

Workshop Report: “The International Criminal Court in Turbulent Times” The Hague, 31 May–1 June 2018*

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The workshop hosted by Professors Gerhard Werle (Humboldt-University of Berlin) and Andreas Zimmermann (University of Potsdam) at the German Embassy in the Netherlands focused on questions of international criminal law (ICL), which have been raised in the past work of the International Criminal Court (ICC) and will remain relevant for the years to come. They address the role of the ICC within a changing global political framework, its relationship to States Parties and third States, as well as regional and international institutions and actors. Within the current global context, the ICC stands at a turning point. Undeniably, judicial review of the most serious crimes is of utmost importance for international peace and justice. The ICC has proved able to stabilize and consolidate the field of ICL. Its future weight within international criminal justice will depend on the development of its jurisprudence, its way of dealing with politically charged issues as well as the scope and limits of its work as determined by the States Parties.

I. Introduction

On the occasion of the 20th anniversary of the adoption of the Rome Statute, the workshop aimed at critically reflecting the ICC’s past work. The widely-discussed¹ crisis of the ICC as well as its potential future development formed the basis of scholarly exchange. The current challenges faced by the ICC marked the guiding questions of the workshop: How valid is the critique the ICC is confronted with? What are the precise effects of the activation of the Court’s jurisdiction over the crime of aggression? How should the ICC deal with the political implications of its decisions?

Recent withdrawal decisions or intentions of various States illustrate the risk of growing discontent among States Parties. Although the feared mass withdrawal did not occur,

* The papers presented at the workshop will be published in the forthcoming collection “The ICC in Turbulent Times” edited by Professors Werle and Zimmermann (Asser Press, 2019). All contributions to the workshop have been made in June 2018. Yet, as of today, Al-Bashir is not a sitting head of State any longer, the Pre-Trial Chamber II of the ICC has rejected to authorize an investigation into the Afghanistan situation in April 2019, and its Appeals Chamber has handed down a decision in the Jordan case in May 2019.

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¹ Among the vast amount of instructive contributions, the following deal with the main questions posed at the workshop: Stahn, JICJ 15 (2017), 413; Woolaver/Palmer, JICJ 15 (2017), 641; Kreß, JICJ 16 (2018), 1; de Gurmendi, JICJ 16 (2018), 341; Linton, JICJ 16 (2018), 265.

the ICC stands at a turning point regarding its global relevance. Meanwhile, no international criminal court has ever operated within non-turbulent times. The establishment of the ICC faced strong resistance from powerful political players and was only possible thanks to intensive diplomatic efforts. Many contentious questions discussed at the Rome Conference pose immense challenges to date. However, the progress of the ICC – being the first permanent international criminal court – is continuous. Its consolidation depends on the confidence of the States Parties.

II. Individual Contributions

Judge Chang-ho Chung and Ambassador David Scheffer started out reflecting on the international community’s expectations of the ICC prior to its establishment as well as its achievements since then. Both recalled that numerous States, including powerful ones, did not share the immense expectations of the new institution, while others considered the compromise as insufficient. Almost two decades after the ICC commenced its work, the Court operates in a constant tension: On the one hand, the States Parties expect expeditious trials in order to achieve the much-anticipated impact of the ICC fostering international peace and security. On the other hand, though, the Court must meet high rule-of-law standards in extremely complex trials and needs a lot of time to do so. Victims’ rights and interests was another issue the two speakers brought up. Unlike the ECCC/UNAKRT for instance, the ICC will remain in the dilemma of operating far away from the crime scenes and from victims. The debate on further advancement of victims’ reparations, however, is ongoing and vivid, while leaving doubts as to funding and the reach of the Court’s mandate in this regard.

On the first panel, Hannah Woolaver and Judge Antoine Kesia-Mbe Mindua discussed legal and political implications of withdrawals from the Rome Statute. It was noted that a State’s pre-existing obligations persist post-withdrawal, e.g. financial obligations and duties to cooperate. Some participants opined that preliminary examinations would not constitute a matter already under consideration by the Court according to Art. 127 (2) of the Rome Statute. The speakers also pointed out that threats of withdrawals from the ICC have been connected with individual domestic politics, while there was no coordinated effort to withdraw. It was agreed that the Court must take the States Parties’ genuine concerns seriously and improve its communication.

With regard to regional developments, Marshet Tadesse Tessema and Darryl Robinson discussed whether the envisaged establishment of an African Criminal Court (ACC) was a challenge or a chance for the ICC. They highlighted that while some view the ACC as a progressive endeavor, others identify it solely as an effort to deflect. The speakers agreed that the ACC could constitute an important addition to the international criminal justice system, but particularly criticized its immunity provision. Concerning regional mecha-

nisms in general, some asserted that the focus should be on strengthening and improving the ICC, while others considered regional courts as an appropriate means to address regional problems.

The immunities of high-ranking officials continue to cause critique vis-à-vis the ICC, as the proceedings against the sitting head of State of Sudan Al-Bashir show. *Gerhard Kemp* and *Miles Jackson* illustrated the debate among scholars of both public international law and ICL. After the Pre-Trial-Chamber had to deal with a contentious immunities question in its Jordan decision, the Appeals Chamber will likely take a position soon. The potential advisory proceedings before the International Court of Justice are another option to receive clarification on that matter. This would challenge the ICC's authority once more and at the same time demonstrate the dichotomy in which the ICC operates, deciding purely legal questions on the one hand and having to consider political implications on the other. And yet, similar dilemmas are not unique to the ICC and constitute everyday challenges to national constitutional courts.

At the reception hosted by the German Ambassador *Dirk Brengelmann*, Judge *Bertram Schmitt* in his keynote speech stressed that the ICC is not a comfort zone – and was never meant to be one. He reiterated that it was designed to strictly apply nothing but the law on the one hand and operate wisely and anticipatively in politically sensitive contexts on the other hand. Judge *Schmitt* called for acknowledgment of the Court's work and trust in this institution of immense importance for international peace and security and thus for the rule of law in international affairs. And yet, he conceded shortcomings of the ICC, pointing exemplarily to the fact that most situations and all current cases relate to the African continent. While in non-African situations political resistance is fierce and support for the Court low, he nevertheless expressed optimism that the years to come will guide the ICC out of this dilemma. In this vein, he also voiced his hope for timelier reactions of the Court to international crimes.

Yaël Ronen and *Carsten Stahn* spoke on the ICC's relationship to third States and their nationals. As to States Parties, the Statute applies from the moment its norms enter into force, not retrospectively (*nulla poena sine lege praevia*). A Security Council referral, however, is made after the commission of a crime and thus challenges that principle. The underlying question relates to doctrinal details and the scope of such a referral, as illustrated in the Darfur situation. Some suggest that a Security Council referral merely triggers the ICC's jurisdiction over crimes it previously lacked jurisdiction to prosecute. Others contend that such a referral is a question of substance rather than jurisdiction, pointing out that in relation to the individuals affected, the Security Council referral retroactively sets forth new crimes. The reference to jurisdiction therefore might not suffice to conceal that such a referral does challenge the principle of *nulla poena sine lege praevia*. As many international crimes have previously existed under customary law, practitioners deal less with the question whether a crime can be prosecuted at all, but rather with specific points such as subjective foreseeability, error in law or *ne bis in idem*.

Robert Frau and *Elizabeth Wilmshurst* discussed the ever-recurring question of the political dimensions of the ICC's work. As the Security Council is a political organ, voting on referrals is always determined by political intentions, although in theory the ICC should operate independently of any political goals and serve only international criminal justice. In the context of the Darfur referral for instance, the permanent members faced criticism for having acted solely based on their own policy goals. In the Afghanistan, North Korea and Syria situations, the contrary policy goals of the permanent members prevent a referral decision, thereby illustrating the use of the ICC as a political tool. Still, the speakers stressed the importance of the Security Council referral mechanism, the politically motivated use of which needs to be accepted in return.

Kevin Jon Heller analyzed the ICC's jurisprudence on the complementarity principle, criticizing it as overly narrow. He particularly criticized the jurisprudence on the "same perpetrator" and "same conduct" tests, noting that the strict requirements prevent the Prosecutor from adopting a "pyramidal" approach. What is more, he opined that the "same conduct" test undermines the complementarity principle and instead enforces primacy of the ICC, which unnecessarily strains its resources and undermines State sovereignty.

Pertaining to the fierce criticism of selectivity, *Rod Rastan* and *Philipp Ambach* discussed the realities of case selection from an inside perspective. *Rastan* asserted that case selection and prioritization are inherently political exercises. He noted that the Court's limited capacity and budget pose challenges, and stressed the relevance of opportunity and pragmatism. *Ambach* highlighted the importance of victims' interests in selecting persons and crimes to prosecute. Thus, the ICC finds itself in a dilemma whether to focus on smaller cases that can be tried successfully, or on bigger cases adequately reflecting the respective situations. It was also noted that pending cases like the one against Al-Bashir, although probably not resulting in a conviction, can be seen as a success for the Court.

With a view to substantive law, *Volker Nerlich* and *Florian Jeßberger* discussed whether the ICC is moving towards progressive development or showing cautious reluctance. *Nerlich* observed that the ICC's jurisprudence on substantive law has been limited and has not diverged substantially from the ad hoc tribunals. Instead, it was noted that the Court aims to avoid fragmentation and strives to consolidate the crimes' definitions. *Jeßberger* highlighted different understandings of the notion of "progress": Whereas from the international legal perspective, progress would entail a broader protection of human beings, it would encompass restraint from a criminal legal perspective. Referencing the workshop's title, the speakers noted that substantive ICL is the least turbulent aspect of the ICC.

Leena Grover and *Harold Koh* discussed the activation of the ICC's jurisdiction over the crime of aggression. The turbulent negotiations demonstrated the States' persisting concerns regarding sovereignty restrictions as well as the possibility of politically motivated prosecution. The vague wording of Art. 8 bis of the Rome Statute caused criticism, in

particular the element of a “manifest” violation of the UN Charter. In this respect, the ICC will need to provide clarification, though it is questionable whether a case of aggression will be tried successfully in the near future. The relevance and deterring effect of this crime thus remain to be seen.

The concluding session discussed the topic “ICC – rise or decline?”. Judge *Silvia Fernández de Gurmendi* noted that there is now less support for the idea that the ICC is a centerpiece for international criminal justice than 20 years ago. Judge *Raul Pangalangan* asserted that the Court will be judged in light of the way it deals with victims, observing that their role is one of the high points of the Rome Statute. Ambassador *Rolf Einar Fife* remarked that even at the time of the adoption of the Rome Statute, it was expected that the Court would face turbulence. All three agreed that despite setbacks and criticism, the ICC continues to play a meaningful role as a last resort institution in the fight against impunity. In order to fulfill this role, they identified efficiency, prioritization of cases, and better communication as factors for improvement.

III. Conclusion

The ICC faces numerous challenges at the 20th anniversary of the adoption of the Rome Statute, both legal and political in nature. Nevertheless, turbulent times are not unusual for international criminal justice. As the workshop once again illustrated, the adoption of the Rome Statute necessitated intensive diplomatic efforts. Many fundamental questions were highly disputed; some remain so until today. As international criminal justice by definition operates in a political sphere, the ICC will need to play its role as a political actor more efficiently. And yet, the Court can only act complementarily to domestic – and increasingly regional – jurisdictions.

20 years after Rome, the ICC still needs to improve the efficiency and quality of its processes with a view to further standardization of the work of the different chambers as well as greater transparency. Nevertheless, the ICC provides an excellent contribution to the stabilization and consolidation of ICL. The mere existence of a permanent international criminal court prevents further fragmentation of this field of law. Not to forget, the ICC already made a significant increase in efficiency in the past years.