

Judge Piotr Hofmański

[00:00:00]

Katerina Linos: Welcome, everyone. I'm Katerina Linos, the host of Borderlines, and I'm delighted today. It's a special treat to have the President of the International Criminal Court, Judge Piotr Hofmański, with us today.

Judge Hofmański has been an ICC Judge since 2015 and president since 2021. And before that he was a prolific scholar, having contributed more than 300 books, commentaries, and articles on the topic of international criminal law, criminal procedure, and human rights protection.

I'm going to start today by asking a general question about the role of the International Criminal Court in these troubled times.

Since the Russian invasion of Ukraine, we have rethought about what the United Nations is capable of doing. We have security councils, members that are unable to [00:01:00] act in unison given the Russian invasion, and we have a different institution, a newer institution, the International Criminal Court, also playing a role in this difficult situation. Judge Hofmański, what is the role of the International Criminal Court in this moment?

Judge Piotr Hofmański: Let me start by saying that, this is quite a fortunate situation that we are not a part of the UN system. We are the, I would say, sister organization. We have a lot of relations with the UN, but we are the separate organization created on the basis of separate treaty.

And we do our job completely independently of United Nations Security Council. But I understand your question is more generally about the role of the ICC. Maybe I will start by saying that the ICC was created more than 20 years ago, with the mandate to [00:02:00] fight impunity, in respect to the most serious crime under international law, which is genocide, which is crimes against humanity and war crimes.

And after a few years, also the jurisdiction over the crime of aggression has been added. So the ICC has the right, has the power to investigate and to prosecute these crimes, and to put perpetrators on trial. But of course, we are not doing it alone. Because one of the main principles of the functioning of the whole system is the principle of complementarity, which means that the

jurisdiction of the Court has no primacy over the jurisdiction of national jurisdictions.

So it means that the International Criminal Court steps in only if the national jurisdiction is not able or don't want to [00:03:00] investigate or prosecute atrocities. So, it is not our interest to step in everywhere and just to grab the cases to The Hague. Our idea is just to encourage national jurisdictions to act, and we act as a court of the last resort.

If the victims are not able to get justice from national jurisdictions, then this additional path is open for them.

Katerina Linos: Thank you so much for that answer. I do want to ask a bit about your big successes and the relation to some criticisms we hear here in the United States. So here in the United States, we led in the development of the Rome Statute and then we fought its signature and ratification. We supported some investigations under the Obama [00:04:00] administration, when we did not necessarily like particular leaders; there's new enthusiasm in this country for the ICC at this moment among some branches, not among our military -- so we get a biased perspective here in the United States. You, as president of this institution, have seen criticism and praise.

What do you consider a big success?

Judge Piotr Hofmański: This is more than one question, I'd say. So I think that it is indeed the big success that after 21 years we still exist. And indeed, I think it's a big deal what we have done. The prosecutor of the ICC requested arrest warrants against more than 50 persons, and many of them has been caught, has been tried, has been convicted by the Court.

Of course, others were acquitted, but it is the nature of the court of law that it is not always the case that the accused person is convicted. [00:05:00] So, I think that we can say it's quite a lot because we are talking about very complex cases with hundreds of thousands of victims, with hundreds of witnesses and so I think that these numbers we achieved is remarkable. Another thing which is linked more to your second question is the issue of the universality of the court. So, our goal, our vision is to bring on board as many countries of the world as possible. We have 123 states ratified the Rome Statute. It's also a remarkable number because it's two third of the states of the world.

But it is not enough because as you mentioned, the big powers of this world didn't join the system and it concerns also United States. I came here to

[00:06:00] California to talk to military also. I took part in the Fleet Week in San Francisco. We had a frank discussion about the reasons for which the U.S. didn't join the Rome Statute so far and what are the arguments needing to be used to convince the Congress to ratify the Statute.

I personally believe that we are able to see this step soon. So, the main concerns of U.S. concerned the jurisdiction of the court over the citizens of non-state parties, including U.S., obviously, in respect to some situations in Asia. But now, after the conflict in Ukraine, the U.S. supports our efforts to bring to justice citizens of states who are not state parties to the Statute. I think that we [00:07:00] need to apply the same standards to both situations and to both scenarios. And I think that American decision-makers stand to understand, that is better to be in than to be out. Because being a part of the system, you can influence the development of the system.

You can influence the decision-making process in the assembly of a state party. You can propose candidates for the judicial positions, but also for the other positions in the Court. So, if you are out, you do not demonstrate your commitment to such values as rule of law, as peace, as security.

I know that is in the middle of the heart of Americans, but my request would be, please show it. Please show it. I think it's not the most comfortable situation when we see that, for example, from the NATO states, all of them are members of the ICC, [00:08:00] except Turkey and U.S.

Katerina Linos: I completely agree with you and have a lot of colleagues who write about the importance of the institution. So, Professor Saira Mohamed at Berkeley writes about the expressive value of the ICC decisions. Professor Beth Simmons at the University of Pennsylvania writes about deterrence.

But I wanted to touch on your conversations with the U.S. military. On the one hand, the U.S. military is an actor that says, "We don't want our soldiers before any other court other than our own internal procedures. We have bases around the world. We're involved in this global operation." On the other hand, it's my belief that they're quite serious about compliance with the laws of war. They have JAGs. They're training their soldiers. In your conversations, what points of agreement did you find? As well as this larger tension, of course.

Judge Piotr Hofmański: I [00:09:00] understand that the most important part of the discussion was discussion about the complementarity.

It is a very simple issue. If you are able to ensure that with your judicial system, you will do your job, then the ICC will not intervene. I think it's simply the misunderstanding that -- it is not only in the U.S. -- that some states are just afraid that after the ratification we will just step in, we will look into the previous cases, which is also not the case, and we will just try to grab the jurisdiction from the Judicial Council.

It is not the case. So, if we have the reliable partner and we are sure that with the internal system, it's possible to achieve the goal to stop impunity, then we are sure that we don't [00:10:00] need to intervene. And I think it is the aspect that was the center of discussion and our partners start to understand better.

Katerina Linos: So can I follow up a bit on this? So I understand that the U.S. has a robust military, robust court martial system. A low-level official who abuses detainees or otherwise violates the law of war will be punished and complementarity will function.

But the crime of aggression . . . The indictment of a head of state, not of an African state, but of a Permanent Five member of the Security Council might put into question some of the actions of the United States in a future meeting. That to me, if I were a military leader, would raise some questions. What would you answer to that?

Judge Piotr Hofmański: I don't think -- it's not really good if you use the argument, "I don't want to ratify the Statute because I am going to commit crimes."

Katerina Linos: You mentioned some big successes of the International [00:11:00] Criminal Court. You said it's impressive that this institution that has been under so much criticism still exists. It's impressive that almost two thirds of the countries in the world are parties and more signatories are being added.

It's impressive to have some support from the United States given the back and forth in the positions. Are there specific cases or specific developments that happened following the indictment of key leaders that you're particularly proud of?

Judge Piotr Hofmański: As you know, the prosecutor brought charges against the leaders of states, including head of states. There's two. Such cases are not "successful" in that sense that one of them was to finish with acquittal. It is not a success of the prosecutor's office, but still I think it's a success for justice.

But the second one, the case against the President al-Bashir of Sudan, is still [00:12:00] underway because we are still waiting for Sudan to surrender the previous president to the ICC. And we hope that, after the political situation in Sudan will improve, their step will come. But we have had a lot of cases which were not against the head of states, but also the military leaders.

And one of the examples would be the conviction of the leader of the Lord's Resistance Army, it's about the conflict in North Uganda, some 20 years ago. We have also the leaders of Al Qaeda in Mali. So, it is the court for leaders indeed. And I think that there are some remarkable success in this field.

Katerina Linos: Let me ask you the flip side of that question. What concerns you most about the [00:13:00] future of the Court and the future of the field? What keeps you up at night?

Judge Piotr Hofmański: So currently we have some problems, obviously. As you know, we had some problems in the cooperation with the United States during the presidency of Mr. Trump. But now the situation in the U.S. is completely different. We have quite effective and very good cooperation.

And we are all happy about it, but at the same time, we have a lot of problems with other big power, because one third of the judicial bench is now under the arrest warrants issued by the Russian authorities. We had also the huge cyber attacks in the Court. We don't know yet what happened exactly, but it shows that not everybody respects the Court as we would expect.

So we have troubles, we have difficulties, but we are doing our job even [00:14:00] if it is very difficult situation.

Katerina Linos: I want to ask you a little bit more about the levers states have to engage or not engage with the Court. So a state can sign and ratify, and then welcome another leader who's indicted onto their territory and not actually arrest that leader. A state can challenge the Court judges and say they will be arrested if they move on to Russian territory. A state could attack. A state could share evidence or not share evidence.

What are some levers that states can use? And, perhaps, if you can talk about the U.S. under the Trump administration and the U.S. under the Biden administration, just to get a range of the tools that a state has short of signing and ratifying, to impede the work of the Court or to facilitate it.

Judge Piotr Hofmański: So I would say, as you know, the cooperation with states is the most important element of the system because we have no enforcement mechanism. We [00:15:00] need the help of states in the process of the collection of evidence and enforcement of the decisions of the court, enforcement of sentences. All of this is in the hand states, including the enforcement of the arrest warrants.

So we have to rely on the cooperation. And, well, this cooperation is not perfect. It's not perfect. We had some problems with states because not all of them are really ready to fulfill an obligation they have under the Rome Statute. And it makes our life obviously more difficult. But, look, we are operating in very difficult situations, also in the countries where there's ongoing conflict. We have cooperated countries that are completely not ready to cooperate with the Court. And the prosecutor's office is still able to do something positive, still to collect the evidence, to bring charges, find states which are able to help.[00:16:00]

And even if sometimes difficult, we are going forward.

Katerina Linos: So let me ask you a question about evidence, because that has been the focus of the Human Rights Center here at Berkeley. Under the leadership of Alexa Koenig and Eric Stover, large teams of Berkeley students have been working to help authenticate particular types of evidence. How is that useful to the Court?

What types of evidentiary issues are you facing in 2023 that perhaps you did not face even a decade or two earlier?

Judge Piotr Hofmański: It's not an easy question because the Rome Statute, our founding treaty which creates our framework, legal framework, does not limit the types of catalogs of the evidence which is admissible in the proceedings before the Court. So this is a lot of space for the intervention of the prosecutor's office, for the defense team to bring evidence before judges.

It is still[00:17:00] something which develops because, you know, the type of evidence is always linked to the level of the development of such a things as electronic communication.

Katerina Linos: So, in some cases, issues of evidence are less important than in others. Because if a party admits to abducting children, then perhaps proving it will be easier than if a party does not admit to that.

Katerina Linos: In other cases, I can imagine a lot of falsified evidence. I can imagine videos that purport to show atrocities that are not, in fact, from the location and dates when those atrocities happened, and that's work that our Human Rights Center here considers very important. How does the Court see that work? Or is that work that is more significant to prosecutors and defense teams?

Judge Piotr Hofmański: The role of judges in court of law is just to [00:18:00] assess evidence presented by the parties. We have the adversarial system, and of course the prosecutor and the defense teams have a lot of invention to provide the Court evidence.

And of course, it's changed. It's still changing, because we are living in a modern world. We are using more and more the means of electronic communication. And it means that it's influenced also the type and quality of evidence being considered by judges. Of course, a lot depends on the type of the situation we are dealing with.

I think that this is a completely different issue to present evidence in relation to the war crimes committed during the pending conflict. The different thing would be to collect evidence, in respect to something that happened before. Additionally, you have to take into account the International Criminal Court works in special circumstances. Because it is not like in the national court where we can just call [00:19:00] witnesses and hear them in the courtroom.

We could, but we have the limited possibilities because of many reasons: because of the logistics, because of the security of these people. We have to use the means of electronic communication to hear witnesses. So for these purposes, we have the country offices in the situation countries. We can just join them with the electronical measures and in this way, we can build the case.

Katerina Linos: Thank you so much. I want to ask about your earlier life and how it connects to your current life. So you've been in the field of international criminal law for many decades, both as an academic and as a judge in the top global criminal court. How do the two jobs compare? What are some insights that you had as an academic that perhaps, turned around completely once you saw the day to day work of the Court?

Judge Piotr Hofmański: It's not an easy question. [00:20:00] Indeed, I was involved in the research and in the field of criminal law, criminal procedure, but also partly international criminal law, although it was not my main area.

I was also a judge of the Supreme Court in my country for 20 years, dealing with the national cases not involving the international element. So, after I was elected judge of the International Criminal Court, I was confronted with something which is new. Which is new. It concerns the type of the crimes we are dealing with. And complexity of the cases and also the very difficult administration of justice, which is, of course, in cases of such complexity, much more difficult.

Therefore, I think that the beginning of my activity in the International Criminal Court, it was difficult just to switch from another type of cases, another method of work and, [00:21:00] so on. But I'm in The Hague already nine years, and I, today I would say it's my world. I'm feeling in this environment as a fish in water.

You are asking also about my academic career. Indeed, it is even longer than the judicial one. And, there is a lot of advantages to just to combine the academic career with the judicial one because you can use your academic experience in your judicial work and also in your research you can use your experience, again, in the judiciary, which I constantly do.

Of course, during my time in ICC, I was forced to stop my academic life, it was a simple -- no, no time to do everything. But I still think that maybe in the future I will come back to academia and will use a lot of experience again.

Katerina Linos: The judges from your home country and the academics in your home country have been under some pressure in recent years. There have been key decisions from Poland that [00:22:00] look a lot like conservative German decisions vis-à-vis the relationship to the European Court of Justice and maintaining national sovereignty.

And there have been other decisions that seem more similar to those of Hungarian courts, more similar to those of authoritarian regimes. As you think about perhaps continuing with academia or the judiciary in Poland, a key state in the European Union, what, thoughts do you have about what's happening now?

Judge Piotr Hofmański: Of course, there's a lot of concerns because it is the erosion of the judiciary and democratic system in Poland. And of course, I'm very worried about it.

Katerina Linos: I want to ask a final question, which is what advice you would give to students of international criminal law?

We have a lot of students here at Berkeley, a lot of students around the world that see in the ICC this promise that impunity will end, that want to study in this field, that want to obtain clerkships. What advice would you have for them?

Both [00:23:00] big picture and concrete career advice, about how they might think about what to prioritize, where to work domestically before they think of international careers, and what other advice you might have.

Judge Piotr Hofmański: The general advice would be, please believe in the International Criminal Court and believe for the international criminal law.

We, the international criminal law, becomes the solid pilot of the international multilateral infrastructure. And I hope that for next year we will need young people working for the ICC, not necessarily in the premises in The Hague, but also writing about the ICC, making the analysis of the jurisprudence, taking part in discussions about the ICC, about its role, about the development.

We need more interest and we need more awareness about the ICC and the field. [00:24:00] I am happy to hear that you have a lot of students interested in international criminal law.

I have the opportunity to travel to the different parts of the world and had a lot of meetings within academia. And I would say that you, here in the U.S., have a very comfortable situation because there is an interest for the international criminal law, that not everywhere is the case.

Katerina Linos: Thank you so much for that. And in fact, we're going to go, to a large lecture hall where lots of these students will come to hear your talk and conversation with Dr. Alexa Koenig next, because we do have a lot of student interest and a lot of student enthusiasm here at Berkeley.

Thank you so much.

Judge Piotr Hofmański: Happy to hear it. Thank you very much for this conversation.