

INTRODUCTION TO THE SYMPOSIUM ON THE ROME STATUTE AT TWENTY

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There could not be a better time to publish this symposium, which is devoted to the twentieth anniversary of the Rome Statute of the International Criminal Court (ICC). Apocalyptic visions of unmanageable crises and a mass exodus of African members from the ICC have not transpired, which is in itself a cause for celebration for all those who hold dear the project of international criminal justice. But it is also undeniable that the Rome project still falls short of the expectations of the participants at the groundbreaking conference in Rome, with their visions of creating the best international criminal court possible: one that is efficient, economic, and fair, and one that applies a full panoply of human and due process rights.

The contributors to this symposium include eminent jurists, mostly serving and past judges of the ICC and the ad hoc tribunals, as well as others with profound in-court experience. Their essays highlight the achievements, shortcomings, and challenges still facing the ICC, combining theory with practical insights.

In one form or another, all of the essays address gaps and lacunae in the Rome Statute. The Rome Conference was a remarkable success in all that it achieved, and the Rome Statute is ground-breaking. Yet as the past twenty years have demonstrated, the legal framework to which the Rome Conference gave rise suffers from various lacunae, some textual and jurisprudential, some in the area of procedure and inadequate implementation, some in policy and management. And in one form or another, all of the essays argue that addressing those gaps requires sensitivity to the ICC's broader context, both political and legal. The contributors thus speak in different ways not only to the impact of the Statute itself, but also to the impact that external factors have had on the Court and its development.

Beginning with the Court's docket, the long and indeterminate duration of preliminary examinations has been a major source of criticism of the ICC and especially its Office of the Prosecutor. In his essay, David Bosco of Indiana University points to the absence of guidance in the Rome Statute regarding the duration of the preliminary examinations and considers proposals to impose a time limit on this investigatory stage.¹ The indeterminacy of preliminary examinations can feed perceptions that prosecutorial decisions are affected by international politics, but Bosco notes how the approach of the prosecutor in addressing this particular statutory gap has evolved over time towards increasing transparency. While there is still room for improvement, he argues that the complications of imposing a timetable on the prosecutor outweigh the advantages. In his view, a protracted preliminary examination may be preferable to a confusing series of opened, closed, and then reopened investigations. A premature closing of an examination, for instance, would preclude the prosecutor from taking advantage of an improvement in the political environment. Maintaining prosecutorial discretion in the management of preliminary examinations,

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¹ David Bosco, *Putting the Prosecutor on a Clock? Responding to Variance in the Length of Preliminary Examinations*, 112 AJIL UNBOUND 158 (2018).

at least when coupled with periodic disclosures and updates about ongoing examinations, best allows the prosecutor to navigate the political terrain without becoming embroiled in it.

Turning from the Office of the Prosecutor to chambers, Silvia Fernández de Gurmendi, a former President of the ICC, discusses how fifteen years of operations at the Court have highlighted deficiencies in the selection process for judges.² States necessarily control the selection of judges, but care must be taken to recognize and respect the importance of merit and collegiality. The creation of an Advisory Committee on Nominations has helped to address this need, but it still falls on states to take the Committee's recommendations seriously. In terms of merit, experience has shown that judges must possess both criminal *and* international legal expertise, even though the Rome Statute only requires one or the other. In terms of collegiality, Fernández points out that the regular replacement of a third of the Court's eighteen judges poses a real challenge to the efficiency and judicial cohesion of the Court. She identifies the need for further harmonization of the practices of different chambers, a difficult task in a unique legal environment that makes collegiality a vital qualification, even if not a codified one, for future judges.

Former ICC judge Adrian Fulford writes of "significant lacuna in [the Court's] opportunities to act" with regard to the critical issue of states' failure to enforce arrest warrants, a problem he believes has grown acute.³ He compares the real political and economic pressure applied by the European Union that produced the delivery of defendants to the International Criminal Tribunal for the former Yugoslavia with the lack of concerted pressure to enforce ICC arrest warrants. He emphasizes how the political and practical challenges to making arrests have shaped not only the prosecutor's choices and the Court's proceedings, but also public perceptions of both. The effort, rather belated but still necessary, to develop a properly resourced tracking/fugitive unit within the Court (another gap, as it were) might help. But the fault will ultimately lie with member states and the international community, he concludes, "if the Court slowly declines through enforced inactivity."⁴

Dapo Akande of Oxford University focuses on questions of head-of-state immunity, particularly those involving nonparties to the Rome Statute, which cannot be resolved through application of the Statute alone.⁵ He highlights how the Court's initial approach to head-of-state immunity was problematically insular, which may have contributed to the Court's worsening relations with African states. However, his essay illustrates how that approach has evolved over time, reflecting an ever-greater appreciation that the Court operates within a broader system of international law. His careful and thorough analysis, which weaves together the Court's decisions, its statutory provisions, and customary law, will surely instruct academic and perhaps future judicial developments.

Gabrielle Louise McIntyre, Chef de Cabinet and Principal Legal Advisor to the President of the International Residual Mechanism for Criminal Tribunals, similarly focuses on the early jurisprudence of the Court, identifying a range of omissions in the efforts of the chambers and the prosecutor to address crimes of sexual and gender-based violence.⁶ Those omissions range from failures to bring charges at all, to insufficiencies of evidence and reasoning, to missed opportunities to clarify basic questions, such as what makes violence "sexual" in nature. While the Rome Statute explicitly treats a broad range of sexual acts as crimes against humanity and war crimes, these missed opportunities have led to a much slower development of the Court's case law on sexual and gender-based crimes than might have been hoped in Rome in 1998. For example, she strongly criticizes the Katanga trial chamber for finding that rape and sexual slavery did not fall within the common plan to wipe out the Hema civilian population, and she believes that the analytical ambiguities of the Katanga trial chamber have contributed to perpetuating the

² Silvia Fernández de Gurmendi, *Judges: Selection, Competence, Collegiality*, 112 AJIL UNBOUND 163 (2018).

³ Adrian Fulford, *Who Arrests Those Accused by the ICC?*, 112 AJIL UNBOUND 168 (2018).

⁴ *Id.* at 171.

⁵ Dapo Akande, *The Immunity of Heads of States of Nonparties in the Early Years of the ICC*, 112 AJIL UNBOUND 172 (2018).

⁶ Gabrielle Louise McIntyre, *The Pace of Progress: Addressing Crimes of Sexual and Gender-Based Violence in the Generation After Rome*, 112 AJIL UNBOUND 177 (2018).

notion that sexual violence simply reflects private acts of wayward soldiers. McIntyre also voices strong criticism against the Muthaura, Kenyatta, and Hussein Ali pre-trial chamber for deciding that forcible circumcision of the Luo men should be characterized as other inhumane acts and not as acts of a sexual nature: If a violent attack against a person's sexual organs is not necessarily a crime of sexual violence, she queries, then what is? Indeed, McIntyre sees in this jurisprudence some retrenchment from the law already developed by the ad hoc tribunals, even while recognizing recent improvements in this area.

Finally, Fausto Pocar, formerly a judge on the International Criminal Tribunal for the former Yugoslavia, tackles questions concerning the role of customary international law in filling lacunae in the Rome Statute itself.⁷ He explains that the Rome Statute departs from the ad hoc tribunals insofar as it treats statutory provisions as primary authority and customary law as secondary authority. Because the Rome Statute thus gives priority to the Statute over customary law, it has led to limited application of customary law by the Court. He identifies, however, questions that have arisen—or will inevitably arise—that will require the Court to look beyond the Rome Statute to the broader context of customary international law. In particular, the Rome Statute itself directs judges to draw on customary international law to fill the Statute's gaps in certain instances. Pocar warns that the ICC's application of customary law may lead either to the Court progressively modifying current customary law to align with the Statute (despite its nonuniversal ratification), or else to the further fragmentation of international law.

In short, all of the contributions highlight how different choices at different points have impacted the development of this young institution, and none is sparing in its critique of at least some of these decisions. Indeed, it was inevitable that some mistakes would be made in the early years of the ICC. Yet despite this clear-eyed assessment of the Court and its Statute, the authors also offer hope for how the Court may continue to grow and develop in the years ahead. McIntyre, Akande, and Pocar, for example, all identify positive analytical developments (or opportunities for development) in the Court's case law. Fernández, Fulford, and Bosco, on the other hand, each point to possible institutional developments that could improve the Court's efficacy and legitimacy. As Fulford perceptively notes, the Court has developed in fits and starts. Despite criticisms of delay, missteps, and missed opportunities, the next twenty years still offer plenty of opportunities for the Court to evolve considerably towards fulfilling the promise of Rome.

⁷ Fausto Pocar, *Transformation of Customary Law Through ICC Practice*, 112 AJIL UNBOUND 182 (2018).