organizations as responsible actors in their own right has to be tied to the essence of the organization: that they are social structures (i.e., collectivities of people, not things) that are oriented around the pursuit of internal or external objectives. They exist separately from their individual members, but they remain entities created by and for the benefit of human beings (again, they are not things). Finally, organizations are created because they offer an advantage over individual pursuit of goals. This collective power creates the potential for greater good and greater harm than individual actions.

[After considering some of the challenges to organizational liability and offering some suggestions for the means of resolving these challenges, Ms. Quaid concluded as follows.]

There will be real resistance to corporate liability. If I have seemed very insistent on linking a corporate or organizational basis of liability to the collective nature and then tying it to the basic justifications of the criminal law, it is because I know the dangers of

being sloppy. In domestic law, corporate criminal liability, as a basic idea, continues to be challenged. Some continue to believe that corporate criminal liability makes no sense and has no place in the criminal law. We can expect at least as much skepticism and resistance if corporate criminal liability is added to international criminal law. As a consequence, we need to be very clear about why it is necessary and justified so we can be prepared to respond to the furious opposition that will be raised.

The good news is I think that both from a theoretical and practical point of view, we can get the big issues right, and ensure legitimacy of the enterprise. Lots of great work is being done in this area by scholars and domestic law enforcement and this will provide ideas and support when we are ready to take the plunge. The African Protocol gives me hope that there is the will to do this, that it is important and that it will make a difference.

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The second presentation on this panel, by James Stewart (UBC), offered some stark empirical evidence of the relevance of Jennifer Quaid's interventions. Prof. Stewart explained that much of his work focuses on the relationship between commerce, atrocity and international criminal law. He looks at the responsibility of individuals who are in corporations (known as common in criminal liability), and of corporations committing crimes. Specifically, Stewart focuses on the extractive industry, the weapons industry and private militaries. One of his driving questions is: what does impunity look like in the weapons sector?

Since 1993, when investigations for weapons provision began, only one corporate investigation has taken place, and it resulted in an acquittal. This in spite of the fact that there have been 502 alleged allegations by panels of experts. In effect, people can supply weapons to whoever they like and not face any accountability, Prof. Stewart explained. "What's the best way to get away with atrocity? Incorporate. It's even better than being the president of your country!"

The work, he said, is inherently controversial because weapon vendors are often considered guilty because of their accomplices. Stewart argued that in egregious cases, there is a need to tweak the way enforcement is understood and law is practiced as it relates to organizations that sell weapons. We must understand that there is a range of crimes and a range of weapons, and that there are clear benefits to prosecuting in certain cases, while perhaps not in others.

“What’s the best way to get away with atrocity? Incorporate. It’s even better than being the president of your country!” — James Stewart (UBC)

To offer an example, Stewart explained the legal reaction to the massacres that took place in the Democratic Republic of the Congo (DRC) shortly after the Rwandan genocide, noting that they were mostly a continuation of that violence. Although Rwanda got the attention, the subsequent UN Panel of Experts on the DRC noted a “vicious triangle” in which the continuation of armed conflict with egregious violence was driven both by the purchase of weapons and resource extraction by foreign governments.

Prof. Stewart explained that cycles like these are self-supporting, and become “a win-win incentive for all belligerents.” He argued that “we focus too much on the violence once the bloodletting had begun; it is better to focus on the corporation that fuels it.” Stewart explained that there is precedence for this in Nuremberg with the Zyklon B case – people were held responsible for the use of their technology in Auschwitz. Also, in the 1980s the Dutch prosecuted a national for selling chemicals to the Iraqi regime.

Prof. Stewart then walked the participants through the various conditions that could prove most effective. Prosecutions could ideally be divided into three types, based on commerce (manufacturing, distribution and vending), weapon type (cluster ammunitions, nuclear weapons, etc.), and different international crimes (including, but not limited to homicides). These categories would allow more robust prosecutions for incidents like the Charles Taylor case (based on the widespread use of small arms in rape), for incidents that used cluster munitions and “indiscriminate attack”, and for the use of drones and the war crime of “terror” (e.g., the ICTY case that a sniper imposes “terror” on a civilian population because you can be shot at any time). He suggested that this might even apply to those who control or monitor the drones. Stewart further argued that crimes associated with nuclear weapons could include forced deportation, this because irradiation of land will force populations to leave, and that prosecutions in this regard should be levelled not just at those who press the button, but those who manufacture, distribute and vend these weapons of mass destruction.

In Stewart’s view, these undertakings would create a shift in the use of criminal law to prosecute those engaged in indiscriminate attacks away from a very narrow definition of liability and toward an approach that broadened culpability to those who manufacture and distribute these weapons. He then outlined multiple benefits of this approach.

On a practical level, this would offer new strategies for prosecutors to address the rape crisis in the DRC. If we focus on arms vendors then perhaps we can tie the military objectives to compliance with international humanitarian law. “If your men continue to rape people, then it becomes harder to get arms,” and in this case there becomes a change

in the incentives for the militia, which might cause militias and formal military to police internally.

It would also spread responsibility in favorable ways. “There are a lot of human rights violations in Africa but we must question the assumption that only Africans bear responsibility for atrocities in Africa. We must pay attention to foreign actors involved in the conflicts,” explained Stewart. This allows the Office of The Prosecutor to say: “when Western actors are implicated in these atrocities, we will hold them responsible or ensure their national jurisdictions do.”

Prof. Stewart noted that there is some evidence that corporations are more exposed, if not necessarily more deterrable, than individuals. For example, a Swiss company being tried for gold exploitation found that investigators could break down the doors of their office and take all the computers. This would have been harder to do if it had been an individual. That said, “it is also important to remember that there are often individuals behind groups.”

Stewart concluded by emphasizing the need for an interdisciplinary approach: “We need to bring together the media and those generating public opinion. We need forensic analysis at atrocity sites to piece together things: the doctors, ballistics and mapping. We need the criminal law and we need the legal theorists.”

DISCUSSION

The discussion began with a question about how we use the term “organization” in this context: Are they non-state actors, or something else? The panelists and participants remained divided on a precise definition, but in the case of these two presentations, it seemed useful to consider the term as referring to organizations very broadly, and not just social structures organized for profit motives (even if that may be where the greatest interest is). The definition could thus include churches and other non-state actors.

Participants also expressed concern about how we might get around the attachment to the individual in criminal law, which seems to vex efforts to hold organizations accountable. One speaker responded to this concern by insisting that while organizations are social structures, they are not people in a material sense; that we need to be careful to avoid anthropomorphizing organizations. In order to do this we must create boundaries in the law that define the organization, but we also need to recognize that our fear of overreaching in Western law sometimes leaves us stuck. Indeed, it was only because of a push from the Global South that the UN Human Rights Commission began drafting a treaty on human rights and business.

As for the value of punishing an organization, one speaker made the case that the lack of accountability is based more on a lack of political and legal will than on a lack of evidence. Noting that there is rarely a lack of evidence of organizational wrongdoing, this speaker argued that what we need to do is build a more dynamic view of the nature of organizations within domestic law.

The group then turned to the issue of arms and sexual assault, as referred to in Prof. Stewart’s presentation. One participant said that weapons are exceeding easy to purchase in the DRC – except in the case of women, who have no access to arms. This individual wondered why we discuss arming rebels while no one talks about arming women in the DRC to defend themselves from rape. We talk about arming rebels in Syria and other vulnerable groups and yet we only conduct ex post facto investigations when it comes to rape. Why do we think that adding weapons to a conflict is a bad idea in the case of women, but it makes sense in the case of rebels in Syria? [Editor’s note: This comment was made before the evidence of widespread female slavery and sexual abuse among ISIS groups was broadly available.] This is counterintuitive to the idea of disarming rapists, and certainly not a preventative response.

Complicating the issues of arms, one participant added that self-defense is important. It is a legitimate justification, but exceptions where self-defense can be demonstrated

cannot be made to obscure the widespread use of weapons for other reasons. For instance, with chemical weapons a direct link to self-defense is extraordinarily difficult to establish. What we can often show is a direct intent: these chemicals in this amount must be used for these activities, and those activities are criminal.

The conversation then turned to the challenges that efforts around corporate criminal responsibility would face among the business sector and political elites in the Global North. Some speakers reminded the group that it was in fact pressure from poorer nations that had produced any movement forward we have seen on these issues. One in particular raised the core issue of, what, in fact, is acceptable business practice, insisting that we should at least codify the relationship between business and human rights in international criminal law. The same speaker noted that the real question may be: do we need to codify or do we need to enforce?

One final speaker noted that political stability was an essential precondition for these efforts at establishing accountability, and a key reason behind the advent of the concept of the Responsibility to Protect. The same speaker indicated that R2P is thus a critical and greatly underexplored part of any efforts to prevent atrocities.

PANEL VI

NOVEL USES OF INTERNATIONAL JUSTICE

Rachel A. Cichowski, “Interest and Advocacy Group Use of the European Court of Human Rights”

Georgette Gagnon, “Using International Justice in the Field: the Case of Afghanistan”

Ruben Reike, “The Responsibility to Protect: Impetus or Obstacle for Enforcing International Criminal Justice?”

Nicole Barrett, “International Accountability in African Courts”

Overview: This panel offered four opportunities for conference participants to consider the often unforeseen impacts of international criminal justice in practice. Prof. Cichowski’s and Ms. Gagnon’s presentations demonstrated the ways in which two distinct initiatives with no formal prosecutorial standing (the amicus brief in the European Court of Human Rights and the UN Human Rights Mission to Afghanistan) had a positive effect on the practice of human rights in two very different settings. Prof. Barrett offered the curious case of the trials of Habré and his henchmen, suggesting that, although these processes have proceeded in circuitous ways, the trials in Chad and Senegal represent significant achievements in terms of accountability, and perhaps even the prevention of future atrocities. Finally, Dr. Reike reminded participants that the ICC faces significant risks when it expands its mandate beyond the more narrow legal processes that adjudicate crimes after the fact. R2P has informed ICC investigations in both Libya and Syria, and in both instances these referrals have forced the Court into a highly charged political debate in ways that weakened its support among critical constituencies.

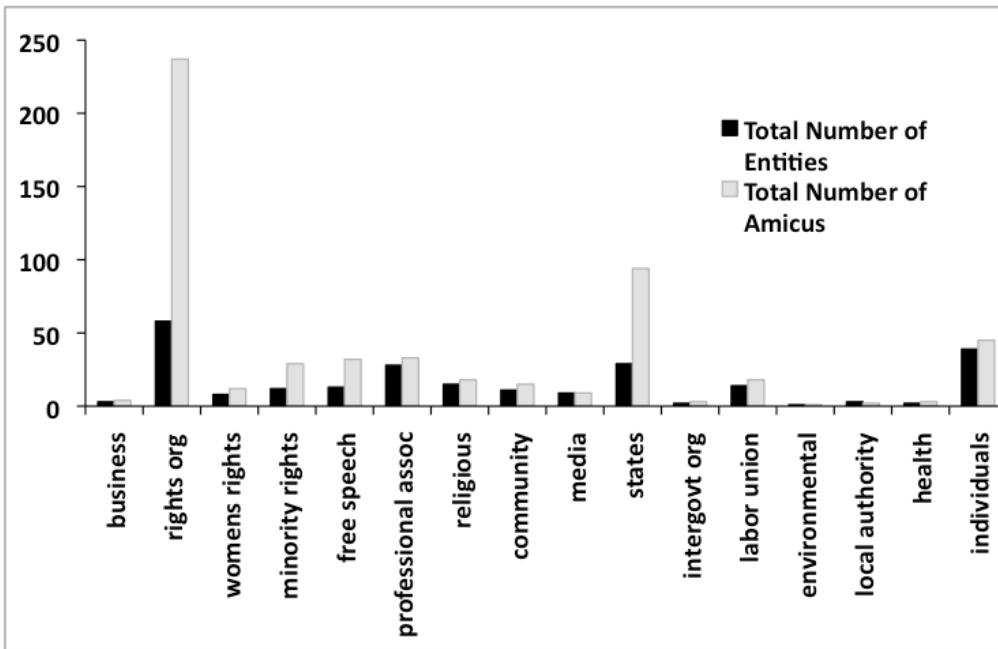
The first presentation on this panel, by Rachel Cichowski, broadened the scope of our discussions by introducing the European Court of Human Rights (ECHR) as an agent of international criminal justice. Prof. Cichowski examined how international courts transform domestic law and have both empowered and constrained nation states. Her questions focused on the role of both individuals and civil society in generating democratic critique. In other words, can courts provide a means of enhancing rather than prohibiting and constraining human rights?

Her goal was to move beyond state-dominated approaches to international law and international organizations, and to theorize what this can mean for the legal process, with a special emphasis on understanding who is using this avenue of participation and how they are using it. Prof. Cichowski’s current project looks at the Court’s decisions in 1960–2011, paying particular attention to those with Third Party Interventions (amicus), and combines these with national implementation measures (or actions taken by the states in response to the ECHR decisions).

“The goal is to move beyond state-dominated approaches to international law and international organizations, and to theorize what this can mean for the legal process.” —Rachel A. Cichowski

In this research she has found that original treaties tended to constrain individual and group access to redress, but that changes in access evolved through the case law. These were ultimately codified in 1998, so that today, individual and group access is codified in the Convention.

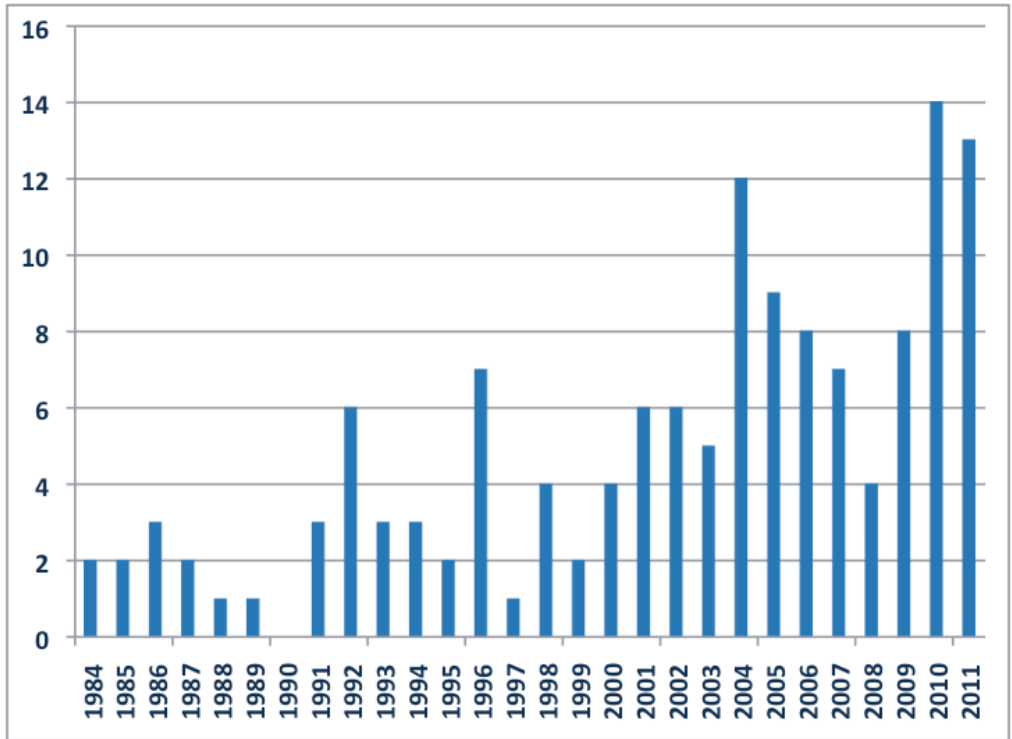
Figure 3. ECHR Amicus Participation by Organization and Advocacy Type, 1984–2011.



Source: Data compiled by the author from HUDOC, the database of case law of the European Court of Human Rights, Council of Europe (<http://hudoc.echr.coe.int/>).

Amicus briefs played a critical role in this process dating to 1978, when in *Tyrer vs. UK* the National Council of Civil Liberties tried to bring a brief and was denied. In the following year, in *Winererp vs. Netherlands*, the UK Government asked a third party to accept briefs. Two years later (in 1981) in the case *Young, James and Webster vs. UK*, the court ruled that a trade union could be third party. From then on these practices became a part of case law. They were codified in the 1998 reforms of the Court.

Figure 4. Total Number of Organization and Advocacy Types Submitting Amicus, 1984–2011.



Source: Data compiled by the author from HUDOC, the database of case law of the European Court of Human Rights, Council of Europe (<http://hudoc.echr.coe.int/>).

In evaluating the cases from 1984 to 2011, Cichowski was able to examine a broad array of active interventions before the court, and concluded that “it is not just rights groups. There is an increased amount and diversity of voices having access to the Court and seeing it as a viable forum and use of legal advocacy. It is a dialogical relationship.” Still her evidence showed both that the potential impact of the Court was undermined by significant backlogs and that powerful states (notably Russia) are playing a potential role in sabotaging the Court’s work by refusing to address these delays. Prof. Cichowski concluded her presentation by noting that “the states’ commitment to the role of law

must be seen at the domestic and international level,” but that organizations and third parties are clearly having an impact in the way human rights are being adjudicated by the Court.

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The second presentation on this panel was delivered by Georgette Gagnon, who from 2010 to June 2015 led the human rights unit of the United Nations Assistance Mission in Afghanistan (UNAMA) and represented the UN Office of the High Commissioner for Human Rights in the country. Her presentation focused on how the UNAMA’s Human Rights Unit uses international criminal justice and how they leveraged their human rights work on the ground in pursuit of international criminal justice and accountability for serious human rights violations and international crimes.

Ms. Gagnon began by stating that after 30 years of war, Afghanistan is a country characterized by neither stability nor justice. “There are very few domestic prosecutions, no truth commissions, no sustained national or international calls for justice and accountability... but it’s not a total black hole on international criminal justice,” she emphasized.

She suggested that UNAMA Human Rights has chipped away at the entrenched impunity for international crimes in Afghanistan by operationally linking the Mission’s work to protect civilians in the armed conflict and with torture of conflict-related detainees, and international criminal justice. Under UN Security Council Resolution 2210 (March 16, 2015), human rights is a key priority in the Mission’s mandate, with many references to violations of international humanitarian and human rights law. The Human Rights Unit has a specific mandate to monitor the situation of civilians, coordinate efforts to ensure their protection, promote accountability and assist in implementing the human rights provisions of the Afghan Constitution and international treaties ratified by Afghanistan.

The human rights team (91 officers, mainly Afghan colleagues, 70 percent of whom work in UNAMA’s 13 field offices) operationalizes this mandate through targeted fact-finding, public reporting, and strategic public and private advocacy with government actors, armed opposition groups, international military forces, civil society, different communities across Afghanistan and donors. From among five priority areas Ms. Gagnon highlighted two: protection of civilians in the armed conflict, and ending/preventing torture and ill treatment of conflict-related detainees by Afghan security, police and military forces.

Through its mandate on protection of civilians, UNAMA has worked to address the short-term imperative of reduction/prevention of civilian casualties and improved compliance with international humanitarian law and the longer-term need to lay the groundwork

for future efforts at accountability through building a record and detailed evidentiary base on the impact of the war on civilians. They have done this through “sustained systematic documentation” and the use of rigorous methodologies to document war crimes and crimes against humanity. They found that approximately 47,000 civilians have been killed and injured in the conflict since 2009.

Through these efforts, UNAMA Human Rights developed and implemented best practices on civilian casualty recording within the UN system and externally. According to Gagnon, they documented the conduct of all parties to determine whether they were complying with Common Article 3 and relevant sections of the Rome Statute and found that deliberate attacks against civilians, targeted killings, indiscriminate attacks and gender-based violence were occurring. They used these data and analysis to create public reports, and to make detailed policy recommendations and carry out advocacy with all parties to the conflict. Published every six months, their reports on protection of civilians discuss tactics, protection trends, specific cases, emerging areas of harm/early warning and prevention. In 2014, UNAMA verified 4,247 incidents of conflict-related violence impacting civilians throughout Afghanistan. These were recorded by perpetrator, tactic, target type, victim demographic attributes including gender and age, date and location, and certain incidents and actions that may amount to war crimes. As such, the reports provide a critical public (historical) record, and enable certain forms of targeted advocacy with all parties.

According to Ms. Gagnon, this documentation and advocacy has yielded changes in both policy and practice, including changes in the conduct of hostilities, reduced civilian casualties and enhanced compliance with international humanitarian law. She specifically pointed to changes in tactics and procedures by international and Afghan forces on air strikes, night raids and explosive remnants of war. She also noted changes in messaging by the Taliban, which has increasingly stressed protection of civilians with some changes observed in their targeting with more attacks directed at Afghan forces, more warnings to communities about the location of improvised explosive devices (IEDs) but with much more needed to reduce civilian casualties by the Taliban. Still, 75 percent of all civilian casualties attributed to Anti-Government Elements.

Efforts at documentation also have an impact on the level and forms of torture committed by Afghan security forces. Ms. Gagnon’s office began systematic documentation of torture of conflict-related detainees several years ago, and published three reports (including one released in February 2015). They interviewed 1,500 detainees, Afghan officials and others and found that almost half of detainees interviewed had been tortured or ill-treated. “There is strong evidence that the Afghan Government is committing the war crime of torture as defined under Rome Statute,” said Gagnon.

Still, based on the reports, recommendations and follow up actions taken, the situation is changing. After UNAMA's first report on torture, international forces which had been transferring their detainees to Afghan custody stopped transfers and brought in a program of detention monitoring, inspection and remedial measures. After the second report, international forces revised their program to make it more robust and Afghan President Karzai appointed a fact-finding commission that confirmed UNAMA's findings. The Afghan President also issued a decree aimed at curtailing torture and ill treatment by Afghan forces.

UNAMA's recent report documents a 14 percent reduction in the incidence of torture among detainees interviewed, compared to UNAMA's previous reporting period. The Afghan government also introduced a national plan on the elimination of torture. That said, the Afghan government has not pursued any efforts at accountability and no Afghan officials have been prosecuted for torture.

Ms. Gagnon turned to the work of the ICC preliminary examination in Afghanistan in her concluding remarks. The evidence gathered by the UN Mission has been essential to the work of the ICC in Afghanistan – and particularly its finding (outlined in the ICC's December 2014 public report) that war crimes and crimes against humanity were and continue to be committed under articles 7 and 8 of the ICC Statute, indicating a reasonable basis to conclude that crimes within the Court's jurisdiction have been committed. "We believe that the work UNAMA Human Rights has done in the field in Afghanistan has provided a basis and significantly contributed to the ICC's preliminary examination. References to UNAMA can be found in the preliminary examination materials and the ICC's 2014 public report. UNAMA's work has led to some positive changes on the ground now and will perhaps provide information on which to build a foundation for future accountability." As there is "no national effort," there appears to be no conflict of complementarity. The decision about how to proceed is now in the Office of the Prosecutor, but Ms. Gagnon expressed the view that the evidence is quite clear on which the ICC can draw conclusions whether to open an investigation.

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Our third presentation on this panel, by Nicole Barrett, drew from her work on the Hissène Habré case in Chad to describe the ways in which the African Union has approached legal accountability for atrocities. In a case that Desmond Tutu calls "an interminable legal soap opera," it has taken 25 years for Habré to be brought to justice, 15 of which involved active attempts to prosecute Habré in the courts of several countries.

According to Prof. Barrett, the trial is an important example from which we might gain insights into the problems surrounding complementarity, preference for domestic

accountability, and the importance of understanding the specific context in which these trials take place (in this case the Extraordinary African Chambers in the Courts of Senegal, which can consider the international crimes committed by Habré and his top associates).

The contours of the case have been extraordinarily complex. In 2000 victims' group brought cases against Habré in Chad and Belgium. After a four-year investigation, the Belgian courts indicted Habré on charges of crimes against humanity, war crimes, and torture. When the Belgians sought Habré's extradition in 2005, however, the Senegalese courts decided they lacked jurisdiction to decide on the extradition request.

In 2006, the African Union asked Senegal to prosecute Habré "on behalf of Africa." It proved excessively costly to mount this trial, however, and given the meagre judicial budgets of most members of the African Union, it took more than four years to agree to the 8.6 million euro budget for the trial. In the interim, the possibility of trial was thrown into doubt when the Economic Community of West African States (ECOWAS) found that the proposed retroactive application of criminal law, which was not permitted under Senegal's constitution, would violate Habré's human rights. The [African Union responded to ECOWAS ruling](#) by proposing a plan in 2011 for special Chambers within the Senegalese justice system to hear the case. After the election in Senegal in 2012 of a new president who was a strong supporter of international criminal justice, the process to prosecute Habré in Senegal began moving forward. Senegal amended its constitution to allow for the prosecution of international crimes via the theory of universal jurisdiction in order to give the Senegalese courts jurisdiction over the case. Finally, Senegal created a special chambers in their appeals court, called the Extraordinary African Chambers, to hear the Habré case, which included judges from both Senegal and the African Union.

The following year, the government of Chad decided to prosecute many of Habré's henchman and refused to send five of them to Senegal to be tried alongside Habré, despite the request from the Extraordinary African Chambers in Senegal to extradite them. It was unclear why the government of Chad decided to undertake these trials after 13 years of inactivity, but Prof. Barrett argued that this represented a significant political shift and opportunity for prosecution.

In explaining the benefits of the Extraordinary African Chambers being located within the Courts of Senegal, Barrett indicated that Habré would not enjoy immunity as the head of state, that amnesty was irrelevant, and that the court had jurisdiction over international crimes – crimes against humanity, war crimes, genocide, and torture. In short, the Extraordinary African Chambers has jurisdiction to prosecute "the person or persons most responsible" for international crimes committed in Chad during Habré's rule [editor's note: the Habré trial began in July 2015]. She found it good that the trial would be held

in Africa with African judges, as this would allow it to avoid the charges of neocolonialism frequently lodged by African leaders against the International Criminal Court.

Prof. Barrett speculated that this trial would represent something quite distinct from the trial of the 21 henchmen in Chad, which she had observed in person in early 2015. “There were lots of victims in attendance at the trial. They really felt satisfied by the fact the trial was going on. They had waited 24 years. This [trial] was an acknowledgement that terrible things had occurred and these wrongs were finally being addressed.” As much a truth commission as a criminal trial, it was not uncommon to have witnesses reflect at length on past events. According to Barrett, there was “a lot of reflection and memorialization.” She recounted a specific example of the head of the national truth commission screening a film that showcased the places and implements of torture. When he did so, many in the public audience wept. Such extensive victim participation will likely be missing in the Extraordinary African Chambers. Barrett reflected: “Here I am writing down procedural irregularities, but for victims the trial was incredibly significant. Must Chad’s criminal trials meet international standards for justice to be done?” She also noted that the whole process was being televised.

Figure 5. Photo from the Criminal Trial of the 21 Habré Henchmen (N’Djamena, Chad), with Nicole Barrett in attendance, January 13, 2015.



Source: UBC (<http://news.ubc.ca/2015/01/14/dictators-henchmen-on-trial-ubc-expert-at-historic-torture-trial-in-chad/>).

Given that one of the purposes of international criminal justice is to act as a deterrent and prevent future crimes, Prof. Barrett was curious as to whether the trial would have a deterrent effect. She explained that there were 40 armed guards from various branches of the military and police in the courtroom, watching their former leaders be tried for

crimes, which she found to be significant. Although the domestic trial was less rigorous than an international trial would have been, “it felt like you were watching the building of domestic capacity.

“Here I am writing down procedural irregularities, but for victims the trial was incredibly significant. Must Chad’s criminal trials meet international standards for justice to be done?” —Nicole Barrett

That said, Barrett noted several problems with the trial. The lawyers were given two weeks to prepare for trial, leaving little time to prepare a defense. The investigation was rushed and, as a result, the charge sheets were collective, and it was not always clear which charges applied to the individual defendants. Adding to the confusion was the fact that only one month was allocated for the trial of 21 people. Money was very tight in this trial, and became even more of a problem when news of potential reparations suddenly increased the number of victims coming forward. Last, there were security concerns, underscored by the fact that the lead victims’ counsel was the victim of an assassination attempt.

Prof. Barrett also noted that there was little international attention paid to this case, and thought that this may have had some impact on the process. Observers included only one Human Rights Watch observer and one BBC Afrique stringer, which resulted in only a few minor news articles. By contrast, the Habré trial has a \$1.3 million outreach budget, largely due to the fact that the Extraordinary African Chambers has a trust fund supported by member states.

Barrett concluded by reminding participants that it is essential to examine closely the context in which these trials take place. For example, during the trial in Chad, the bar association went on strike twice for back pay, security was a real concern, and “it felt like no one in the world was watching. There was very little dissemination about what was going on outside of Chad.” She also pointed out is critically important that we not simply measure these trials against some sort of imagined international standard, but that we ask ourselves who benefits from such a standard, and what sorts of justice are ultimately needed in these specific contexts.

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Ruben Reike closed the panel with an analysis of the relationship between R2P and international criminal justice. He began by explaining that Chief Prosecutor Fatou Bensouda has gone on record saying that the ICC could be seen as the legal arm of R2P, and that the two can mutually reinforce each other. Such sentiments position the ICC as an

additional instrument to deter crimes and to enforce international criminal law. However, Dr. Reike suspects the responsibilities of the ICC do not align neatly with the goals of R2P, which was intended as a political and diplomatic framework. Specifically, political mediation can become more difficult when one adds judicialization. So, for Reike, the question is: once the ICC is activated do you lose political opportunities?

R2P is ordinarily recognized as a political commitment in response to genocide, war crimes, ethnic cleansing, and crimes against humanity. Since 2005 prevention has emerged as the primary function of R2P, and many have argued that R2P ought to be a useful tool for the ICC, but when one examines the Libyan and Syrian cases, it is not clear that the R2P and the ICC work in a complementary fashion.

Beginning with the Libyan case, Reike noted that the referral to the ICC was supposedly to be “part of the package of deterrence and encouraging defections.” It was assumed there would be fewer large-scale atrocities after the referral. The ICC was put in a difficult situation here, working mainly with anecdotal evidence and in a context where the speed with which events unfolded made mediation impossible. He noted however, that several observers believed that the ICC’s presence only complicated the mediation efforts that were undertaken. Negotiators tried to avoid mentioning the ICC when talking to interlocutors, although they admitted it was the bombing by NATO and not the ICC that ended mediation efforts. The African Union similarly argued that the ICC hampered mediation in this case.

This was in part because, contrary to Security Council’s expectations, the ICC moved forward very quickly on the situation. According to Dr. Reike this gave many of the actors in the conflict the impression that when acting on the principles of R2P, the ICC investigation represented the first step toward military intervention. The ICC was also hampered by the fact that in order to win the cooperation of the US it had to give the Americans immunity from prosecution, a widely known fact that engendered little cooperation on the ground, and only further strengthened arguments that an ICC investigation was the first step toward military intervention. This argument has been used actively by Russia to undermine subsequent ICC referrals.

The Syrian case, argued Reike, was much more complicated. The reasons of the referral were myriad, including moral outrage, a desire to prevent further atrocities, and perhaps other geo-political imperatives. Those supporting the ICC resolution also wanted to expose and isolate Russia and China in order to leverage a stronger resolution on cross-border humanitarian access (this was granted a few weeks after the referral).

In this case then, the ICC was used as a bargaining chip, and yet after the initial concessions by the major actors there was very little follow up in initiating the cases, a failure that many assumed to be the result of a series of political compromises by the Court. Dr.

Reike concluded that this was a pretty clear case in which we must recognize that the Security Council has often used the referral to the ICC as a strategic tool, with ‘justice’ as a secondary concern. In addition, “there has been a mixed record of success when one compares ICC intervention and the lack thereof, such as in Libya and Iraq, respectively.”

Dr. Reike closed with some thoughts on the implications of these experiences for R2P and the ICC. As for R2P, referrals sent the message that accountability was possible. They also paved the way for cross-border humanitarian access, which did in fact help to protect some individuals. As for the ICC, these experiences exposed the court to some reputational damage. Even though it was broadly believed that the referral would be vetoed, it was passed, but with some very controversial clauses (on US immunity and the issue of the Golan Heights). The debate also pushed China more into a camp that opposes the ICC, creating significant long-term political challenges for the Court.

DISCUSSION

The discussion began exactly where Dr. Reike ended, with a series of concerns about the implication that ICC and R2P should be delinked. Reike provided clarification of his remark: if R2P is discredited then so is everything else, including the ICC. He suggested that narrowing down what constitutes military intervention invariably produces unintended consequences, and that it remained critical that the ICC maintain its power of leverage.

The discussion then turned to issues related to impunity and compensation in a variety of settings. One speaker noted that even between the Habré trial and trials in Chad, the different funding contexts of the courts meant that reparations could vary widely. Another noted that humanitarian efforts in other countries also often entail compensation to civilians. The US government has been paying civilians compensation, and so has the Afghan government, but mostly on an ad hoc basis. The Afghan constitution also has a provision for seeking compensation for violations by government for torture, but it is not consistently enforced.

On the issue of impunity, some speakers wondered whether or not victims' groups believed these procedures would result in any sort of accountability. Another replied that even without formal forms of accountability, these processes were often very important for victims. This same speaker noted that one of the issues here are tensions between common law approaches to criminal justice and procedures that emphasize the voices or interests of victims.

The discussion then turned to the Darfur referral. One speaker said he had originally been a strong supporter of this referral but came to regret that decision, and argued that referrals like these risk undermining international rule of law and had become an enormous liability for the court. In addition to this principled objection, the speaker argued that the way it is done is problematic. "There is a doctrinal flaw in the concept of referrals", which is in conflict with the fundamental principle of equality before the rule of law. The same speaker argued that we should look at R2P's sequence of prevention, reaction, repair, punishment as a linear function, rather than "collapsing" prevention and punishment in a confusing and unproven way.

Several others concurred with this view. One suggested that the Office of the Prosecutor could have argued that Security Council should give "proper" referrals, without the problematic additions to them. Another asked, "Could a rule be created that the ICC cannot operate during active military operations?" "What about drones in Afghanistan? It's not just casualties but rather it is terror. How is that measured?"

PANEL VII

TENSIONS BETWEEN INTERNATIONAL JUSTICE AND OTHER GOALS

Fannie Lafontaine, “To Prosecute or What? National Jurisdictions and the Gaps in Closing the Impunity Gap”

David Petrasek, “The ICC and peace Processes: Is a Balance Possible?”

Onur Bakiner, “Cycles of Universal Jurisdiction: Ideas and Legal Mobilization”

Overview: This panel offered three distinct views on the contemporary challenges of implementation of universal jurisdiction. Fannie Lafontaine’s close examination of the incoherence between states’ internal laws and international treaties, particularly with regard to establishing jurisdiction, what is criminalized and the obligation to “prosecute or extradite”, highlighted the issues international criminal law must address if it is to become more effective. David Petrasek reminded participants of the difficult challenges that the ICC faces in contexts where the imperatives of justice seem to conflict with the need for peace or security, and argued for the use of complementary bodies (advisory groups) and processes with local legitimacy to shield the Prosecutor’s Office from politicization. Onur Bakiner’s analysis of the political fallout from universal jurisdiction laws among European nations adds another dimension to this story, reminding participants that it is not only a question of whether innovations in universal jurisdiction fill the gaps or are conducive to peace in societies riven by conflict. They must also take into consideration the political backlash in nations outside of conflict zones, where a variety of interested parties see their economic and political fortunes placed at risk by these novel forms of justice.

Fannie Lafontaine began this panel by revisiting the problem of immunity through a consideration of the uneven ways that national jurisdictions align with international obligations. Prof. Lafontaine’s presentation is excerpted below.

The general purpose of the paper is thus to highlight gaps in the existing framework and system of accountability for international crimes where national courts are concerned. I will discuss gaps related to two distinct but closely related issues, namely 1) the gap in existing legal obligations imposed on states as regards core crimes and 2) the gaps in interstate cooperation in the enforcement of international criminal law. As the title

hints, one issue I will focus on is the “what”, the silent alternative to prosecution – that is, the much talked-about but seldom used “extradition”, the effective missing limb of the obligation “to prosecute or extradite”. Canada will often be used as an example – not so much as an example to follow – but as an illustration of how the gaps in the current system prevent states to contribute to close the impunity gap as they should, or as they must.

The first critical gap is the discrepancy of legal obligations imposed upon states in international law as regards the core crimes. Legal obligations can relate to three distinct but closely related concepts: 1) the obligation to criminalize the offence in domestic law; 2) the obligation to give national courts jurisdiction over the core crimes (prescriptive jurisdiction, which can be territorial or extraterritorial, including on the basis of universality); and 3) the obligation to exercise jurisdiction, most often where a suspect is found on a state’s territory and embodied in the obligation *aut dedere aut judicare*, or the obligation to prosecute or extradite.

International treaty law is very uneven in its prescriptions regarding the three obligations mentioned above. As is well known, while the Rome Statute, in its preamble and by implication of the complementarity principle, provides for States Parties’ duty to prosecute the international crimes contemplated in the Statute, it is generally accepted that it does not create an treaty obligation on the part of states to criminalise the core crimes in their legislation, nor obliges them to establish jurisdiction, be it territorial or extraterritorial and less so to exercise jurisdiction.

The Genocide Convention provides an obligation to criminalise, to establish and exercise territorial jurisdiction and to facilitate extradition to the territorial state. For crimes against humanity, there are obviously no treaty obligations as there are no treaties (yet), but the Convention against Torture (CAT) and the Convention against Enforced Disappearance, which target discrete crimes which can constitute crimes against humanity, provide the most recent and state-of-the art provisions for all three obligations. Finally, the Geneva Conventions also provide for all three obligations for war crimes committed in an international armed conflict. For war crimes committed in “Non-International Armed Conflict” (NIAC), there are no such obligations.

It should also be noted that human rights treaties have been interpreted as obliging states to investigate with a view of prosecution grave human rights violations in order to secure an effective remedy to victims. This has had a tremendous impact in certain regions, notably in Latin America, where states instituted proceedings and annulled amnesty laws following decisions of the Inter-American Court of Human Rights. However, this obligation is only imposed to territorial states and should remain parallel to obligations arising out of criminal law conventions, which have a different purpose.

In summary, the Swiss cheese of international obligations has many holes, with the consequence that for most core crimes (genocide, crimes against humanity as such and war crimes in NIAC), there are no obligations to prosecute or extradite. There may be a rule of customary law emerging obliging states to prosecute or extradite, but a safer view at the moment is that customary international law provides for a permissive rather than mandatory rule.

This piecemeal and incomplete approach to treaty-making for core crimes means that for crimes of similar gravity, there are unjustifiably unequal obligations for states. This incoherence manifests itself in the three types of obligations. The first concerns *criminalization*.

The extent to which states have included the core crimes in their domestic criminal legislation and the manner in which they do – it is quite chaotic. Some criminalize genocide but nothing else, some will adopt a definition for just one crime against humanity (for example, Apartheid), many will only criminalise war crimes committed in International Armed Conflict (IAC), etc.

The non-existence of the core crimes in national legislation can have at least two impacts with regard to role that the state in question can play in the global endeavor to put an end to impunity. First and obviously, it means that its courts cannot prosecute the underlying acts that are constitutive of an international crime as an international crime. Second, the absence of core crimes in domestic legislation can block extradition requests from other states where the applicable law provides for a strict rule of double criminality. For instance, if Canada requests extradition of a suspect of torture as a crime against humanity who resides in Mali, Mali law might require that the crime for which extradition is sought be also criminalized in Mali. If it is not, it prevents extradition.

The incoherence in the legal obligations also leads to chaos and uncertainty regarding prescriptive jurisdiction, i.e., which heads of extraterritorial jurisdiction states provide for in their internal laws. Despite lack of explicit obligation in the Rome Statute, many states have taken advantage of the need to adopt implementing legislation to also provide for extraterritorial jurisdiction for the core crimes.

So, states do provide for extraterritorial jurisdiction, but in an incoherent and unequal fashion as regards all core crimes. Of course, the lack of international obligations as regards prescriptive jurisdiction means that the web meant to close the impunity gap is filled with holes. A fugitive war criminal would be better off in Austria or Kenya, for instance, which only provide for limited universal jurisdiction for piracy and other crimes, but not all core crimes, than in Canada, which does.

This relates essentially to the obligation to prosecute or extradite which, let us recall, only exists explicitly in treaty law with respect to war crimes committed in IAC and torture and enforced disappearances as discrete crimes which can also constitute crimes against humanity. So, for ICC crimes, the crimes of gravest concern to the international community, there are, essentially, no obligations at international law. That is the greatest irony.

If we were to adopt a formal obligation at international law, we could potentially see two major impacts. First, from a positive perspective, the existence of obligations can influence in a significant manner the exercise of prosecutorial discretion, by will or (judicial) force, actually leading to effective results. To begin with, one would think that an obligation at international law to investigate (and to submit the case to its competent authorities for the purpose of prosecution) would be taken into account by a state's prosecution authorities in the exercise of their discretion to launch a criminal prosecution. In Canada, international obligations are allegedly taken into account in the exercise of prosecutorial discretion. Faced with a treaty obligation, it is presumed Canadian authorities will act with a view of not breaching the international obligation.

Also, as provided for in treaties that do provide for an obligation *aut dedere aut judicare*, like the CAT Art. 7(1) (2), on whether to prosecute, upon examination of information available to it, "these authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State". This apparently innocuous prescription can actually carry great weight. In Canada, the decision to prosecute in general cases takes into account two criteria: the existence of a reasonable prospect of conviction and public interest. Generally, the graver the offence, the more likely it is that a prosecution will take place. Provided there is sufficient evidence, it is certain, for instance, that a prosecutor will launch a prosecution for the crime of murder. Where international crimes are concerned, however, these criteria, formally applicable as per the information rendered available by the War Crimes program, become almost irrelevant. Suffice it to say that provided there is sufficient evidence to reach the level of a reasonable prospect of conviction – which obviously brings particular challenges in extraterritorial prosecutions – the main guiding principle is very different than for ordinary crimes, and not glamorous: it is money.

The second tangible impact explicit obligations at international law to exercise jurisdiction (*aut dedere aut judicare*) could have, this time seen from a negative perspective, is that, *a contrario*, the absence of clear obligations could then not be invoked as a justification to *not* use the existing legislation to investigate or prosecute, where other motives may wrongly justify the refusal to do so.... The gaps in the existing system favor arbitrary distinctions not based on traditional factors related to whether to initiate criminal proceedings, i.e., reasonable prospect for conviction and public interest. It creates an

environment that is not conducive to a sense of ownership and responsibility by states in the fight against impunity.

The horizontal, or indirect, enforcement of international criminal law through state cooperation is weakly provided for in international multinational treaties. The Rome Statute provides for an extensive vertical cooperation regime that has its own challenges, but does not provide anything as regards horizontal cooperation to implement effectively the complementarity principle.

Extradition suffers from the gaps in the multilateral treaties on international crimes mentioned above. The CAT and other more recent treaties, such as that on Enforced Disappearances, provide for a detailed regime regarding extradition and mutual legal assistance, but the applicable scope of these treaties is very limited. Interstate cooperation for the core crimes relies thus almost exclusively on bilateral and regional treaties as well as domestic law. This aspect of the enforcement system of international criminal justice is under-developed and perhaps less sexy than other issues, but it is the future of international criminal justice.

New treaties, new obligations, will only partly close the impunity gap. Recourse to extradition can still be limited by a number of factors. In order to even enter the possibility of extradition, there needs to be a request from the state wishing to prosecute the suspect. For that to happen, it is necessary that the state knows the whereabouts of the suspect or is informed by the state where said suspect ended up. Here, there is still a lot of work. There is a nice initiative by Interpol for fugitives but it is still quite limited (mainly to Rwanda). Usually, these suspects will be detected through the immigration system when they seek refugee status or some immigration status in a third state. They can then be identified on “reasonable grounds to believe” that they have committed an international crime, thereby leading to exclusion from refugee status, for instance. But this process is classically very secretive and confidential. Immigration officers do not necessarily share information with the Prosecutor or, even more complicated, with other states or local victims’ groups. There is little information sharing with the state where crimes may have been committed, so obviously no possible extradition request.

The EU’s Genocide Network for cooperation amongst member states is promising and has already led to concrete results. But there is a lot of work that needs to be invested in the idea of information-sharing, including respect for the suspect’s human rights. There needs to be some thought given to a new perspective for the custodial state of being proactive in seeking extradition requests from territorial states where it has information that a suspect who entered its territory has been involved in war crimes. The current passive attitude leads to a state-centric “no safe haven” perspective that does not fully take into account the responsibility of each state in the fight against impunity.

The perfect system would then heed on the ICJ's decision in *Habré*, according to which "prosecution is an obligation, extradition an option"...

We're not there yet, but this is where we need to go.

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David Petrasek, a former activist with Amnesty International turned academic, focused his presentation on the role the ICC could play in peace processes. In his activist days he tended to take an uncompromising view on justice issues. "NGOs tend to have a very strong line, and I did as well, but when I began to do back channel mediation work I became less convinced of the firm line."

Petrasek's core concern is the competing need to seek peace and the demands of justice in societies emerging from conflict. Examining the cases of Mali, Afghanistan, DRC, and Columbia, he concluded there was overwhelming evidence that the work of justice could not proceed without a careful balancing with the imperatives of peace negotiations, which sometimes hinge on a certain degree of immunity for combatants.

He explained this need was written into the founding acts of the ICC. Article 53(1) and (2) of the Rome Statute allows the Prosecutor to halt a prosecution if it would be in interests of justice. According to Prof. Petrasek, there was an assumption that the "peace vs. justice debate" could be resolved within the Prosecutor's office through Article 53 itself.

"[We should] widen 'interests of justice' but shield the Office of The Prosecutor in different ways, perhaps through creating advisory bodies (for example expert panels) – to broaden the decision and protect the Office of the Prosecutor from direct political influence which could undermine legitimacy." —David Petrasek

In 2007 the Office of the Prosecutor issued a policy paper on Interests of Justice, which said three important things. First, "the interest of justice was interpreted to mean the interest of victims and by and large interests of victims was assumed to mean prosecution." Second, alternate approaches are welcome and seen as complementary, but their existence will not be something taken into account under "interests of justice." Third, the Security Council can defer a prosecution if there is need for a peace process.

Prof. Petrasek then turned to the "interesting relationship" between Article 53 and Article 16-5c. If the purpose of the Court is to prosecute, and Article 16-5c can deter prosecution

if it is a threat to peace or security, he argued, then this is a political function. It seems that “the interest of justice is something more than the interest of victims.”

In sum, Petrasek believes that the negative impacts of prosecution are overblown. Rather, the problem is appearing to defer to political calculation. This can have several consequences. “If you are deferring prosecution are you handing power to rebel leaders? Are victims only victims in the past, or also victims in the present and in the future?”

All of this requires a broader approach to international criminal justice than is often the case. Justice is more than criminal prosecutions – it could include other transitional justice mechanisms. Indeed, if the primary goal is to end gross human rights abuse, the most important factor is to end conflict, and for this reason domestic prosecutors need the discretion to decline to press charges.

Still, a broader approach to justice is somewhat difficult put into practice. “Some argue that the way out is not to have a policy [but] to live with and embrace the vagueness,” but this is not something that Petrasek supports. Recognizing that the current policy is too open and is generating controversy, he argued that institutions like the ICC need to adopt a clear and defensible policy on when and where to initiate prosecutions in these contexts. Moreover, although Article 16 seems to apply an escape clause, it really is not, because Security Council’s threshold (threats to international peace and security) may be too high, the politics of Security Council too contentious, and there is a fear of setting precedence.

Prof. Petrasek did endorse a policy that began with a close reading of the facts on the ground, including risk assessment and the use of non-criminal domestic processes. He also noted that the Office of the Prosecutor appears to understand the importance of local context, in that they have dealt with the issue by moving slowly and carefully through the preliminary examination phase in their investigations. They have generally taken a wait-and-see approach to their work, waiting until late in the process to commit to formal investigation. While Petrasek is sympathetic to this, he warned, “inevitably you will run into problems and the process is not transparent... that is, the deference to local circumstances is being done in a non-transparent way.”

He suggested that a better approach would entail widening “the interests of justice” while shielding the Office of the Prosecutor in different ways. One possible means would be to create advisory bodies (for example, expert panels) to broaden the decision-making process and protect it from the types of direct political influence that could undermine legitimacy.

These might be subtle practices, but inasmuch as they can produce forms of justice that balanced universal claims with local contexts, they are far more likely to be seen as legitimate than policies which tilt the scales toward either peace or justice.

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The final presentation, by Onur Bakiner, considered the ways in which the concept of universal jurisdiction had come into and out of fashion over a long period of time. He noted that ideas about universal jurisdiction date at least to anti-piracy laws in the 17th century, but that the reach of this concept had grown particularly extensive since the end of the Second World War, when it was incorporated into treaty law. By the 1990s it acted as the ideational source for legal mobilization around human rights, only to see its potential for legal mobilization significantly curtailed in the recent past.

According to Prof. Bakiner, the recent weakening arose primarily out of a diplomatic backlash by states that are increasingly reasserting their primacy in criminal law. His ongoing research is endeavoring to understand this process, and thus far he has identified a fairly diverse set of actors engaged in the battle over universal jurisdiction.

Contemporary efforts to extend the reach of universal jurisdiction continue to enlist support from domestic victims' groups, from state and international human rights organizations, and some legal professionals. Some of these advocates support this form of criminal accountability because although universal jurisdiction may not be ideal, it is the best tool they have to fight for redress of their grievances. And yet, the more human rights groups press for the recognition of universal jurisdiction, the more their political adversaries oppose it, often arguing that these issues have the capacity to generate a great deal of diplomatic friction.

The political adversaries of the human rights groups also include executives, lawmakers, and some legal professionals who have argued for a weakening of the principle. Many of these critics have raised significant procedural questions, such as: can prosecution take place without the Chief Prosecutor's consent? And can prosecution take place if the perpetrator is not present? Changing answers to these questions tend to reflect larger changes in the approaches being taken to universal jurisdiction on a social, political and legal level.

“We don’t know if universal jurisdiction is dead, but it is certainly not as shiny.” — Onur Bakiner

In those places that experimented in the 1990s with an expansive approach to universal jurisdiction and saw liberal judicial interpretations of that law (Belgium, Spain and the UK), statutory changes have significantly reduced the scope of universal jurisdiction over time. Where universal jurisdiction was fairly limited from the start (France, Germany and the Netherlands), fewer changes have been enacted. One notable change is that in all cases it is now much more commonly for victimized nationals to bring cases based on this principle.

What the historical trajectory of universal jurisdiction shows is that principled ideas can become focal points for dynamic and strategic interactions between a host of state and non-state actors. Originally devised as a principle to protect state interests from pirates, universal jurisdiction became increasingly relevant for human rights accountability in the second half of the 20th century. It was the dialectical unfolding of the emerging human rights norm that necessitated the creative re-appropriation of universal jurisdiction to overcome impunity promoted in the name of state sovereignty. The creative use of the principle empowered a new set of actors, while weakening or eliminating the agenda-setting and veto powers of others. However, the sudden transformation of the playing field resulted in an executive and legislative backlash that took the form of amendments to existing universal jurisdiction laws. The amendments rolled back some of the newly acquired powers from human rights groups and legal professionals, and strengthened administrative, executive and judicial veto players.

DISCUSSION

The discussion began with some consideration of the problematic articles of the Rome Statute. One participant suggested that Article 13 clearly causes problems, but that Article 16 (deferral of process, not investigation) could be useful. This speaker noted that this does not impede justice, as a delay of “a year is nothing.”

The same speaker indicated that it was important to distinguish the different ad hoc tribunals and their particular settings. In case of the ICTR, the conflict was terminated by victory. “You got victor’s justice, in effect.” In case of the ICTY, the conflict ended with negotiated peace. The ICTY already existed before the Dayton peace negotiations, and “there was no way we could have negotiated an accountability mechanism at Dayton.”

There was some consensus in the room that the justice-first approach is not always ideal especially in contexts like Lebanon and Colombia. One speaker suggested that, rather than outline grand principles and specific policies in advance, it is better to follow a common law approach of dealing with cases as you encounter them. An approach can be one of building through precedence. In relation to Colombia this speaker commented: “I don’t think the role of the ICC in Colombia is useful... What they are trying to do in Havana in terms of combining negotiations and accountability is incredibly difficult... We know that with all the capacity of the ICTY, and the high cost, it still had few convictions... Colombia has strong civil society actors. It has domestic courts and the Inter-American Court of Human Rights. So what’s the added value of the ICC? Let them sort it out and move on...”

Another speaker noted that given the fact that the “interest of justice” criteria have not been applied in the Colombian case, it was not clear why the ICC was engaged in this process. That same speaker also reiterated the point that there is a real danger when the issue of justice becomes politicized. The balance had to be based in an awareness of the political context, but not in political calculation. Colombia, this speaker concluded, was a textbook example of the need to proceed very slowly.

CONCLUDING REMARKS

The Honourable Louise Arbour

This conference has provided a rich overview of the accomplishments and recurrent as well as emerging challenges faced by international criminal justice. The expansion, if not the creation, of international criminal law some 22 years ago with the setting up of the International Criminal Tribunal of the former Yugoslavia (ICTY), and a year later of the International Criminal Tribunal for Rwanda (ICTR), by the UN Security Council, was the most imaginative and the most potent expansion of international law since the creation of the UN. It was surprisingly imaginative in many ways. Created by the UN body responsible for the maintenance of “international peace and security”, it unequivocally used a legal process – criminal prosecutions – as an instrument of peace, thereby expanding in a novel way the tried and true toolbox of peace management: diplomatic engagement, economic sanctions and military intervention.

It was also novel and bold in encroaching dramatically on state sovereignty – for example by requiring the cooperation of all states with the Prosecutor, including that the Prosecutor be given access to all relevant territory, etc... and, most importantly, by setting aside the expected immunity of heads of states from international criminal prosecutions. The early successes – all relative but somewhat unexpected – of these two ad hoc tribunals were instrumental in gathering the impetus which led to the creation of the International Criminal Court (ICC) by the Rome statute. Inevitably, compromises were made in moving from the coercive diktat of the UN Security Council (UNSC) to a consensual treaty-based institution. But not enough compromises, so it seems, to generate the support of the big players in the field of armed conflicts.

The core compromise, in my view, was that of replacing the primacy of the international prosecutor that the ad hoc tribunals enjoyed, by the principle of complementarity, giving national courts primacy over the ICC under the obvious conditions of capacity and integrity.

Our discussions yielded different views on many issues, including this one. I, for one, believe that complementarity has failed to deliver its most important intended objective of universal ratification while reducing the potency of the court, as evidenced by the Kenya case. Ironically, it is under the primacy of ICTY that national courts in the country under its jurisdiction have seen a flourishing of national war crimes prosecutions. Flaws such as this one will not be easily – or ever – remedied. But they are not fatal. Other factors accounting for the current low standing of the institution, not legal but political and

cultural factors, will prove harder to overcome. The perception of double standards, inevitable until universality of ratification is achieved, is harming the court, as is the claim, not always advanced in good faith, that it has unfairly targeted Africa. To the extent that the jurisdiction of the court, or lack thereof, can be linked to the existence of the veto in the UNSC, there is no question that claims of politicization will continue to be credibly made.

As a non-national institution, the ICC will always be an easy target for accusations of foreign meddling in domestic affairs, thereby fueling nationalistic reactionary forces and even possibly at times negatively affecting both peace processes and democratic transitions. For all these potential undesirable consequences arising from accountability mechanisms, many of which were exposed and analyzed in this conference, the impetus for improving, rather than abandoning, the international criminal justice enterprise is alive and healthy.

The ICC, parallel activities in national jurisdictions, continued recourse to a specialized forum, like the one trying Hisène Habré in Senegal, and new accountability initiatives, like the one launched by the African Union, speak to the irreversibility of what could be called “the accountability project”. Part of this wider project includes renewed calls for the enforcement of the Genocide Convention and the Torture Convention, for example, and the movement which led to the creation of the Responsibility to Protect doctrine. Yet for all the vitality of this “accountability project” it has suffered recent setbacks, some from within, some external. The internal setbacks are likely to be capable of redress. Doctrinal inconsistencies, institutional weaknesses, and inadequate leadership are never fatal. Combined, though, they may create a period of disenchantment with the entire project. It is urgent that they be addressed.

The external challenges were unpredictable and more difficult to control. They are currently twofold, and will evolve. The first is the dominance of the post 9/11 so-called war on terror, and the erosion of norms that it has engendered. These norms included not only the Torture Convention but many fundamental principles in International Humanitarian and Human Rights law that came to be challenged, directly or not, by many of its previous purported champions, thereby exacerbating the perception of double standards already prevalent in international relations. These challenges are exacerbated by the rise of religious extremism and the early collapse of the “Arab Spring”, renewed international armed conflict, and new forms (and perhaps norms) of internal and international armed conflicts. New war-related technologies – the use of drones, cyber warfare – will force international criminal institutions to keep pace with a new reality on the ground.

Maybe even more significantly, larger concerns related to climate change should continue to dominate the international agenda and to mobilize many who will devote their energies to this greater universal threat.

Meanwhile, activities like this conference remind us of the importance of the ideal of justice for all, enshrined in the UN Charter and the Universal Declaration of Human Rights. More than this, we are also reminded of the need to improve the doctrines and institutions devoted to international criminal justice, and to cultivate the new generations of leaders who will be essential for its success.

GLOSSARY OF TERMS AND ACRONYMS

Complementarity

(as defined by the Coalition for the International Criminal Court)

“Complementarity is one of the foundational principles of the Rome Statute system. What was envisioned by the drafters of the Rome Statute was not simply a self-standing Court, but rather a comprehensive system of international justice, where the duty on States Parties to investigate and prosecute international crimes is clearly reinforced. Consequently, the International Criminal Court (ICC) is a court of ‘last resort’ and will step in where national jurisdictions have failed to address international crimes.”

Expressivist Theory of Law

This theory holds that law is “symbolic”, or “expressive”. It holds that laws should be evaluated both in terms of their effectiveness and in terms of the moral and social meanings they convey. Law should thus be evaluated in terms of their capacity to achieve certain social goals. Moreover, the meanings attached to official actions are relevant to determining the moral status of those actions.

Fragmentation

(as defined by the Oxford Bibliographies)

“The fragmentation of public international law is a long-observed phenomenon that demonstrates uneven normative and institutional development and evolution in inter-state relations. Separate legal norms and institutions have developed largely independently from one another, often instigated by non-identical groupings of states and in response to specific functional issues. The proliferation of courts and tribunals has impacted upon long-standing generalist bodies such as the International Court of Justice (ICJ) and increased the potential for fragmentation and diversification of the law.”

Legal Pluralism

(as defined by Wikipedia)

“The existence of multiple legal systems within one (human) population and/or geographic area. Plural legal systems are particularly prevalent in former colonies, where the law of a former colonial authority may exist alongside more traditional legal systems (cf. customary law).”

ACC	African Criminal Court
ECHR	European Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal in Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
NGO	Non Government Organization
R2P	Responsibility to Protect

CONFERENCE PARTICIPANTS

Louise Arbour

Chair, Conference on *International Criminal Justice: State of Play*
Simons Visiting Chair in Dialogue on International Law and Human Security
School for International Studies
Simon Fraser University

The Hon. Louise Arbour, C.C., G.O.Q. has served on the Supreme Court and Court of Appeal of Ontario and the Supreme Court of Canada. She was Chief Prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda, High Commissioner for Human Rights at the United Nations, and President and CEO of the International Crisis Group. She is currently a jurist in residence at Borden Ladner Gervais LLP in Montreal and serves as a member of the advisory boards of the Coalition for the International Criminal Court, the Global Commission on Drug Policy, and the International Commission against the Death Penalty.

Onur Bakiner

Assistant Professor, Political Science Department
Seattle University
and Adjunct Faculty Member, School for International Studies
Simon Fraser University

Onur Bakiner is Assistant Professor of Political Science at Seattle University. His past research on truth commissions was published in 2015 under the title *Truth Commissions: Memory, Power, and Legitimacy* by the University of Pennsylvania Press. Currently he has been working on a research project examining judicial actors during prolonged internal conflict in Colombia and Turkey. His research and teaching interests include transitional justice, human rights and judicial politics, particularly in Latin America and the Middle East. Bakiner's articles have been published in the *International Journal of Transitional Justice*, *Nationalities Papers*, and *Memory Studies*.

Nicole Barrett

Director, Joint International Justice and Human Rights Clinic
Osgoode Hall and University of British Columbia Law Schools

Nicole Barrett is Director of the Joint International Justice and Human Rights Clinic at Osgoode Hall and University of British Columbia Law Schools. She was previously a trial lawyer and a Legal Officer for the International Criminal Tribunal for the former Yugoslavia as well as a Senior Scholar in Residence at New York University Law School's Center for Human Rights and Global Justice, where she directed clinical projects with international criminal courts and tribunals. Barrett holds a JD from Columbia Law School, a Masters in International Affairs from Columbia University and a BA from Stanford University.

Rex Brynen

Department of Political Science
McGill University

Rex Brynen is Professor of Political Science at McGill University. He is author or editor of 11 books on politics, security, and development in the Middle East, including various aspects the Arab–Israeli conflict. In addition to his academic work, he has served as an advisor to the Privy Council Office, Department of Foreign Affairs, the World Bank, and various UN agencies.

Rachel A. Cichowski

Director, Comparative Law & Society Studies Center
and Associate Professor, Department of Political Science
University of Washington

Rachel Cichowski is Director of the Comparative Law & Society Studies Center and Associate Professor in the Department of Political Science, with a joint appointment in the Law, Societies and Justice program at the University of Washington. Her primary research interests include legal mobilization, international law and organization, comparative constitutionalism and international justice and human rights. Her research has been published by Cambridge University Press, Oxford University Press and in edited volumes and various journals, including *Law & Society Review*, *Comparative Political Studies* and *Journal of European Public Policy*.

Alexander Dawson

Director, School for International Studies
Simon Fraser University

Alexander Dawson is a historian of modern Mexico with a PhD from SUNY-Stony Brook (1997). He is the author of *Indian and Nation in Revolutionary Mexico* (University Arizona Press, 2004), *First World Dreams: Mexico Since 1989* (Zed, 2006), and *Latin America since Independence* (Routledge, 2010, 2014). Dawson has published articles in the *Journal of Latin American Studies*, *The Americas*, *Latin American Perspectives*, and the *Hispanic American Historical Review*. He is currently working on a book titled *Peyote Wars* (under contract with the University of California Press) which examines the ways peyote, whiteness, and indigeneity have been linked in Mexico and the United States by indigenous peoples, ecclesiastical authorities, government officials, and others. It also explores the ways in which the boundaries created around peyote and policed by various authorities have been blurred or crossed by a variety of actors since the colonial period.

Richard A. Falk

Albert G. Milbank Professor of International Law and Practice Emeritus
Princeton University
and Research Fellow, Orfalea Center of Global Studies
University of California, Santa Barbara

Richard Falk is Albert G. Milbank Professor of International Law and Practice Emeritus at Princeton University and currently Research Fellow, Orfalea Center of Global Studies, UCSB. He was UN Special Rapporteur for Occupied Palestine in 2008–2014. His most recent books are *Humanitarian Intervention and Legitimacy Wars* (2014) and *Palestine: The Legitimacy of Hope* (2015).

Georgette Gagnon

Director of Human Rights for the United Nations Assistance Mission in Afghanistan (UNAMA)

and Representative of the Office of the United Nations High Commissioner for Human Rights in Afghanistan

Georgette Gagnon, a Canadian lawyer, is Director of Human Rights for the United Nations Assistance Mission in Afghanistan (UNAMA) and Representative of the Office of the United Nations High Commissioner for Human Rights in Afghanistan. She was Director of Human Rights for the UN Supervision Mission in Syria based in Damascus in 2012, serving as senior human rights advisor to Kofi Annan in his role as UN-Arab League Special Envoy for Syria. She previously worked with Human Rights Watch in New York as Executive and Deputy Director of the organization's Africa Division (2004–2010) and with the Organization for Security and Cooperation in Europe's Mission to Bosnia and Herzegovina in Sarajevo, as Director of Human Rights and Rule of Law (2001–2003). Gagnon has served as an investigator and advisor on human rights and rule of law for the Canadian government on projects in China, India and Sudan, for the United States government in Sudan and as a human rights officer with UN missions in Bosnia-Herzegovina and Rwanda.

Hyeran Jo

Assistant Professor of Political Science

Texas A&M University

Hyeran Jo holds a PhD in political science from the University of Michigan. Her primary academic interests lie at the intersection of international relations and international law, with an additional interest in international political economy. The analytical questions on her current research agenda include how international rules are designed, why and how states comply with international rules, and how international rules interact with domestic regulatory structures and ultimately impact the advance of cooperation in international relations. Jo's teaching interests include courses on International Relations, Global Governance, International Law and Institutions, and Research Design.

Fannie Lafontaine

Canada Research Chair on International Criminal Justice and Human Rights
and Co-director, International Criminal and Humanitarian Law Clinic, Laval University

Fannie Lafontaine is a Professor at the Law Faculty at Laval University (Quebec City). She holds the Canada Research Chair on International Criminal Justice and Human Rights and is the Founder and Co-director of the [International Criminal and Humanitarian Law Clinic](#). She previously worked with Louise Arbour in her Executive Office as the United Nations High Commissioner for Human Rights and as a law clerk at the Supreme Court of Canada. She also worked with the International Commission of Inquiry on Darfur, with NGOs and in litigation practice. Lafontaine is the author of *Prosecuting Genocide, Crimes against Humanity and War Crimes in Canadian Courts* (Carswell, 2012) and of the yearly publication *Chartes des droits de la personne* (Wilson & Lafleur). She consults and acts as pro bono counsel in international justice projects and court cases.

Bridget Marchesi

Fellow, Carr Center for Human Rights Policy, Harvard Kennedy School
PhD Candidate, University of Minnesota

Bridget Marchesi is a fellow at the Carr Center for Human Rights Policy in Harvard University's John F. Kennedy School of Government, working in the Transitional Justice program. Bridget is pursuing a PhD in political science at the University of Minnesota. Her research focuses on explaining the global diffusion of transitional justice and how conditions of adoption affect the quality of policy design and implementation. As a Fellow, Marchesi is also working on a Carr Center and Harvard Humanitarian Initiative affiliated evaluation of the Colombian *Unidad para las Víctimas* and the *Victims and Land Restitution Law*. She holds a Master of Public Policy from the Humphrey School of Public Affairs and a Master of Business Administration from the Carlson School of Business. Her Bachelor of Arts is from Princeton University.

Tim McCormack

Professor of Law
Melbourne Law School

Tim McCormack is Professor of Law at the Melbourne Law School and Adjunct Professor of Law at the University of Tasmania Law School. He is the Special Adviser on International Humanitarian Law to the Prosecutor of the International Criminal Court and Law of Armed Conflict Expert Adviser to the Australian Defence Force Director of Military Prosecutions. McCormack has been awarded a Fulbright Senior Scholarship to take up the position of Charles H Stockton Distinguished Scholar-in-Residence at the US Naval War College, Newport, Rhode Island (from July 2015) and he has also been appointed Visiting Professor at Harvard Law School to teach International Criminal Law in the Winter Term (January 2016).

Diane F. Orentlicher

Professor of International Law, Washington College of Law
American University

Diane Orentlicher is Professor of International Law at the Washington College of Law of American University and is Co-Director of the law school's Center for Human Rights and Humanitarian Law. She has previously served as United Nations Independent Expert on Combating Impunity (2004–2005) and as Deputy for War Crimes Issues in the US Department of State (2009–2011). She is currently writing a book about the impact of the International Criminal Tribunal for the former Yugoslavia in Bosnia-Herzegovina and Serbia.

David Petrasek

Associate Professor, Graduate School of Public and International Affairs
University of Ottawa

David Petrasek is Associate Professor, Graduate School of Public and International Affairs, University of Ottawa and formerly Special Adviser to the Secretary-General of Amnesty International. He has worked extensively on human rights, humanitarian and conflict resolution issues, including for Amnesty International, for the Office of the UN High Commissioner for Human Rights, and as Director of Policy at the Henry Dunant Centre for Humanitarian Dialogue (2003–2007).

Jennifer A. Quaid

Assistant Professor, Civil Law Section, Faculty of Law
University of Ottawa

An expert on corporate criminal liability, Jennifer Quaid's research focuses on the theoretical and practical aspects of applying the criminal law to organizations. Her current work proposes a new framework within which to analyze organizational responsibility for *mens rea* crimes using an interdisciplinary approach that brings together law and elements of organization theory. A graduate of the University of Ottawa in both law and economics, Quaid holds graduate degrees from the University of Cambridge and at Columbia University and is currently completing a doctorate in law at Queen's University. Before joining the academy, she practiced law for several years, first with Canada's federal Department of Justice and then in private practice.

Ruben Reike

Research Fellow
European University Institute

Ruben Reike is a Post-Doctoral Research Fellow at the European University Institute, where he is part of the ERC-funded project: “The Individualization of War: Reconfiguring the Morality, Law, and Politics of Armed Conflict”. He holds a DPhil in International Relations from the University of Oxford, Somerville College, and a Masters in International Studies from the University of Queensland. Reike has also worked for Amnesty International.

Ali A. Rizvi

Dr. Rizvi is a writer and physician who grew up in Libya, Saudi Arabia, and Pakistan before immigrating to Canada. He is a regular contributor to the Huffington Post and has also been published and made appearances on CNN, CTV, NPR, and more. He is currently writing his first book, *The Atheist Muslim*, which explores the challenges faced by secularists and reformers in Muslim majority countries.

Sheri Rosenberg

Associate Clinical Professor of Law and Director, Human Rights and Atrocity Prevention Clinic and Cardozo Law Institute in Holocaust and Human Rights
Cardozo School of Law, Yeshiva University

Sheri Rosenberg is Associate Clinical Professor of Law and Director of the Human Rights and Atrocity Prevention Clinic and the Cardozo Law Institute in Holocaust and Human Rights (CLIHHR). Rosenberg worked for the US Department of State with the Human Rights Chamber, a quasi-international court established under the Dayton Peace Agreement, in Sarajevo, Bosnia- Herzegovina, and has been the recipient of the Human Rights Fellowship at Columbia Law School, where she worked for the United Nations Office for the Coordination of Humanitarian Affairs, Policy Branch, and completed her LL.M with honors. Her book, *Reconstructing Atrocity Prevention*, was published by Cambridge University Press in 2015.

William Schabas

Middlesex University London and Leiden University

William Schabas, O.C., is the author of many books and articles on the abolition of capital punishment, genocide, the international criminal tribunals and the European Convention on Human Rights. Prof. Schabas was a member of the Sierra Leone Truth and Reconciliation Commission and the UN Commission of Inquiry on the 2014 Gaza Conflict. He is president of the Irish Branch of the International Law Association and chair of the Institute for International Criminal Investigation. He is an Officer of the Order of Canada and a member of the Royal Irish Academy and has been awarded several honorary doctorates.

Beth A. Simmons

Clarence Dillon Professor of International Affairs, Harvard Government Department
Harvard University

Beth Simmons is Clarence Dillon Professor of International Affairs in the Department of Government at Harvard University. She teaches international relations, international law and international political economy. Her current research interests include human rights, human trafficking, and international cooperation relating to criminal law. Her books include *Mobilizing for Human Rights: International Law in Domestic Politics* (2009) and *Who Adjust? Domestic Sources of Foreign Economic Policy during the Interwar Years* (1994). She was elected to the National Academy of Sciences in 2013.

Jennifer Allen Simons

Founder and President
The Simons Foundation

Jennifer Allen Simons, C.M., Ph.D., LL.D. is Founder and President of The Simons Foundation, a private charitable foundation located in Vancouver, Canada, with a mission to advance positive change through education in peace, disarmament, international law and human security. Simons is Adjunct Professor at the School for International Studies, Simon Fraser University, and Senior Visiting Fellow and Dialogue Associate at SFU's Centre for Dialogue; a Council Member of Pugwash Conferences on Science and World Affairs; a Founding Partner of Global Zero; and serves as a board member or advisor on a number of national and international organizations. She was appointed to the Order of Canada in 2010.

Izabela Stefija

Simons Postdoctoral Fellow, School for International Studies
Simon Fraser University

Izabela Stefija is the Simons Postdoctoral Fellow in Dialogue on International Law and Human Security at the School for International Studies at Simon Fraser University. She holds a DPhil in Political Science from the University of Toronto, where she completed a dissertation entitled “(In) Humanity on trial: on the ground perceptions of international criminal tribunals,” and an MA in political science from McGill University. Stefija has conducted extensive fieldwork in East-Central Africa and the Balkans and her research has been funded by a number of prestigious awards. Her recent work has been published in *Europe-Asia Studies*, *Human Rights Review*, and *Global Change, Peace, and Security*.

James G. Stewart

Assistant Professor, Faculty of Law at Allard Hall
University of British Columbia

James G. Stewart has spent the past 15 years working in international criminal justice, as either a practitioner or a scholar. He joined the University of British Columbia Law Faculty in August 2009, after spending two years as an Associate-in-Law at Columbia Law School in New York. Before then, he was an Appeals Counsel with the Prosecution of the United Nations International Criminal Tribunal for the former Yugoslavia. He also worked for the Legal Division of the International Committee of the Red Cross and the Prosecution of the International Criminal Tribunal for Rwanda. At present, he works as a Senior Legal Advisor (part-time) to judges of the Appeals Chamber of the Extraordinary Chambers in the Courts of Cambodia. He holds degrees from Victoria University of Wellington, New Zealand in both law and philosophy, a Diplôme d'études approfondies in international humanitarian law from Université de Genève and a JSD from Columbia Law School. He has received the Cassese Prize in International Criminal Justice and an Open Society Fellowship, and was a Global Hauser Fellow at NYU Law School for his research on the relationship between atrocity commerce, and international criminal law. This research, together with a blog on associated issues, is available online at jamesgstewart.com.

James K. Stewart

Deputy Prosecutor
International Criminal Court

James K. Stewart was elected Deputy Prosecutor of the International Criminal Court by the Assembly of States Parties to the Rome Statute in November 2012 and took up his duties in the Hague in March 2013. For over 30 years he served as Crown counsel in Toronto, and also served for periods of time in the Office of the Prosecutor as Senior Trial Attorney and later Chief of the Appeals and Legal Advisory Division at the International Criminal Tribunal in Rwanda and Chief of the Prosecutions Division at the International Criminal Tribunal for the former Yugoslavia.

Stephen J. Toope

Director of the Munk School of Global Affairs and Professor of International Law
University of Toronto

Stephen J. Toope is Director of the Munk School of Global Affairs and Professor of International Law at the University of Toronto. He was President and Vice-Chancellor of the University of British Columbia, from 2006 to 2014. A former President of the Pierre Elliott Trudeau Foundation and Dean of Law at McGill University, Toope also served as Law Clerk to the Rt. Hon. Brian Dickson, of the Supreme Court of Canada. He also served as Chair of the United Nations Working Group on Enforced and Involuntary Disappearances. His most recent book, with Jutta Brunnée, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010) was winner of the American Society of International Law's 2011 Certificate of Merit for Creative Scholarship.

Castro Wesamba

Team Leader
Office of the United Nations Special Adviser on the Prevention of Genocide

Castro Wesamba is the Team Leader for the Africa Region in the Office of the United Nations Special Adviser on the Prevention of Genocide and the Responsibility to Protect since 2008. He has extensive experience in political affairs and human rights in the United Nations. Before joining the UN, he worked for the Ministry of Foreign Affairs of Kenya for 13 years as a diplomat. Wesamba holds a Bachelor's degree in international relations from Kenyatta University, Nairobi, a Master of Arts in International Affairs and a post-graduate diploma in International Law from Saint John's University, New York.



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