

Introduction to Panel Discussion:

“The Rome Statute: Opportunities and Challenges in Enforcement”

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I was honored to have been asked by Paul T. Babcock, the Editor-in-Chief, and Laura Walker, Symposium Coordinator, to moderate the panel on “The Rome Statute: Opportunities and Challenges in Enforcement” during the 2015 Annual Live Symposium of the *Indiana International & Comparative Law Review*.

The panelists were Professor Yvonne M. Dutton, Professor Stuart Ford, and Avril Rua Pitt. The discussions of the panel and questions from those attending were wide-ranging and provocative. The purpose of this brief introduction is not to recount the details of our deliberations but to identify the questions we examined and debated as predicate for the scholarship to follow.

First, a brief introduction of the panelists is in order. My colleague Professor Dutton is an Associate Professor of Law at the Indiana University Robert H. McKinney School of Law where she is a popular teacher of international criminal law, evidence, and criminal law and procedure. She is the author of a book on the International Criminal Court (“ICC”)<sup>1</sup> and has served as a federal prosecutor in the Southern District of New York. Her law degree is from Columbia University and she holds a Ph.D. from the University of Colorado.

Professor Ford is an Assistant Professor at The John Marshall Law School in Chicago where he researches and writes about public international law and teaches courses in

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<sup>1</sup> RULES, POLITICS, AND THE INTERNATIONAL CRIMINAL COURT: COMMITTING TO THE COURT (Routledge, May 2013).

international criminal law and international organizations. He worked as a prosecutor, and had an international tribunal prosecuting senior leaders of the Khmer Rouge. His law degree is from the University of Texas and he holds an LL.M. from the University of Nottingham in the United Kingdom.

Ms. Pitt is currently on the staff of the Indiana University Center for Bioethics. She holds an LL.M. in Human Rights from the Indiana University Robert H. McKinney School of Law, where her research included studying the role of child soldiers and the intentional transmission of HIV. Her law degree is from Moi University in Kenya and she holds a Masters in Bioethics from Indiana University-Purdue University Indianapolis.

Our panel began by comparing and contrasting the principle of “universal jurisdiction” and the jurisdiction of the ICC. The Restatement (Third) of Foreign Relations defines “universal jurisdiction” as follows:

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism. . . .<sup>2</sup>

A comment to this section discusses “universal jurisdiction” in further detail as follows:

[I]nternational law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the victim). Universal jurisdiction over the specified offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations. These offenses are subject to universal jurisdiction as a matter of customary law.<sup>3</sup>

The panel examined the practical difficulties in effectuating the exercise of universal jurisdiction

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<sup>2</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS §404 (Am. Law Inst. 2002).

<sup>3</sup> *Id.*

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and the consequent establishment of, first, specific tribunals,<sup>4</sup> and, subsequently, the ICC.<sup>5</sup>

The panel next turned its attention to the uneasy tension between the role of the United Nations Security Council as an entity that both refers situations to the ICC and authorizes peacekeeping missions.

Under the Rome Statute, the United Nations Security Council can refer situations to the Prosecutor for investigation.<sup>6</sup> This is how the situation in Darfur, Sudan, was brought before the ICC.<sup>7</sup> The Security Council has authorized peacekeeping missions in Darfur,<sup>8</sup> in Sudan's Abyei region,<sup>9</sup> and in South Sudan.<sup>10</sup>

Using the charges against Omar Hassan Ahmad Al Bashir, the President of the Republic of Sudan,<sup>11</sup> as the most graphic example of this tension, the panel discussed whether the Security Council jeopardizes the neutrality and the safety of a peacekeeping mission in a region when making a referral to the ICC.

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<sup>4</sup> *E.g.*, the Nuremberg Tribunal established by the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991, Security Council Resolution 827, U.N. S.C.O.R., 48th Sess., 3175th mtg., U.N. Doc. S/RES/827 (1993); and the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Such Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwanda Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between January 1, 1994 and December 31, 1994, Security Council Resolution 955 (1994), U.N. S.C.O.R., 50th Sess., U.N. Doc. S/RES/134 (1995).

<sup>5</sup> Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf/183/9 (1998) [hereinafter "Rome Statute"], art. 13(b).

<sup>6</sup> *Id.*

<sup>7</sup> Security Council Resolution 1593, U.N. S.C.O.R 5158<sup>th</sup> mtg., U.N. Doc. S/RES/1593 (2005).

<sup>8</sup> African Union-United Nations Hybrid Operation in Darfur, Security Council Resolution 1769, U.N. S.C.O.R., 5727<sup>th</sup> mtg., U.N. Doc. S/RES/1769 (2007).

<sup>9</sup> United Nations Interim Security Force for Abyei, Security Council Resolution 1990, U.N. S.C.O.R., 6567<sup>th</sup> mtg., U.N. Doc. S/RES/1990 (2011).

<sup>10</sup> United Nations Mission in the Republic of South Sudan, Security Council Resolution 1996, U.N. S.C.O.R., 6567<sup>th</sup> mtg., U.N. Doc. S/RES/1996

<sup>11</sup> See ICC Case Information Sheet, Situation in Darfur, Sudan, No. ICC-02/05-01/09 (26 March 2015), <http://www.icc-cpi.int/iccdocs/PIDS/publications/AlBashirEng.pdf> (last visited January 28, 2016). [<http://perma.cc/ZS8H-MEEL>].

Next, the panel examined the situation in Kenya. The discussion began with an explanation that under the Rome Statute, the Prosecutor can initiate investigations *proprio motu* (on his or her own motion) on the basis of information on crimes within the jurisdiction of the Court.<sup>12</sup> This is how the situation in Kenya was brought before the ICC.<sup>13</sup> Professor Dutton and Ms. Pitt, both experts on Kenya, discussed the Kenyan reaction to the charges, and more generally, the implications from the Kenyan situation for future compliance with investigations initiated *proprio motu*.

Frequent attention has been drawn to the fact that only situations in Africa have been brought before the ICC to date.<sup>14</sup> However, investigations are underway of situations in Afghanistan, Colombia, Georgia, Guinea, Iraq, Nigeria, Palestine, and Ukraine.<sup>15</sup> The panelists reviewed the challenges and opportunities that the ICC would be presented with if these situations are brought before the court. This discussion led to an intense debate over the recent action of the Palestinian Authority to join the ICC and the potential of Palestinian claims being brought against Israel and counterclaims against Palestinian officials.<sup>16</sup> The panel noted that some observers see the ICC taking such cases as a way of blunting criticism of pursuing only African targets.<sup>17</sup>

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<sup>12</sup> Rome Statute, *supra* note 5, art. 15(1).

<sup>13</sup> See ICC Case Information Sheet, Situation in the Republic of Kenya, No. ICC-01/09-02/11 (13 March 2015), <http://www.icc-cpi.int/iccdocs/PIDS/publications/KenyattaEng.pdf> (last visited January 28, 2016). [<http://perma.cc/XR2A-2ETL>].

<sup>14</sup> E.g., Adam Taylor, *Why so many African leaders hate the International Criminal Court*, Wash. Post (June 15, 2015); *African Leaders to Court: Drop Cases Against Top Africans*, Associated Press (Feb. 1, 2015), [http://news.yahoo.com/african-leaders-court-drop-case-against-sudans-leader-071440718.html;\\_ylt=A0LEVj3LnapWLYAAiSQnnIIQ;\\_ylu=X3oDMTE0MGhyOWFIBGNvbG8DYmYxBHBvcwMxBHZ0aWQDUFJEQkNLMV8xBHNiYwNzcg--](http://news.yahoo.com/african-leaders-court-drop-case-against-sudans-leader-071440718.html;_ylt=A0LEVj3LnapWLYAAiSQnnIIQ;_ylu=X3oDMTE0MGhyOWFIBGNvbG8DYmYxBHBvcwMxBHZ0aWQDUFJEQkNLMV8xBHNiYwNzcg--) (last visited January 28, 2016) [<http://perma.cc/7JK7-7H5L>]; Kenneth Roth, *Africa Attacks the International Criminal Court*, N.Y. Rev. of Books (Feb. 6, 2014).

<sup>15</sup> See ICC, Situations and cases, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) (last visited January 28, 2016). [<http://perma.cc/UR7T-UG36>].

<sup>16</sup> Jodi Rudoren, *Court membership Wouldn't Guarantee Palestinians a War Crimes Case*, N.Y. Times (Jan. 2, 2015).

<sup>17</sup> *Id.*

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In response to an observation that metrics are regularly applied to many court systems in order to assess their productivity and efficiency, Professor Ford explained the results of his research on the productivity and efficiency of the ICC.

Lastly, the panel and the audience considered the hypothetical of a state granting an individual a complete pardon and immunity for any and all crimes as part of a legitimate, transparent domestic truth and reconciliation process. This hypothetical amnesty pardons and immunizes the individual of crimes within the jurisdiction of the ICC. Does the Rome Statute nevertheless permit such an individual to be prosecuted? If so, should it?

The attendant conversation delved into the principle of “complementarity,” which as a general matter refers to the granting of jurisdiction to a subsidiary body when the main body fails to exercise its primary jurisdiction.<sup>18</sup> In the context of the panel’s discussion, it refers to international criminal justice systems intervening when national systems fail to curb crimes of international law.<sup>19</sup> The panel and the audience debated whether the ICC was consistent with the principle of complementarity. Some argued that it was, operating as sort of a “safety net” to prevent impunity for the most serious of crimes against humanity. Others took the view that the ICC has expanded jurisdiction at the expense of individual states, radically altering the balance between international and national criminal justice systems, and thereby changing the concept of complementarity.

As noted at the outset, it was a great honor to moderate a panel of such experts on such an interesting constellation of issues before such an engaged and knowledgeable audience. And it

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<sup>18</sup> See Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?*, 88 Int’l Rev. of the Red Cross 375 (June 2006), citing Bartram S. Brown, *Primacy Or Complementarity: Reconciling The Jurisdiction Of National Courts And International Criminal Tribunals*, 23 Yale J. Int’l L. 386 (1998).

<sup>19</sup> Philippe, *supra* note 18, at 380.

demonstrated again the singular contribution that the Indiana International & Comparative Law Review makes to scholarship and discourse on major topics of international and comparative law.