

## *ZOOM IN*

### *The question:*

#### **Testing the legitimacy, consistency and credibility of the International Criminal Court**

*Introduced by Béatrice Bonafé and Micaela Frulli*

The Rome Statute entered into force in 2002 and the International Criminal Court (ICC) will soon celebrate its eighteenth birthday. Yet, whether the Court has actually reached, so to say, adulthood is a matter of contention.

During these first years of activity, the Court has repeatedly affirmed its personality. It has painstakingly learned to try very serious international crimes. It has prompted the adoption of national legislation protecting fundamental principles of the international community as a whole. And it has even been twice entrusted by the Security Council to investigate situations outside the scope of its consensual jurisdiction.

The Court has also been the object of strong criticism. A number of States have threatened withdrawal, two of them have actually done so. The relations with third States have been at times extremely tense. The effectiveness of proceedings has been questioned. The carrying out of investigations and proper trials has been put into question. The use of some of its powers has been challenged. The very purposes for its establishment have been tested.

The present Zoom-in chooses a specific perspective from which to look at this broader debate, that of the reliability of the International Criminal Court, if not (yet) its authority. Two experts of international criminal law – Andrea Carcano and Gabrielle McIntyre – have been asked to analyse a number of issues that we thought could be crucial in establishing whether the ICC has become a reliable actor in international relations.

The assumption that the International Criminal Court has reached adulthood is based on its case law that insists on its having international

legal personality and being not only able to entertain relations with other international law subjects but also having the powers (sometimes implied) that are necessary to accomplish such relations. The 2018 decision on jurisdiction in the *Robingya* case, for instance, is almost entirely devoted to reaffirming the legal personality of the Court. This is not surprising, the history of international law knows of young international organisations in need of reaffirming their legal personality, especially when relations with third States or entities are at stake. However, the most interesting question is whether the young international subject can live up to the expectations connected to its newly acquired status.

The two authors have declined the intentionally non-legal concept of reliability in different ways and they have tested the legitimacy, consistency and credibility of the ICC in its first years of activity. The issues that they examined are among those that have most raised concern. Andrea Carcano tests the legitimacy of the Court by having regard to a number of situations in which the credibility of the Court is questioned because they reveal a lack of judicial modesty, poor legal reasoning and lack of collegiality. On the other hand, he takes into account issues concerning the institutional design of the ICC, such as the selection of judges, as well as the general context in which the Court operates. Gabrielle McIntyre takes into account consistency in the ICC decision-making or rather the lack thereof, which results in undermining its legitimacy and more generally legal certainty. On the one hand, she examines jurisdictional issues raising the question of the relations between the Court and third States and maintain that they have been addressed in a rather inconsistent way and with poor legal reasoning. On the other, she contends that certainty and predictability have been put at risk in a number of cases dealing with the procedural aspects that characterise the main judicial activities of the ICC. While both contributors basically agree on the need for a shared legal vision among the ICC judges, the measures suggested to achieve that end may be different.

