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Atrocity Crimes Litigation Year-in-Review Conference 2011

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Atrocity Crimes Litigation Year-in-Review Conference 2011

Introduction

Phil Sandick, Editor-in-Chief

¶1 The Atrocity Crimes Litigation Year-in-Review Conference is now five years old. Each year, the Center for International Human Rights at Northwestern University School of Law and Journal of International Human Rights convene a panel of jurists and experts to discuss the jurisprudence and extra-jurisprudential affairs of the five war crimes tribunals. Each year, the panel is moderated by Northwestern's own David Scheffer.

¶2 This year, instead of bringing the tribunals to Northwestern Law, we brought Northwestern Law to the tribunals. For the first time, the conference was held in The Hague¹ at the Special Tribunal for Lebanon (STL). We are sincerely grateful for the generosity and hospitality of everyone at the STL.

¶3 While the location was different this year, the conference was the same by the most important metric: it was still an extended roundtable on the most significant developments at the major war crimes tribunals during the previous calendar year (2011). For a full day, Scheffer asked specific questions to each participant; others jumped in; the audience laughed, groaned, and asked questions; panel members got feisty.

¶4 The value of such candid reflection cannot be understated. It is here, in the "halls" of international criminal justice, that both the humanity and the analytic rigor of practitioners shine through. Prosecutors admit judges were right to deny their motions. Defense counsel say they have no problem with certain procedures. Academics—and audience members—interrogate prosecutorial discretion, budgetary limitations on justice, and treatment of detainees and victims alike. The only issues that are off-limits are those currently before the respective Chambers, where substantive discussion may affect pending procedure.

¶5 This arrangement works in part because Professor Scheffer has had many of these conversations with these individuals before. For the past two decades, Scheffer has been cultivating trust and insulating lines of frank communication with those in the field of international criminal law.² It is an open question whether the conference would be the same without his diplomatic moderation.

¶6 Of course, it is the caliber of the panelists that make the conference work and make it important. This year, the panel comprised jurists from the prosecution, the defense, the registry, and academia.³ Diane Amann, Emily and Ernest Woodruff Chair in International Law at the

¹ More precisely, Leidschendam.

² See DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* (2012).

³ A sector of the international criminal justice sphere that might be considered for a seat at the next conference table is the NGOs that routinely submit *amici curiae* and support international justice in myriad other ways.

University of Georgia School of Law and a graduate of Northwestern Law, whose article appears in this issue, gave the conference introduction and never failed to point out important associations between tribunal jurisprudence and politically contentious issues of the day, such as the ramifications of the ICTY's *Gotovina* decision on the legality of drone strikes that will incur civilian casualties. Caroline Buisman, Defence Consultant at the International Criminal Court, whose article is also included in this issue, raised important concerns about fairness across proceedings and Chambers. Andrew Cayley, International Co-Prosecutor of the Extraordinary Chambers in the Courts of Cambodia, offered personal insight into how his conception of the role of the Prosecutor in atrocity crimes litigation offers guidance for prosecutorial policies and procedures. Prosecution Coordinator at the ICC, Sara Criscitelli; recently retired Senior Trial Prosecutor at the International Criminal Tribunal for the Former Yugoslavia, Mark Brian Harmon; and Chief Prosecutor of the International Criminal Tribunal for Rwanda, Hassan Jallow, all brought a wealth of experience from and eloquent analysis of their respective tribunals. Iain Morley, Senior Trial Counsel at the STL, spoke about the open and closed issues at the newest tribunal, and Fidelma Donlon, Deputy Registrar of the Special Court for Sierra Leone, shed light on the process of winding down the work of a tribunal.

¶7 This publication offers an abridged transcript of the Conference as a window into these discussions. Because much has been edited out in the name of brevity, we encourage you to look up the full video and transcript of the conference on the CIHR website.⁴ Available there, for example, is a truly extemporaneous discussion of the *Lubanga* judgment, which we all watched in that room in the STL, live-streamed from an ICC court room across town. Even before Judge Fulford finished reading the prepared statement on the judgment, cell phones all over the room were vibrating. Criscitelli worked on the case, and Buisman worked with Lubanga's counsel. Spectators watched and listened as panelists hashed out what they heard and what they thought about the first judgment on guilt or innocence from the first permanent international criminal court. There may not have been a more informative place in the world to watch the Court's first public statement on the judgment.

¶8 Also available on the JIHR website are memoranda on the jurisprudence of each tribunal during 2011 authored by Northwestern law students.⁵ These memoranda are invaluable resources for the field of international criminal law, offering a rare and rich overview of the 2011 jurisprudence of all five tribunals.

¶9 This publication presents four articles that touch on some of the most important and recent developments in international criminal law.⁶ As noted above, conference participants Amann and Buisman each authored an article. Two additional articles by Northwestern Law students Christine A. Bishai and Raphael Sznajder, who interned in 2011 at the ICC and the ICTY, respectively, are included thereafter.

¶10 As suggested by its title, Amann's article, *A Janus Look at International Criminal Justice in 2011*, looks both to the past and to the future. 2011, she argues, is "a year when global

⁴ Transcript of Atrocities Crimes Litigation Year-In-Review (2011) Conference 41 (Mar. 14, 2012), available at <http://www.law.northwestern.edu/legalclinic/humanrights/documents/ACL2011ConferenceTranscript.pdf>.

⁵ Ashagrie Abdi, Puspa Pokharel, Jamie Liebert, Kelly Hamren, Jessica Dwinell, Melissa Hindman, Alice Lin, Victoria Jiha Lee, Kelsey Green, Michael Novak, Chang Liu, Alexandra McDonald, Joy McClellan Dineo, Takeshi Yoshida, Elena Baca, William Magenya, Regina Trillo, Paulina Pazzavala, Jiayi Yue, Matthew Young, Kristin Leasia, Kevin Jakopchek.

⁶ The articles are current through November 2012.

criminal justice poised on a threshold.”⁷ Some courts—like the ICC and STL—were just winding up as others—like the ICTY, ICTR, and SCSL—were winding down. She begins the article by pointing to global political and economic trends and their affect on all of the major atrocity crimes tribunals. The Arab Spring precipitated unexpected global change, political power plays in the United Nations Security Council resulted in the referral of Libya to the ICC, and political will and material resources remained a challenge to dispensing global justice. Economically, the tribunals are said to be costly. While it is hard to measure what is considered costly “without any yardstick,”⁸ Amann concedes that the tribunals “were designed to be costly.”⁹ That is, they were designed to administer justice—not to control costs—and the scopes of their respective jurisdictions reflect that mandate. And when compared with the costs of war, international justice is good value for the money. Amann traces these global trends through the jurisprudence of the tribunals and notes the wider significance of specific decisions thereof.

¶11 Buisman’s comprehensive article adds significantly to the literature on international investigations.¹⁰ While ostensibly relying on the *Lubanga* judgment¹¹ as a lens, Buisman follows ICC Trial Chamber I and criticizes the Office of the Prosecutor (OTP) for “essentially the outsourcing of evidence gathering to third-party organizations or intermediaries.”¹² In actuality, Buisman goes far beyond *Lubanga*, chronicling the investigative shortcomings across all cases currently before the Court. The pattern that emerges is OTP reliance on third party evidence, including evidence procured from essentially unsupervised, unscrutinized intermediaries whose relationship with the Court is far from clear. Security concerns, she argues, simply do not justify the method the OTP has chosen for evidence collection.¹³ After comparing the ICC OTP’s methods with those of the *ad hoc* tribunals, Buisman offers some suggestions for improvement, including a review of the investigation budget and strategy, the permanent presence in the region of at least one international investigator, and the elevated importance of verification of evidence.

¶12 Bishai’s piece, *Superior Responsibility, Inferior Sentencing: Sentencing Practice at the International Criminal Tribunals*, asks the question: if leaders are the ones most responsible for “culture[s] of lawlessness and impunity,”¹⁴ why do they receive disproportionately short or lenient sentences (when compared to those convicted under an active perpetration theory)?¹⁵ Bishai analyzes the superior responsibility jurisprudence at the ICTY, ICTR, SCSL, and ICC, parsing the sentencing guidelines, the mitigating and aggravating factors considered by each Chamber, and policy considerations. Her practical suggestion is sentencing guidelines to facilitate more consistent punishment. Bishai argues that guidelines should punish atrocity crimes at least as harshly as domestic courts punish less extensive domestic crimes, and judges should be clear in delineating which crimes garner which sentences. Most immediately, she

⁷ Diane Marie Amann, *A Janus Look at International Criminal Justice in 2011*, 11 NW. U. J. INT’L HUM. RTS 5 (2013).

⁸ *Id.* at 11.

⁹ *Id.* at 12.

¹⁰ See, e.g., Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT’L L.J. 323 (2009).

¹¹ ICC, Prosecutor v. Thomas Lubanga, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute (Mar. 14, 2012).

¹² Caroline Buisman, *Delegating Investigations: Lessons to be Learned from the Lubanga Judgment*, 11 NW. U. J. INT’L HUM. RTS. 30, 32 (2013).

¹³ *Id.* at 62.

¹⁴ Christine A. Bishai, *Superior Responsibility, Inferior Sentencing: Sentencing Practice at the International Criminal Tribunals*, 11 NW. U. J. INT’L HUM. RTS. 83, 91 (2013).

¹⁵ *Id.* at 84.

argues that if Jean-Pierre Bemba is found guilty under the theory of superior responsibility, his sentence should reflect the moral gravity inherent in allowing others to commit grave crimes under his watch.

¶13 The last article in the issue is Sznajder's *Provisional Release at the ICTY: Rights of the Accused and the Debate that Amended a Rule*. Sznajder traces the vacillation of ICTY Rule 65(B) on provisional release and attributes it to competing policy grounds. On the one hand, the gravity of the crimes within the jurisdiction of the ICTY and the "Tribunal's limited powers to enforce its mandate" counsel toward more stringent provisional release rules.¹⁶ The more liberal and expansive protection of the rights of the accused, the higher the risk indictees may abscond and evade justice. On the other hand, the ICTY aspires to provide accused "with the sort of robust presumption of innocence common to many domestic jurisdictions."¹⁷ Sznajder traces these competing policies, finding that "the overall path of Rule 65(B) has been towards a liberalization of the criterion for provisional release, one that embraces the presumption of innocence."¹⁸ As the first international criminal tribunal since Nuremburg and Tokyo, the ICTY's legacy will be the values that underlie its decisions, and its jurisprudence will remain important precedent for the other tribunals (and the Mechanism for International Criminal Tribunals).

¶14 At merely twenty years old, the tribunal era is still young. And, as Amann explains in the transcript, international criminal justice is on the march.¹⁹ The tribunals and institutions will continue to experience setbacks and shortcomings, but these afflictions are not likely to be fatal. The articles and abridged transcript in this issue are part of our annual contribution to the maturation of the field. We hope you enjoy them.

¹⁶ Raphael Sznajder, *Provisional Release at the ICTY: Rights of the Accused and the Debate that Amended a Rule*, 11 NW. U. J. INT'L HUM. RTS. 109, 142 (2013).

¹⁷ *Id.* at 143.

¹⁸ *Id.*

¹⁹ Transcript, *supra* note 4, at 35.