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Burchard · Triffterer · Vogel (eds.)

THE REVIEW CONFERENCE AND THE FUTURE OF THE INTERNATIONAL CRIMINAL COURT

Proceedings of the First AIDP Symposium for Young Penalists in Tübingen, Germany, co-organized by the AIDP YP Committee

AIDP YOUNG PENALISTS

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edited by

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Joachim Vogel

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Introduction by the Editors

The permanent *International Criminal Court* has finally become a reality. Only few years have passed since its Statute was finalized in Rome in 1998 and entered into force on 1 July 2002 after ratification by 60 countries. Today, 109 countries are parties to the Rome Statute and foster the international fight against impunity for international core crimes. Besides, the Rome Statute no longer only contains law in books but has turned into law in action: four situations (in Uganda, the Democratic Republic of Congo, the Central African Republic as well as in Dafur, Sudan) are currently under investigation by the ICC's Office of the Prosecutor and several individual proceedings are underway at and underwent various stages (from the issuance of an arrest warrant, to the pre-trial and trial phase and on to appellate review).

All the more pressing become the various open questions as they remain unresolved in the Rome Statute. After all, this Statute is the product of highly delicate and all too often hasty diplomatic negotiations: many political compromises had to be made, conflicts and clashes of legal cultures – natural for an endeavor to assemble a global regime including the necessary enforcement institutions against international core crime – had to be left unaddressed, and criminal legal experience and doctrine had to remain unconsidered. What is more, by the time the Rome Statute was concluded in 1998, the international community could neither draw on nor foresee the many important experiences and developments as they were ever since made by the two U. N. ad hoc tribunals for the former Yugoslavia and Rwanda: vertical and horizontal cooperation, coordination and harmonization between supranational institutions and domestic legal orders have brought about a truly unprecedented and indeed multileveled enforcement regime. Further, due to its permanency and due to the novel concept of complementary, the International Criminal Court has entered the arena of international politics as a permanent point of reference for national actors.

The looming of the *Review Conference* of the Rome Statute, as it is to take place in mid 2010, presents a welcome opportunity to reflect upon the shortcomings as they permeate the Rome Statute in particular and the future of International Criminal Court in general. The Review Conference calls upon state parties, the international criminal legal staff and academics alike to identify un- or underdeterminate positive norms and regulations and to produce doctrinally sound, politically feasible and practically manageable international criminal law in books and in action: be it within substantive international criminal law, be it within international criminal procedure, or be it within the interplay between national and international jurisdictions.

When challenged with the task to organize the *First AIDP Young Penalists' Symposium*, it was therefore straightforward to identify the Review Conference as *the* subject matter hand: international criminal justice has a truly global reach, as the AIDP's Young Penalists form a truly global network; international criminal justice encapsulates diverse areas of law and is pursued by professionals of diverse vocations, as do the AIDP's Young Penalists come from diverse criminal legal disciplines and careers; finally, international criminal justice spans generations – with witnesses of the Nuremberg trials and of the lacuna of international criminal proceedings in the times of the Cold War being of paramount importance –, as do the AIDP's Young Penalists profit from the constant interaction with their more seasoned, experienced and senior peers.

All this became reality in the highly successful First AIDP Young Penalists' Symposium: Dozens of senior and young penalists, from Brazil to Japan, with an international or a domestic background, pursuing either the academic career or practicing criminal law as prosecutors or defense counsel, convened in Tuebingen, Germany, from 1 to 4 April 2008 to discuss the upcoming 'Review Conference and the Future of the International Criminal Court' as well as proposals for legislative or adjudicative reform.

This volume contains most – alas not all – of the presentations as they were given during the symposium; as editors, we refrained from far-reaching intrusions and encouraged the authors to submit their contributions in light of the instructive discussions as the unwound. These contributions speak of the high overall quality and standard of the lectures of senior and young penalists alike; they also speak of the holistic approach necessary to tackle the Review Conference and the future of the International Criminal Court where substantive and procedural as well as doctrinal and policy questions are to be raised and answered. This volume thus also serves as reminder that the first must not be the last of the AIDP Young Penalists' Symposia and that the Tuebingen tradition – to initiate a serious academic, global and inter-generational legal discourse – merits perpetuation.

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With regard to substantive international criminal law, *Thomas Weigend's* vital analysis of Article 28 ICCSt identifies various problems of an overly broad and doctrinally uninformed mode of liability, that of superior responsibility. *Weigend* suggests revising – indeed limiting and clarifying – this concept at the Review Conference in order to account for the differences between military and civilian superiors, between the superior acting either with intent or mere negligence, and between the superior either failing to exercise control before or failing to take necessary and reasonable measures after the commission of the crime by a subordinate – all differences that Article 28 ICCSt neatly collapses into one provision with a common range of punishment.

Boris Burghardt – a core editorial collaborator in Gerhard Werle's seminal 'Principles of International Criminal Law' – continues on the importance of a doctrinally cohesive structural approach to modes of participation. Drawing inter alia on the spirit of German criminal law theory, but even more so on a careful analysis of the jurisprudence of international criminal tribunals, he emphasizes that modes of participation do not only – in a phenomenological way – identify and describe conduct that entails criminal responsibility; they also control the – normatively – warranted degree of criminal liability and thus pre-structure the determination of criminal guilt as well as the sentencing phase. *Burghardt* thus fleshes out the central demand, and from a more agnostic point of view: the essential hope of a 'differentiation model' of criminal participation.

Advancing to the legal theoretical fundaments of the Rome Statute, *Björn Jesse* announces and promotes nothing more than a paradigm shift in international criminal law. According to him, the interpretative methodology of the Rome Statute is to account for – as an 'ordinary' international treaty with relative significance – its creating new substantive international criminal law rather than codifying pre-existing custom as it was inter alia 'found' – or from a more cynical point of view: 'invented' – in the jurisprudence of the ad hoc tribunals. *Jesse* therefore emancipates the Rome Statute from former precedents of other tribunals and models a sui generis concept of crime for the ICC. This indeed represents theoretical break from the commonplace extension of the prior jurisprudence of the ad hoc tribunals to the International Criminal Court, a break which instructs our understanding of international criminal law, and thus a break which legal theorists and practitioners alike have to address in the future.

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The practical relevance of a conclusive interpretative framework of the Rome Statute, especially the importance of comparative criminal law, is also highlighted in *Mohamed Elewa Badar's* reflections on Article 30 ICCSt. in light of the Lubanga & Katanga decisions on the confirmation of charges. In examining the different degrees of intentionality under Article 30 ICCSt., *Badar* draws a firm distinction between dolus directus of the second degree and dolus eventualis. Based on an encompassing comparative survey of several domestic legal orders, he nevertheless supports the ICC's finding in Lubanga that dolus eventualis is covered by the Rome Statute. He also heeds special attention to Islamic jurisprudence and thus reminds international criminal lawyers about the rich history and content of a legal tradition which so far has received far from enough – if any – consideration in the theory and practice of international criminal justice.

Turning towards the special part, *Dov Jacobs* takes to issue the politically highly controversial definition of the crime of aggression. Within the context of the current discussion, he submits to keep things simple and to not introduce novel jurisdictional trigger mechanisms, a specific role of the Security Council, or special modes of liability for the crime aggression; rather, the Rome Statute is legally prepared to account for this crime and critique often solely arises from misplaced political fears. In proposing to follow the Nuremberg precedent and to include the declaration of organizations as crimal in the Rome Statute, *Jacobs* touches upon the immensely delicate and legally as well sociologcially under-theorized relation between individual criminal responsibility on the one hand and the organizational nature of the crime of aggression on the other.

The various counterarguments against the responsibility of collective units, namely against that of corporations, are explored with great care and knowledge by *Larissa van den Herik*. She distinguishes between three paradigms of corporate responsibility, namely (a) public international law, (b) the ICC system and in particular its complementarity principle, and (c) criminal law. For each paradigm, she analyzes possible counterarguments and thus arrives at the conclusion that neither principles of public international law, nor the ICC complementarity regime nor theoretical objections from criminal law present legal obstacles that are unsurmountable. *Van den Herik's* contribution pierces the ideological antagonism between advocates and adversaries of corporate criminal responsibility and thus lies the fundament for a more objective – but nevertheless normative – discussion of the subject matter.

This discussion is enriched by *Marc Engelhart's* clear and encompassing study of the same subject matter: international corporate criminal responsibility. He not only sets forth phenomenological prototypes of corporate involvement in international crimes, but also reviews the current legal situation including its historical development. Ultimately, he promotes both an international and a criminal solution, properly institutionalized at the International Criminal Court, to the participation of corporations in core crimes. A young German penalist, *Engelhart* thus challenges the very German opposition against corporate criminal responsibility.

Going a step further, *Athanasios Chouliaras* draws on critical criminology in order to emphasize the meso-organizational and especially the macro-state level of international crime: Although the commission of core crimes, in his his view, normally takes place as a part of institutional, systemic or state criminality, he rightly observes that the international judicial discourse focuses on personal responsibility, that is: the micro-individual level. *Chouliaras* thus criticizes the traditional judicial discourse – not only of international criminal tribunals but also of the International Court of Justice – because it turns a blind eye to the collective dimension of core crimes. In substantiating this critique with

critical criminology, *Chouliaras* introduces an important but comparatively unnoticed layer to the appraisal of international efforts to end impunity for core crimes.

With her wide-ranging account of the ICC proceedings from the point of view of comparative law, *Kanako Takayama* opens this volume's chapter on international criminal procedure and judicial assistance. *Takayama* rightly identifies the particular character of the proceedings before the ICC which are not identical to any national and international criminal legal system; rather, she reconstructs this character as an hybrid of various different systems. In order to guarantee the smooth and proper functioning of this hybrid, her emphasis of the role of comparative legal insights – which also pertain to fundamental legal and cultural principles as well as to the roles of the various actors of the compared legal orders – is of great significance for the future hybridization of international legal proceedings. In also taking into account the experiences of Asian legal tradition, *Takayama* again introduces an element to the discussion which all too often is forgotten in the commonplace narrative of a clash between civil and common law.

With Takayama having laid out general foundations of international criminal proceedings, *Steven Becker* focuses on a particular and highly sensitive subject matter: So far, there was conspicuously lacking in the vast literature on international criminal justice a – let alone: profound – analysis of biased or prejudiced judges and the procedural possibilities, especially for the defense, to disqualify them from the bench. *Becker* remedies this with a highly instructive analysis of the disqualification of judges for pre-elevation activities and opinions. Especially in the international criminal law context, where judges often have and also shall have an international humanitarian law or human rights background, there may arise serious tensions between qualification and bias which call into question the necessary appearance of impartiality of the bench. *Becker* concludes that the Assembly of State's Parties should be made aware of this dilemma, be cognizant of it in selecting future judges, or consider amending the criteria for selection of judges in order to avoid adverse impacts on the integrity of the International Criminal Court.

Ever since the Nuremberg International Military Tribunal, international criminal procedure is concerned with multi-accused cases. *Emmanuelle De Bock* brings to our attention that the ICC will face the same challenges in ensuring the fair trial rights of all the accused in a joint trial as experienced by the Ad Hoc Tribunals. After developing general principles of joint trials in particular the rationales and the judicial scope of discretion for joinder of trials –, she focuses on various problems of evidence in a joint trial, especially on the admissibility of evidence not tested through cross-examination from one accused against his co-accused. Vice versa, she acutely raises the opposite scenario where persons accused jointly cannot be tried together, e. g. because one is still fugitive. Insofar *De Bock* foresees problems in the repetitive hearing of evidence on common themes in subsequent trials as well as the danger of contradictory judgments. To streamline the jurisprudence of the ICC, she advances an ammendment of Article 69(6) ICCSt in order to incorporate judicial notice of adjudicated facts or documentary evidence from other proceedings of the Court.

The last chapter of this volume is dedicated to the interplay between national and international jurisdiction. *Christian Ritscher's* contribution on the integration and practice of international criminal investigations and prosecutions in the German domestic legal order holds various interesting insights – the more, since *Ritscher* is Senior Public Prosecutor with the Office of the German Federal Public Prosecutor General and in charge for operations under the 'German Code of Crimes Against International Law', i. e. the German implementation of the Rome Statute. *Ritscher* not only gives an encompassing overview – so far unkown to the international audience – over the various cases as they were launched under this Code in Germany and as they developed, but also acutely

describes the problems, the self-understanding and the (especially factually limited) role of German prosecutors in the multilevelled fight against impunity for international crimes. He also underlines that within the international community, Germany will contribute to closing safe harbours for perpetrators of international crimes. The contribution represents the status of the time of its origin. In fact the situation at the Office of the Federal Public Prosecutor General has changed considerably as there is an entire War Crimes Unit established meanwhile.

Julia Geneuss analyzes the German Code of Crimes Against International Law from an academic point of view and locates it in the overall framework of a multilevelled – international/domestic – enforcement regime. She first identifies the Rome Statute as a 'catalyst' for national efforts to curb core crime, then to describe the effects it had in Germany, i. e. the enactment of the above mentioned special Code of Crimes Against International Law. Within the multilevelled enforcement regime, *Geneuss* takes up two concepts from European integration research: (vertical and horizontal) coordination and cooperation between jurisdictions. With regard to the latter, she introduces the anticipated legal assistance approach which represents a paradigm shift in that national jurisdictions would not investigate international crimes with the aim of bringing them to trial in their own courts of law, but with the aim of securing evidence for trials abroad. This suggestion, as it is currently discussed primarily in Germany, merits further international consideration and would redefine the role of domestic legal orders in the global efforts to curtail the commission of core crimes.

Taking up the necessity to coordinate jurisdictions in their efforts, *Dawn Sedman* adresses the fundaments of the ne bis idem principle as it is now codified in Article 20 ICCSt. After an overview over this norm, she follows the modern human rights interpretation of ne bis in idem as bestowing on the individual the protection against power. Relating this imperative to the possibility of a subsequent prosecution of the same individual for the same conduct first by the International Criminal Court and then by a domestic legal order for different crimes (e. g. genocide and ordinary murder) – a very real possibility, one might add: after all, while the defendants Fritzsche and von Papen were acquitted before the Nuremberg International Military Tribunal, they thereafter faced domestic national denazification proceedings –, *Sedman* promotes a change of the wording of Article 20 ICCSt. For while this norm now seemingly follows the principle of *ne bis in idem crimen* (thus allowing subsequent domestic prosecutions for ordinary crimes), only the *ne bis in idem factum* principle affords sufficient protection against retrials of the same conduct under the ICC's multilevelled enforcement regime.

Frank Zimmermann closes this volume with an analysis of the necessary standards for the protection of the individual in the context of legal cooperation. Insofar he compares – indeed a highly innovative step – European Cooperation in Penal Matters with the system of judicial assistance under the Rome Statue. He gives particular attention to defendant's rights and analyzes to what extent instruments of international cooperation influence the equality of arms between prosecution and defence. As one of the most intricate problems in this context he identifies the combination of different procedural systems which can lead to a circumvention of defence rights. Another important aspect is the 'institutional' deficit of the equality between the defence on the one side and closely cooperating prosecution authorities on the other. *Zimmermann* concludes that the Rome Statute as a rather homogeneous body of substantive and procedural criminal law provisions avoids several problems that arise on the EU level. Nevertheless, he proposes a number of amendments that could help to further stabilize the equality of arms in proceedings before the International Criminal Court.

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Although this overview could only offer glimpses into some of the forthcoming astounding suggestions and analyzes, we hope that it became clear already that this volume contains several important explorations of the International Criminal Court. This volume accurately draws lines between where the Review Conference is to take immediate action and where the existing law is sufficiently prepared for the future. Since there is up until today no comprehensive agenda for the Review Conference, it is our – maybe idealistic, nevertheless sincere – hope that the First AIDP Young Penalists' Symposium shall therefore have a very real agenda setting impact.

Tübingen & Salzburg, July 2009

Content

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Welcoming Words

Welcoming words by Peter Wilkitzki

Assistant Secretary General of the AIDP
President of the German Section of the AIDP

Spectabilis, esteemed panellists and participants, colleagues and friends,

Dear future of our science,

It is a great honour and pleasure for me to convey to you, at the beginning of this important event, the most heartfelt greetings and wishes on behalf of the President and the Secretary General of the International Association of Penal Law, Professor José-Luis de la Cuesta and Dr. Helmut Epp, who, due to conflicting appointments, will unfortunately both not be able to be present here and have asked me to inaugurate the symposium in my capacity as Assistant Secretary General and President of the German Section of the AIDP.

Let me start by expressing the gratitude of AIDP to both the Young Penalists and the University of Tübingen for their joint initiative to organize a conference in Germany on the problems and perspectives of the International Criminal Court. Saying this, I have embraced in one sentence the four keywords that make this project so remarkable: ICC, AIDP, Young Penalists, and Germany.

I would like to shortly elaborate on these four keywords:

Keyword 'ICC': Everybody in this room knows about the incredible progress which the idea of establishing an international criminal jurisdiction has made between the early 1990s and the finalization and entry into force of the Rome Statute in 1998 and 2002. We can, however, not close our eyes before the question whether the Court, after having become operational in 2003, will be able to catch up in its daily work with the high expectations of the world community. What could express these worries better than the topic of tonight's keynote speech – 'The Court in danger?'

Keyword 'AIDP': Needless to mention in this room that the success story of the ICC is inextricably linked with the work of our Association more than of any other organization. Its efforts towards creating an ICC began already in 1924, when the AIDP, together with the International Law Association, presented a first proposal for the establishment of an international criminal court to the Interparliamentary Union, and has never stopped until today. Let me just mention the work of three of our great former Presidents, namely Vespasian Pella, Hans-Heinrich Jescheck and Cherif Bassiouni.

Keyword 'Young Penalists': The AIDP's 'youth organization' was founded less than ten years ago, but within this relatively short time it has already become an integral and essential part of our scientific life. I am not exaggerating when I say that in the hand of these young penal lawyers will lie not only the future of our Association but also to some extent the future of the ICC.

Keyword 'Germany': Please allow me to say with my German hat on how proud I am to witness this first big event organized by the Secretary General of our National Group for and with the Young Penalists. I am also proud that my country has played an essential

role during the last 15 years in making the dream of an international criminal jurisdiction come true. But it must also be said that these efforts have to be continuously strengthened. Let me demonstrate this by quoting two media clips captured on the same day three weeks ago: On March 11, the German Federal Minister of Justice issued a press release celebrating the fifth anniversary of the swearing-in of the 18 ICC judges, solemnly reiterating the German commitment to support the Court. On the same day, one could read in a German newspaper that the ICC Chief Prosecutor deplored that Germany had diminished its political support towards the work of the Court by, in particular, not imposing sufficient political pressure on Sudan.

It will be the challenging task of this symposium to find out whether and under which conditions the ICC will be able to dissipate any doubts about its future, and how our Association, our Young Penalists and Germany will be able to contribute to these efforts.

To conclude: Once more I congratulate the organizers for their precious initiative which, I am sure, will be crowned by success. And it deserves this success as much as the ICC deserves it, our Association deserves it, and its Young Penalists deserve it (and Germany anyway).

Tübingen, 1 April 2008

Welcoming Words by Zoe N. Konstantopoulou

President of the Young Penalists' Committee of the AIDP

It is with great pleasure that I would like to welcome you to the 1st Young Penalists' Symposium in International Criminal Law and it is with sincere gratitude that I would like to thank the University of Tübingen and, in particular, Professor Joachim Vogel, for generously offering to host this scientific gathering and for contributing and ensuring an impeccable organization. On behalf of the Young Penalists' Committee, which I represent here together with two distinguished colleagues, Mrs Luciana Boiteux and Mrs Els de Busser, I would also like to wholeheartedly thank Mr Christoph Burchard, without whom the organization of this Symposium would not have been possible. Lastly, a warm "thank you" is due to Manuel Espinoza, who has been the "mental instigator" of this Symposium.

I am happy to recognize among you a lot of familiar faces. I am also happy to see a lot of new friends in the audience, which indicates that our academic family is growing. I would therefore like to take this opportunity to say a few words about the Young Penalists within the International Association of Penal Law.

The Young Penalists are young jurists, scholars, academics, practitioners specialized or with a specific interest in Criminal Law, International Criminal Law and Human Rights in a national and international context, who are not over 35 years of age. Our aim is to contribute to the scientific debate, to the academic dialogue, in an active manner; not just to reiterate doctrines, not just to memorize theories and repeat analyses, but also to approach contemporary issues of criminal law, criminal procedure, international criminal law and the protection of human rights through our own original perspective, to nourish the academic exchange of thoughts with our own ideas.

It is in this spirit that this Symposium was conceived and organized, to provide young penalists with a special forum to elaborate on their views and on their knowledge and to contribute to the forging of the norms of International Criminal Law and Procedure. The very aim of this Symposium is not only to exchange views between ourselves, not only to learn from each other and from the senior penalists, but also to disseminate our conclusions and recommendations, in order for them to be taken into consideration by the International Criminal Court Review Conference, to take place in 2009–2010.

The dynamics of a Conference are never foreseeable. Back in 1998, diplomats and NGO members were estimating that it would take decades for the ICC Statute to enter into force. Yet, the 60-ratification threshold was met in less than 4 years. In the same manner, amendments to the Statute which now seem utopian may come to play in 2010 or shortly thereafter.

Are amendments necessary? One has to acknowledge that the Rome Statute, in comparison with the Charters and Statutes of all other International Criminal Tribunals, has marked significant progress with respect to the principle of legality and basic principles of criminal law. On the other hand, it remains incomplete with respect to the definition of aggression, rightly referred-to as the mother-crime. The inclusion of aggression in the Statute with no definition has been a compromise of the Rome "package

deal", but it cannot remain a compromise for the Review Conference. A more precise definition of the material and mental elements of other core crimes and of the different forms of participation in such crimes is also needed in cases where vagueness renders interpretation unpredictable, thereby violating the *lege certa* requirement. For many, the enhancement of the Court's jurisdiction to other international crimes, such as drug-trafficking and international terrorism, is a challenge to be met. From a procedural point of view, the division and balancing of powers between the different Organs of the Court and the role of the Defence in the Court System are issues to be pondered upon and effectively resolved in the interests of justice. The practical operation of the complementarity regime, judicial assistance and its ramifications to the rights of the parties form another area open to improvement.

During the next days we will have the opportunity to elaborate and exchange views on all the above and other questions which form the topic of this Symposium. We have divided our work in three thematic sections: "Substantive International Criminal Law", "International Criminal Procedure" and "Policy and International Criminal Justice". Through those 3 different spectra we will tackle the thorny issues of the Review Conference and the Future of the ICC, through presentations by established panellists in the mornings and presentations by young penalists in the afternoons. At the end of our discussions, we will be drafting our recommendations for the Review Conference.

Again, I would like to thank the University of Tübingen and Professor Vogel for their hospitality. Last but not least, I would like to address a special "thank you" to the International Association of Penal Law, of which the Young Penalists' Committee is an intrinsic part, for the warm and unconditional support and trust with which our Committee has been vested on the part of the organs of the Association in all our scientific endeavours.

I wish us all a fruitful intellectual and scientific interaction.

Tübingen, 1 April 2008

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