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International Criminal Justice Series

Volume 23

The International Criminal Court in Turbulent Times

Gerhard Werle
Andreas Zimmermann
Editors

Springer

International Criminal Justice Series

Volume 23

Series Editors

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Editorial Office

Prof. Dr. Gerhard Werle
Humboldt-Universität zu Berlin
Faculty of Law
Unter den Linden 6,
10099 Berlin, Germany
gerhard.werle@rewi.hu-berlin.de
vormbaum@uni-muenster.de

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Gerhard Werle · Andreas Zimmermann
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Editors
Gerhard Werle
Faculty of Law
Humboldt University of Berlin
Berlin, Germany

Andreas Zimmermann
Faculty of Law
University of Potsdam
Potsdam, Germany

ISSN 2352-6718 ISSN 2352-6726 (electronic)
International Criminal Justice Series
ISBN 978-94-6265-302-3 ISBN 978-94-6265-303-0 (eBook)
https://doi.org/10.1007/978-94-6265-303-0

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

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The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

Foreword

The International Criminal Court After 20 Years: The Possible Way Ahead

The topic 'ICC after 20 years: The Possible Way Ahead' clearly aims at the future of the International Criminal Court (ICC).[1] Unfortunately, the future is uncertain. But this does not mean that we are at its mercy. If we want to shape the future we need to revive the vision for the ICC, that vision that brought the ICC into existence. Visions are not utopias; they are strategies for action and can mobilise unexpected forces. The future is of course rooted in a proper understanding of the present. Such stocktaking is the subject of this conference. Insofar I will try to interweave my thoughts with some of its topics.

The conference labels the current state of affairs regarding the ICC as 'turbulent times'. Well, there is nothing wrong with that. However, I am doubtful if this expression is apt to distinguish the present from any time in the past or the expectable future. I am not sure we can really trust that the times for the ICC will ever be calm and settled. Let me come back to that in a moment. Incidentally, I am glad that the organisers did not choose the expression 'crisis' as the motto of the conference because looking back at the discussions of the past years you could get the impression that the ICC is not only the first permanent international criminal court, but also the first international court in a permanent crisis. I want to present an alternative narrative to such negative descriptions and convey a more optimistic and gripping outlook for the future.

The often heard notion 'crisis' is regularly attributed to withdrawals and threats to withdraw from the Rome Statute. Withdrawals are of course a problem for the ICC. The less States parties, the less the Court can claim universality and the more difficult it is to achieve the goal to end impunity for the most horrendous crimes. At the same time, withdrawals are of course the sovereign right of States parties, and,

[1] This Foreword reflects a speech the author gave on 31 May 2018 in The Hague in the framework of the conference entitled *The International Criminal Court in Turbulent Times*.

as a result, the right to withdraw is immanent to any international treaty. Other international entities, like the European Union and the United Nations Educational, Scientific and Cultural Organisation, recently have painfully experienced this phenomenon too. But withdrawals or threats to withdraw are not a sign of a 'crisis' of the ICC. Instead, they tell us more about the situation in the States parties in question. If you will: withdrawals are rather a sign of a 'crisis' in the concerned State than at the ICC.

Withdrawals certainly do not influence our judicial work and should not influence our policies. If we tried to accommodate States parties' interests in order to keep them in the Rome Statute system, we would betray our mandate. The difficult situations in which the Court may find itself at times are meant to happen. The Court is *supposed* to render displeasing and uncomfortable decisions. Challenging discussions regarding the question in which situation the Office of the Prosecutor decides to commence an investigation, or regarding cooperation of States and immunities of high-level officials, like sitting President al-Bashir, are a natural consequence of our mandate and the statutory framework. The Court is not meant to be a comfort zone. It must remain a staunch defender of those principles enshrined in the Rome Statute and not dither and waver in reaction to the current international political climate. I am convinced that in the long run, the Court will benefit from being perceived as a principled and firm judicial institution.

Instead of focusing its efforts on preventing withdrawals, the ICC should actively try to promote universality. It should make efforts to motivate more States to become parties to the Rome Statute. There are a lot of blank spots on the map that have to be filled or where I see at least potential to fill them. I am not talking about powerful States or those that want to be seen as such. However, there are a lot of other States that might be willing to break free from the firm grip of more powerful States, that might decline to let other States dictate to them what to do and what not to do. Potential candidates, I would think of at first, are the 30 States which have signed the Statute but have not yet ratified it. In some regions of the world, for example in Asia, respective initiatives are under way; we have to support and intensify them. Actively engaging to let States join the Rome Statute is definitely better than waiting until the political environment changes.

It should also be mentioned that the ICC is one of few international institutions where all States parties actually have—and not only on paper—an equal right to voice their position or concerns on any matter of substance irrespective of how big, powerful or rich they are. That is a striking difference to most international organisations which are actually governed by the political, military and economic powers.

With regard to substantive criminal law, it seems unlikely—given the current diplomatic landscape—that the Rome Statute will evolve to include entirely new crimes beyond those in Article 5 of the Statute. It is likelier to see smaller amendments to existing types of crimes (such as new prohibited weapons in the war crimes provision) or understand a certain conduct that could constitute a new type of crime as falling under an existing crime, for example interpreting certain acts of terrorism as crimes against humanity. Allow me to say in this respect that the Court

will sometimes not be able to satisfy urgent calls for intervention by civil society and activists—the mandate of the Court must be carefully preserved and fulfilled and should not be overstretched.

The activation of the exercise of the crime of aggression is an important step in the Court's operation. The Court will have to amend quickly its legal instruments, if deemed necessary, in order to be prepared for the moment it is seized with a question involving this crime. It will inevitably involve sensitive issues and touch upon interests of States. Admittedly, it is not likely that the Court will have many such cases as the procedural preconditions and legal requirements of the crime are rather high. If it comes to that at all the Security Council will play procedurally a crucial role in the exercise of jurisdiction over the crime of aggression. It is the hope that the Security Council will fulfil its responsibilities, if it decides to make use of its prerogative responsibly and timely.

I have to admit that such hope might not seem realistic in the light of the present dynamics in the Security Council. It is regrettable that there is a blockade of certain Security Council members regarding referrals of situations, for example in Syria. It is also rather disappointing that the Security Council has not reacted to the ICC's numerous decisions in relation to findings of non-cooperation of certain States. Yet, in case times are changing, the ICC has to be ready. And looking back on the past decades, and I only mention the fall of the Berlin Wall and the collapse of the Soviet Union, I would not dare say that any current political state of affairs remains forever.

However, it should also not be forgotten that the ICC will have a problem of credibility as long as three out of the five permanent members are not parties to the Rome Statute but are entitled, together with others, to refer situations to the Court. This is a point of criticism which I often have to face in discussions about the ICC. It is true that this can be seen as a structural deficit of the Rome Statute. Yet, complaining about it will get us nowhere. The Rome Statute still remains a big accomplishment; it was the best what could be achieved under the conditions of *Realpolitik*: it is either this Court with all its limitations and assets or none at all.

There might also be a bright side, albeit only faintly glowing: if the big powers were States parties to the Rome Statute, chances would be high that they would dominate the institution and attempt to politicise judicial proceedings. Since they are not, the ICC does not have to cater to their wishes. Ultimately, it is the Chief Prosecutor who decides if she initiates an investigation upon referral by the Security Council. If this legal power is applied confidently, it can be an effective means to counter possible considerations by members of the Security Council to use the ICC as a political tool.

Let me stick for a moment to the problem of referrals and its consequences. I would like specifically to address the critique by some African States and the African Union that the ICC is targeting Africa. I will not repeat all the amply-known arguments that can be brought forward against this reproach. It may be sufficient to cite late Kofi Annan who said: 'It is not Africa that is hostile to the Court, only certain leaders'. Allow me to address at least one accusation that is frequently repeated in this context, namely that the ICC is a 'Western-led

institution' that pursues 'neo-colonial goals'. Nothing could be more wrong. This contention is demagogic and clearly led by the interests of those, who use this kind of propaganda for their own purposes. Twenty-three per cent of the ICC's staff comes from Africa, often in high-level positions; four of the 18 judges come from Africa. The two most important positions at the Court, the President and the Chief Prosecutor, are African. In the light of these facts, it is not an exaggeration to say that you will not find any other international organisation like the ICC where people from the African continent have more influence and Western powers have less.

That said, it is true that most of the situations and all of the cases that we currently deal with originate from Africa. This is not a satisfying state of affairs, given the global situation. It is important for the future that the ICC is able to demonstrate that it is not exclusively responsible for Africa. This is of course easier said than done. Attempts to go outside Africa are there—I only mention preliminary examinations or investigations in the situations in Afghanistan, Georgia, Ukraine, Palestine, the Philippines and Venezuela—but we all know that such steps are extremely difficult. In these situations, political resistance is particularly fierce and political support and cooperation often insufficient or non-existent. However, the ICC should not be disheartened. It must remain relevant in the international discourse. The Court, including the Office of the Prosecutor, must be seen as reacting more timely to international developments and conflict situations—the latest request regarding the Rohingya people could be a promising step in the right direction.

During this conference, Panel 2 addressed the topic: 'Are regional developments in Africa a challenge or a chance for the ICC?' It is clear that the Court will only be able to address selected cases in conflict situations; it is not designed to prosecute hundreds of persons in one situation. Regional courts may therefore prove to be useful means to effectively share the burden with the Court in certain situation and complement the ICC.

The 2014 Malabo Protocol, which provides for an International Criminal Court Section in the yet-to-be established African Court of Justice and Human Rights, grants in Article 46A *bis* immunity to sitting Heads of State and other senior State officials during their tenure of office. This is a *de facto* assurance of impunity for the most powerful and often most responsible. This gap might leave room for the ICC to prosecute exactly such persons. The principle enshrined in Article 27 of the Statute that the official capacity as Head of State or Government shall in no case exempt a person from criminal responsibility and that immunities under national or international law shall not bar the Court from exercising its jurisdiction over such a person has to be preserved under all circumstances. The same applies to any political attempts to shield Heads of State and senior State officials from prosecution or arrest for crimes against humanity, war crimes and genocide.

It is sort of expected that the ICC in principle welcomes new *ad hoc* or hybrid tribunals because they share the burden with the Court. Well, I am not entirely convinced. You have to assess this on a case-by-case basis. There might be situations where such tribunals are a meaningful complement to the ICC. However, it seems to me that the practical and political problems are often underestimated.

Hopes that such regional projects may be free of political influence and more efficient may prove ultimately to be utopian. Moreover, it should not be forgotten that the ICC was created as a permanent international criminal court to make *ad hoc* solutions expendable. *Ad hoc* tribunals and hybrid courts tend to endanger the sustainability of the ICC, and I sometimes cannot avoid the impression that they are meant to do exactly that.

Hence, whenever a perceived need for such *ad hoc* tribunals arises, reflection is required as to why the ICC couldn't serve as a pre-existing solution. I want to point out that in recent years the Court has significantly expedited its proceedings and made them much more efficient. It has proven that it is able to deliver justice in a timely manner and at the same time upholding the high standards of due process as foreseen in the Rome Statute.

It might also turn out as an illusion that *ad hoc* tribunals (or hybrid courts) are more cost-effective than the ICC. We are told that the ICC is expensive. In a way this is true but there are good reasons for it. The logistical effort to keep things going in a multitude of different situations and cases is huge; unfortunately, I do not have the time to dwell on that. It is of course self-evident that the ICC has to account for the money of the taxpayers it spends. However, the costs should also be put into perspective: the annual budget of the ICC is roughly the same as the annual budget for the fire brigade in the city of Berlin (EUR 140 million compared to EUR 147 million). If you think that this is apples compared with oranges, here are some figures comparing different apples: to date, the ICC Chambers have been assigned with 14 situations; active proceedings are ongoing in at least ten cases. The International Residual Mechanism for Criminal Tribunals has a biannual budget of EUR 100 million, EULEX Kosovo and the Kosovo Specialist Chambers a combined annual budget of roughly EUR 90 million.

I want to make some very brief remarks on complementarity. The ICC can have considerable positive impact on national justice. As a recent study by Human Rights Watch has shown, there are serious obstacles to justice in national courts. It also concluded that the ICC Prosecutor can have particular influence on situation countries during preliminary examinations. Her efforts can prompt States to pursue their own investigations, thus diminishing the need for the ICC to step in. These efforts to encourage successful local proceedings should be intensified by the ICC, such as through dialogue or reverse cooperation by the Court, and supported by States parties.

The Court must also remain an authoritative source for relevant case law regarding crimes and modes of liability for domestic prosecutors and courts. The Court must therefore identify its relationship with national authorities by sharing information on case law and best practices. Creative solutions should be found by States, universities and civil actors to disseminate broadly the jurisprudence of the Court. To this effect, it would be helpful to make international criminal law, and the law of the ICC in particular, part of the university curricula. Given the complementarity system upon which the ICC operates, the law of the ICC should also be a mandatory component in the education and training of national judges and prosecutors.

Let me conclude with a few general remarks: I think it is fair to say that the current trend in international affairs is not in favour of international organisations and entities; it is not in favour of a global order governed by internationally recognised rules. Nationalism and ruthless enforcement of national interests seem to be predominant. The ICC also feels this tendency. *Realpolitik* fights back vehemently against the loss of sovereignty, power and influence. The challenges of the Court are enormous, the resistance is huge, we act constantly under the pressure to demonstrate legitimacy, and we sometimes have to fight against exaggerated expectations. However, nobody could have expected that it would be easy to break with the culture of impunity for international crimes that existed for thousands of years. Resistance and setbacks had to be and have to be expected. The evolution of international criminal justice was never and will never be a linear progress.

Let us not forget that the existence of the ICC and its operations are an essential contribution to the rule of law in international affairs. This is something the States parties can and should be proud of. The activities of the Court are also a sign that the universality of human rights moves on. The sheer concept of penalising crimes against humanity before a permanent international criminal court underscores the recognition of rights belonging to all human beings without distinction. Insofar, the ICC constantly reflects the close relationship with human rights law and international humanitarian law in terms of goals, values and terminology.

Further proof for the dissemination of the Court's principles is the fact that many States parties have incorporated international crimes into their domestic legal framework. This is also a contribution by the States parties to the rule of law in international affairs, to the development of a global legal culture. All of this is even more remarkable since it was achieved against the resistance of the so-called super powers.

For the first time the victims have the right to participate in proceedings and the possibility to receive reparations in case of a conviction. Those who have suffered, those who have experienced first-hand the worst human rights violations imaginable, are not only the mere objects of scrutiny by the parties and the judges any more but they are active participants in the proceedings. This is a major progress in international criminal law that should not be belittled. By recognising and conceding the victims independent procedural rights in criminal proceedings against the alleged perpetrator, the concept of human rights is significantly expanded.

Lastly, in the discussions about the ICC, I too often notice a kind of negativism, displeasure, fatigue or a lack of vision. Yet, pessimism and anxiousness paralyse the courage that is needed to cope with the problems of the future. What we need—more than ever—is the power and the will to stay the course for the ICC. We have to shape the future and not succumb to the imposition of current political circumstances. When I speak of 'we' I am referring to all those favourable to the ICC. I mean primarily the States parties themselves, the Court and its principals. I also mean civil society and—yes—I mean the academic world that supports critically the cause of the ICC, represented by many distinguished professors in this room. I know we have a tedious task ahead of us but this has never been different in the history of the Court and it will never be any different in the future.

And it is worth to support the ICC and the idea it symbolises. At the end of my remarks, I want to recall the emblematic words of the Preamble of the Rome Statute: 'That the most serious crimes of concern to the international community as a whole must not go unpunished'. Let us try to make 'possible ways ahead' become a reality in the future. Thank you.

The Hague, The Netherlands

Bertram Schmitt
Judge, International Criminal Court

Acknowledgements

This book is based on the conference *The International Criminal Court in Turbulent Times*, which was organised by *Prof. Gerhard Werle* (Humboldt University of Berlin) and *Prof. Andreas Zimmermann* (University of Potsdam) at the German Embassy to the Netherlands in The Hague on 31 May and 1 June 2018.

We as editors are therefore grateful for the hospitality and support provided by *Ambassador Dirk Brengelmann* and his entire staff and, in particular, *Dr. Reinhard Hassenpflug*, Legal Adviser of the German Embassy, as well as *Ms. Sabine Könen* and *Ms. Barbera Kuppens-Keizer*.

Ms. Tanja Altunjan, *Dr. Leonie Steinl* (both Humboldt University of Berlin) and *Konrad Neugebauer* (University of Potsdam) were extremely helpful in providing input during the preparation of the programme, and when it came to summarising and reporting about its results, while *Ms. Ullrike Schiller* shouldered all organisational matters in an extraordinary manner.

The editors would also like to thank all the people supporting the editing process of this publication, namely *Justine Badura*, *Jan Eiken*, *Mehmet Baran Ersan*, *Christine Götz*, *Nora Jauer*, *Patricia Kröger* and *Nella Sayatz*, as well as, first and foremost, *Mr. Jürgen Bering*.

Last but certainly not least, the editors are greatly indebted to the *German Foundation for Peace Research* whose financial support made the conference that formed the basis for this publication possible.

Berlin, Germany
Potsdam, Germany
January 2019

Gerhard Werle
Andreas Zimmermann

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Editors and Contributors

About the Editors

Gerhard Werle is Professor of German and International Criminal Law, Criminal Procedure and Modern Legal History at the Humboldt University of Berlin.

Andreas Zimmermann is Professor of International and European Law at the University of Potsdam, Germany and Director of the Potsdam Centre of Human Rights.

Contributors

Philipp Ambach International Criminal Court, The Hague, The Netherlands

Chang-ho Chung International Criminal Court, The Hague, The Netherlands

Robert Frau European University Viadrina, Frankfurt (Oder), Germany

Leena Grover Tilburg University, Tilburg, The Netherlands

Gerhard Kemp Alexander von Humboldt Research Fellow, Humboldt Universität zu Berlin, Berlin, Germany;
Stellenbosch University, Stellenbosch, South Africa

Volker Nerlich International Criminal Court, The Hague, The Netherlands

Yaël Ronen Hebrew University of Jerusalem, Jerusalem, Israel

Marshet Tadesse Tessema Hawassa University, Awasa, Ethiopia

Gerhard Werle Humboldt University of Berlin, Berlin, Germany

Hannah Woolaver University of Cape Town, Cape Town, South Africa

Andreas Zimmermann University of Potsdam, Potsdam, Germany

Abbreviations

ACC	African Criminal Court
ACHPR	African Court on Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
African Court	African Court of Justice and Human and Peoples' Rights
AU	African Union
art(s).	Article(s)
ASP	Assembly of States Parties
ch	Chapter
DIPA	Diplomatic Immunities and Privileges Act 37 of 2001
DPRK	Democratic People's Republic of Korea
DRC	Democratic Republic of Congo
EAC	*Chambres africaines extraordinaires* (Extraordinary African Chambers)
ECCC	Extraordinary Chambers in the Courts of Cambodia
ed(s)	Editor(s)
edn.	Edition
EU	European Union
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IIIM	International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011
KSC	Kosovo Specialist Chambers and Specialist Prosecutor's Office
Malabo Protocol	Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights

Merger Protocol	Protocol on the Statute of the African Court of Justice and Human Rights
n	Footnote
no(s)	Number(s)
OTP	Office of the Prosecutor
p(p)	Page(s)
P5	Permanent Members of the UN Security Council
para(s)	Paragraph(s)
SCA	South African Supreme Court of Appeal
SCC	*Cour pénale spéciale Centrafricaine* (Special Criminal Court for Central African Republic)
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
TEU	Treaty on European Union
TFV	Trust Fund for Victims
UK	United Kingdom
US	United States
VCLT	Vienna Convention on the Law of Treaties

Chapter 1
Introduction

Gerhard Werle and Andreas Zimmermann

Contents

On the eve of the 20th anniversary of the adoption of the Rome Statute of the International Criminal Court (ICC), the conference, the results of which are published hereinafter, held in the premises of the German embassy in The Hague on 31 May and 1 June 2018, brought together leading scholars and eminent practitioners from the field of international criminal law and focused on questions of international criminal law in its global political dimensions. It aimed to analyse and evaluate the current and future challenges the ICC is facing after 15 years of operation.

Undeniably, no international criminal court has ever operated in non-turbulent times. Nevertheless, within the current global context, the ICC stands at a turning point. It was established in 1998 despite considerable resistance from many powerful political players such as the United States, the Russian Federation, India and China. Today, several States parties, particularly African States, which represent the largest regional group and which have been among the most dedicated supporters of the ICC's establishment, have voiced serious criticism. Many of these States accuse the Court and its Prosecutor of political bias for almost exclusively selecting situations on the African continent. In 2016, these developments culminated in three notices of withdrawal from the ICC, namely on the part of Burundi, South Africa and The Gambia. Burundi's withdrawal took effect in October 2017. Nevertheless, the Court opened an investigation into events prior to this date. South Africa and

G. Werle (✉)
Humboldt University of Berlin, Berlin, Germany
e-mail: gerhard.werle@rewi.hu-berlin.de

A. Zimmermann
University of Potsdam, Potsdam, Germany
e-mail: andreas.zimmermann@uni-potsdam.de

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G. Werle and A. Zimmermann (eds.), *The International Criminal Court in Turbulent Times*, International Criminal Justice Series 23,
https://doi.org/10.1007/978-94-6265-303-0_1