

Cynicism? Yes, please!

Embracing cynicism at the International Criminal Court

Elisabeth Baier

2019-09-05T13:00:42

Debates surrounding cynicism in international law have an inherently negative focus. But why not try to take something positive-constructive out of the cynicism an institution is experiencing? Since there are few institutions, which are currently facing more cynical backlash than the International Criminal Court (ICC/Court), this piece will take a look at the reasons and at the question how cynicism manifests itself in the context of the Court and how it can potentially be tackled.

The ICC and elevated levels of cynicism

For many years, international criminal justice only knew one predominant narrative: progress. The story from Nuremberg to the ad-hoc tribunals is widely seen as one of success and carried by firm faith in the project. At its preliminary height, driven by idealism and partly utopian expectations by considerable parts of the international community, stood the establishment of a permanent institution at the Rome Conference in 1998. This created an immense *Fallhöhe* for the ICC. The position it was put into at the time of its creation posed the imminent danger and elevated risk for a deep fall and cynical backlash: cynicism as post-idealism.

Cynicism can also occur as the gap between expectations and reality. There is an enormous gap between what the ICC should be able to do in the eyes of many, and what it has shown to be capable of doing in the past 20 years; a gap of expectations regarding norms written on paper and the realities of their execution. Expectations are not just conflicting between different actors, but even within the Court's framework: the decision of the Court to go one way, almost inevitably leads to a disappointed expectation on another side (Robinson). The struggle between apology and utopia which international law often finds itself in, is magnified in international criminal law, and within the field even more so regarding the ICC as an institution.

Another predisposition for cynical backlash can be found in the level of compromise the Rome Statute is built on. It is an altogether different and less coherent code than the IMT Charter or the statutes of the ad-hoc tribunals. These were built on the general consensus by the victorious powers of the conflicts to open up temporary institutions, whereas the Rome Statute would allow permanent jurisdiction on still undefined situations, involving future member states themselves. There are signs that the compromises made during the Rome Conference would haunt the ICC in the years to come. This is especially true for Part II of today's Statute on jurisdiction, admissibility and applicable law, which was particularly contentious. One day before the Conference was supposed to end, there was still a prevailing narrative of the

'tale of two courts', describing two very different concepts envisaged by the parties, and talk about a second conference. Or as a former colleague and participant of the Conference told me: 'You knew that you had reached a compromise, when everybody was equally unhappy'.

How international criminal cynicism manifests itself

There is a number of ways in which cynicism surrounding the ICC manifests itself, ranging from rejecting it as an institution altogether (dismissive), actors abusing certain instruments of the Rome Statute (abusive), to cynicism coming from within the Court (institutional) and cynical commentary from scholars (discursive).

Dismissive cynicism is describing the rejection of the Court as an institution as such, as a form of institutional nihilism and distrust. It can appear as rejection paired with actively fighting the Court, or in the shape of former supporters, which have now turned against the Court. The conduct of the United States towards the Court and the recent withdrawals by former member states can serve as examples.

Abusive cynicism describes the phenomenon of actors using the system for their own benefit from within, egoistically. The main lever which actors use is that of cooperation or rather lack thereof, as the enforcement regime of the ICC remains a toothless tiger without it. Self-referrals by member states such as by Uganda and Palestine, as well as the Sudan and Libya referrals by the United Nations Security Council underline the problem. Both the Sudanese and the Libyan situation were also paired with dismissive acts by member states, showing that perceived abuse from within and dismissal of the system can go hand in hand and facilitate each other. This highlights a dangerous vicious circle dynamic for the ICC: with every cynical attack against it, the level of cynicism of all actors increases, triggering more acts of cynicism in turn.

In many ways the most worrying form of cynicism, is the one coming from within the ICC itself as an institution. What it undoubtedly cannot afford, if it wants to find an answer to the cynicism surrounding it, is to become a cynic itself. A considerable source of cynical behaviour stems from the current judicial culture, highlighted by a series of recent events, such as Judge Ozaki's request for a part-time position, the ongoing wage lawsuit by a number of judges against the ICC, the publicly held debate on the composition on the Presiding Judge of the Gbagbo Appeals Chamber or certain statements made by Judge Perrin de Brichambaut in a speech given at Beijing University. In times of crisis, where solidarity and a strong leadership are more important than ever, these incidents paint a picture of a leadership not acting in concert and setting the wrong priorities. The reputational damage they leave cannot be overestimated.

Finally, academic commentary provides its fair share of cynicism in current debates surrounding the ICC. The focus of these debates has shifted from initial euphoria, to doubt about certain developments and finally an endless crisis narrative, which has evolved in scholarship at least in the past decade, culminating in the 20th anniversary year of the Rome Statute, 2018. More recently, there is a visible shift from criticism to cynicism, especially in social media, namely the blogosphere and

academic tweeting, which are amplifying cynical tones, as for example shown in the recent Gbagbo acquittal debate. If this trend will continue within more traditional channels of publication remains to be seen, but would not be surprising.

What do these manifestations of international criminal cynicism show? First, they are numerous and take on different and complex shapes; the scale of cynicism the Court has to face is huge. They come from both from internal (abusive and institutional) and external (dismissive and discursive) sources. Actors which were supposed to be allies for the Court, turned out to be serious sources of trouble. Second, none of the illustrated examples should be considered in an isolated manner, each provides the environment for further complex patterns of cynicism. Every actor takes on a different role with different interests, which are at a constant interplay with each other and part of a wider mutually dependent framework. Third, the fact that the ICC is more vulnerable to cynicism, make its manifestations a paradigm for its modern phenotype: The 'enlightened wrong consciousness' (Sloterdijk) as the cynical Zeitgeist.

The chances of embracing cynicism for the ICC

There is a chance to expose and disarm existing underlying problems. Cynicism always incorporates a form of critique, even though the manner in which this critique is expressed, is absolute, polarising, discriminating and often appalling. While these connotations are inherently negative, they also bear a chance: to unmask existing problems and focus on them almost like a magnifying glass. Abuse still requires use, and each of these abuses and attacks bear the potential of a learning effect.

Despite and within cynical attacks lies a chance to boost the authority of the Court and the solidarity within. The ICC has become an authority that states turn to, even though in many cases it may be in their own interest. The strong counter reaction of some states towards the actions of the Court has rather contributed to this. External cynical attacks can also boost a sense of internal belonging, solidarity and togetherness.

Finally, there is a chance of de-mystification and coming of age for the Court. Cynicism has the power to de-mystify, which is something that the ICC might be in desperate need of. Many norms were used in practice for the first time and (unsurprisingly) face difficulties in their execution. Problems can be targeted better with each appearance of cynicism, enabling the ICC to move forward, even if it often seems to be in a 'one step forward, two steps backwards' manner. [The Guardian \(humorously\) claims](#) that cynicism starts to grow at the age of 44. Although the ICC has not reached that age yet, cynical backlash should be seen as a necessary evolutionary stage the Court has to go through, as part of its coming of age story. For international criminal justice in general, progress has more often proven to be fluctuating rather than linear. The same might be the case for the ICC as an institution as such, as well as its position within the wider system of international criminal law that it operates in.

Elisabeth Baier graduated from the University of Passau with a degree in law and a specialisation in criminal law in 2014. Her clerkship included a stage at the International Criminal Tribunal for the former Yugoslavia in The Hague. After her time as Carlo-Schmid-Fellow at the International Criminal Court, she recently joined the Berlin-based criminal law chambers Danckert/Bärlein/Sättele as a barrister.

Cite as: Elisabeth Baier, “Cynicism? Yes, please! Embracing cynicism at the International Criminal Court”, *Völkerrechtsblog*, 5 September 2019.

