Conference Report: "Twenty Years of the ICC's Rome Statute: Utopia – Reality – Crisis", Liverpool, 7./8. September 2018

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On 7 and 8 September 2018, a conference was held under the heading "Twenty Years of the ICC's Rome Statute: Utopia – Reality – Crisis" in the Bluecoat Centre for Contemporary Arts in Liverpool. It was co-organized by Edge Hill University (*Dr. Triestino Mariniello*) and the University of Hamburg (*Dr. Julia Geneuss*). Rather than applauding the achievements of the Court, as the conference's title might suggest, it aimed at taking stock of the work of the Court so far, addressing current challenges to the Court and focussing on its (hidden) potential.

Prof. *George Talbot*, Pro Vice-Chancellor and Dean of Arts & Sciences of Edge Hill University, opened the Conference, followed by *Dr. Mariniello* who explained the idea behind and the scope of the conference. He reflected upon the enthusiastic welcome to the Court and its idealistic mission to end impunity for international crimes, its gradual disillusionment when its mission had to face up to reality, up to the proclaimed crisis of the Court due to withdrawals of several member states from the Rome Statute, a lack of state cooperation and excessive length of proceedings. In the following, scholars as well as practitioners discussed their views on and visions for the International Criminal Court (ICC) in four panels.

Panel I, "Global Justice? Theoretical Approaches to International Criminal Law", chaired by Prof. *Caroline Fournet* (University of Groningen), discussed theoretical foundations of the Court and included an interdisciplinary perspective.

Dr. Antje du Bois-Pedain (University of Cambridge) started off the discussion with a presentation on "A Solidarity-Based Justification of International Criminal Justice and the Jurisdiction of the ICC". She argued that while a state's criminal justice system is generally based on social solidarity, this conceptualization is not transposable to international criminal justice due to the lack of a close unit of people. In contrast, the exercise of universal jurisdiction can be based on an instantiation of a different sort of solidarity – namely political solidarity – with the victims of the international crime that is being investigated and prosecuted. This approach also justifies the selectivity of national prosecutions under the principle of universality but runs into difficulties with regard to the ICC as a meta-state institution enforcing international criminal law on behalf of the whole of humankind. Therefore, a different justificatory basis for selective universal jurisdiction is needed for the Court, which may, however, be similar to a solidarity-based justification.

Next, *Dr. Mikkel Jarle Christensen* (University of Copenhagen) explained under the heading of "From Symbolic Surge to Contentious Court: Towards a Sociology of ICC Developments" that research must stop focussing on the ICC in order to understand the underlying mechanisms, resource and power battles which structure the Court's development and shape its activities. He pointed to the necessity to draw up a sociological framework of international criminal justice and thereby sketched a map of different stakeholders and "sites of justice". He highlighted the importance of redirecting the focus from the ICC to the other players in the field, like NGOs, law firms, diplomacy and academia.

Following these sociological insights, Prof. *Alette Smeulers* (University of Groningen) presented a track record of the ICC from a criminological point of view ("The Role of the ICC in the Global Fight against Impunity"). She compared the most common criticism of the ICC with empirical research (i.a. political bias, inefficiency, high costs) and concluded that many points of criticism are not justified on closer examination. For instance, the Court's selectivity can be explained with a general lack of jurisdiction and the unwillingness of the Security Council to refer situations to the ICC, the most obvious example being the Syrian conflict. According to Prof. *Smeulers*, the related selectivity criticism stems from a communication problem of the Court.

After these presentations, a lively discussion ensued. Participants inquired what impact the innovative concept of "political solidarity" would have for the ICC's practice, e.g. for the application of the complementarity principle, and how to accomodate the affected community's interests. Who should decide whether and what to prosecute? In addition, referring to situations of mass atrocity not pending before the ICC, the importance of analyzing "sites of non-justice" was emphasized.

Panel II was devoted to the "Goals and Function of the ICC"; it was moderated by Prof. *William Schabas* (Middlesex University London).

Dr. Silivia D'Ascoli (Kosovo Specialist Chambers & Specialist Prosecutor's Office) brought a practitioner's view to the panel with her presentation about "Balancing Competing Goals between Ideals and Reality – How the ICC has Interpreted its Role and Functions". Recalling the aspirations set out in the Preamble to the Rome Statute to punish "the most serious crimes of concern to the international community" which "threaten the peace, security and well-being of the world", *Dr. D'Ascoli* evaluated how the Court has implemented these formulated goals and how they have shaped and influenced its practice (e.g. initiation of proceedings, arrest warrants). For this purpose, she comprehensively examined the interpretation of the notion of gravity by the prosecution and the chambers of the Court.

Prof. *Larissa van den Herik* (Leiden University) approached international criminal law from an innovative perspective and introduced the notion of diaspora to the legal discourse ("The Goals and Functions of the ICC from a Diaspora Perspective"). Referring to *Edward Said*, she argues that diaspora communities can be particularly vulnerable and easy targets of international crimes. On the other hand, diaspora communities can also become perpetrators of international

crimes, and she also? mentioned the role diaspora communities play in the funding of crimes in their home states which, more generally, hints at the underlying economic structures of international crimes. She used their example as a non-obvious test case to reflect upon the goals and functions of the ICC, since they raise more general questions regarding the definition of the Court's jurisdictional scope (territoriality, nationality), the determination of gravity, and the interrelatedness between international and transnational crimes.

The idea of peace in international and national criminal law played a prominent role in Prof. *Florian Jeßberger's* (Hamburg University) subsequent presentation "Peace through Punishment? On the Peace-Making Function of the ICC". Prof. *Jeßberger* observed that the ICC, more than other international criminal courts, is increasingly employed in conflict situations. As a consequence, the issue of the peace-making function of the ICC becomes more prevalent. Peace, however, is an ambiguous and therefore often misleading term, which has differing meanings on a national and international level. Its multiple meanings in the international legal sphere can lead to intra-institutional frictions at the ICC.

As last panellist, Prof. *Harmen van der Wilt* (University of Amsterdam) presented his "Reflections on the International Criminal Court's Legitimacy Crisis". He identified two deeper, underlying reasons for the often propounded legitimacy crisis of the ICC. On the one hand, the tension between individual guilt, which was transferred from domestic criminal theory to international criminal law, and system criminality, leads to the highly-controversial question how to distribute guilt for international crimes. On the other hand, the fact that states' initial support for the ICC is dwindling is based upon their fear for their sovereignty. In the end, however, he came to the conclusion that criticism of the ICC is fashionable, but grossly exaggerated.

The discussion following the presentations focused on the general question of goals and functions of the ICC and whether there is a need to rethink them. Regarding the never-ending discussion of gravity of international crimes and those most responsible for them, a discrepancy between what is stated in the OTP's policy papers and what the OTP actually does was detected. The ICC's activities, so it seems, are shaped by reality, not by complex theoretical statements and aspirations. In addition, the question was raised whether the ICC's mandate should be interpreted in a narrow or broader fashion. In interpreting the applicable law, should the ICC focus on or move beyond atrocity crimes? What projects demand "political solidarity"? And should the ICC keep pushing its jurisdictional boundaries, like it did in the Myanmar/Bangladesh situation? Could this be a manifestation of a "spotlight function" of the ICC, the aim to shed light on conflict situations even when there is no prospect of criminal proceedings proper?

The second day of the conference also featured two panels. Panel III dealt with the topic "Relationship Status: Complicated – States Parties, the UN Security Council and the ICC" and was chaired by Prof. *Christine Chinkin* (London School of Economics and Political Science).

Talita Dias (Oxford University) opened the panel with "The Retroactive Application of the Rome Statute in Cases of SC Referrals and Ad Hoc Declarations: Blessing and Curse?". She stated that the retroactive application of the Rome Statute is already a concrete possibility at the ICC but may cause frictions with regard to the international principle of legality and the principle of fair labelling. She proposed to replace provisions conflicting with the two principles with applicable national and customary international law rules.

Prof. *Phoebe Okowa* (Queen Mary University of London) addressed the perceived bias of the ICC towards Africa ("Unequal Treatment in the Administration of International Criminal Justice: What Next for the AU and the ICC?"). She emphasized that there was broad acceptance of the values of the ICC, and that the core question was rather who should have the last word on the decision of contentious issues. She argued that the tensions between the ICC and the African Union need to be viewed in the broader context of a crisis of key international institutions due to their inequality and subordination regarding African states. With respect to the response mode to mass atrocities, she questioned the legitimacy of current decision making processes and argued for a more inclusive/corporate mode of decision making to end the enforcement crisis of international criminal justice.

"State Behaviour in the Security Council: Does/Should ICC Membership Make a Difference?" formed the title of Prof. *Frédéric Mégret's* (McGill University) presentation. He pointed out that so far, the UN Security Council has been regarded as a "black box", but that there was a need to disaggregate its behaviour and have a closer look at its members. Thus, he examined the voting patterns of Security Council members in consideration of their ICC membership/non-membership. He concluded that even though ICC membership ought to be a significant vector from a normative point of view, it has not prevented states from supporting resolutions that were unhelpful to the Court, and that non-membership has not prevented some states from supporting referrals.

In the following discussion, many questions related to the propositions of *Dias* and Prof. *Okowa*. It was emphasized that there was a need for deeper understanding of the legal and political powers underlying the Court in particular and the international criminal justice system in general. For this purpose, participants called for more interdisciplinary research, in particular with international relations scholarship.

The organizers of the conference felt, that addressing the crisis of the ICC effectively also requires looking at practical problems of the proceedings of the ICC. Therefore, Panel IV, chaired by *Dr. Sergey Vasiliev* (Leiden University), engaged with "The Effectiveness of ICC Proceedings" introducing also practitioners' personal views into the discussion. Accordingly, Judge *Cuno Tarfusser* (ICC) opened the panel with his take on the "Effectiveness of the Trial Stage: A View from the Bench". Effectiveness for Judge *Tarfusser* means the fairness and expeditiousness of proceedings. Consequently, he provided an overview of the length of proceedings at the ICC and criticized their lack of expeditiousness. He identified various reasons for this situation, among them the non-

existence of deadlines and a trial preparation not focussed on the streamlining of the trial stage of the proceedings. He emphasized that the potential of the ICC has not yet been sufficiently exploited.

Following his colleague, Judge *Bertram Schmitt* (ICC) described the hybrid structure of the Rome Statute’s procedural law combining elements from civil and common law legal thinking (“Reflections on the Blending of Common Law and Civil Law in the ICC-Proceedings”). To his understanding, this legal framework provides the judges who also have disparate legal backgrounds with broad discretion which they must exercise with an open mind towards the unfamiliar to increase the effectiveness of the ICC procedure. Enumerating several examples of contentious procedural issues, he further elaborated his reasoning.

Dr. Yvone Mcdermott Rees (Swansea University) discussed in her presentation “Proving International Crimes” the evaluation of evidence in international criminal trials and argued that there is, up to now, no consistent approach as to how judges should weigh the evidence. In her view, the recent Bemba appeals chamber judgment of the ICC confirmed this finding. Looking ahead, she identified trends which might shape evidence gathering and proceedings at the Court, such as digital evidence, open sources and legal tech.

Looking at criminal courts in general, Prof. *Volker Nerlich* (Legal Advisor to the Appeals Division, ICC) identified different types of audiences (e.g. interpretative, implementing, consuming and secondary) and compared them with the situation at the ICC (“Bringing Justice to the People – Audiences of the ICC”). While he observed that principally the same types of audiences exist at the ICC, he pointed out that their number is even higher due to its specific nature as a “world court”. Prof. *Nerlich* maintained that it is important for the ICC to decide if and how to take these different audiences and their expectations into account, for instance in its communications.

A main topic of the subsequent discussion concerned the question of how to improve the way of writing judgments, for example their readability and accessibility to a non-legal audience (structure of judgments, easy language, outreach).

Dr. Geneuss summed up the feelings of many participants very well when she concluded with the John Lennon quote: “The more I see, the less I know for sure.” Despite many problems which were identified during the Conference, many voices were not too pessimistic regarding the future of the ICC and eager to contribute to the realization of its full potential. Overall opinion concluded that this requires a more nuanced and in-depth research with a closer look at the underlying mechanisms of the international criminal justice system including interdisciplinary perspectives.