

# Conference Report: “Africa and the International Criminal Court” by the South African-German Centre for Transnational Criminal Justice

Cape Town (South Africa), 22.-23.11.2013

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On 22./23.11.2013 the South African-German Centre for Transnational Criminal Justice<sup>1</sup> hosted the international conference “Africa and the International Criminal Court” in Cape Town (South Africa).

The Centre is a joint project between Humboldt-Universität zu Berlin and the University of the Western Cape, Cape Town. In 2008, it was founded as one of six “Centres of African Excellence” as a research and teaching institution. Since then, the Centre is providing the LL.M. and Doctoral Programme “Transnational Criminal Justice and Crime Prevention – An International and African Perspective“, which aims to attract international students with a particular focus on Africa. Up to now, 83 LL.M. students and three PhD students, most of them Africans, graduated from the Centre. Currently, 15 students are enrolled in the LL.M. programme 2014 and ten students in the PhD programme.

The conference “Africa and the International Criminal Court” focused on the controversies surrounding the prosecution of crimes under international law in Africa, both by international and domestic courts, taking into account African alternatives to address such crimes.<sup>2</sup> A specific focus was placed on the achievements and the shortcomings of the International Criminal Court (ICC) in relation to Africa. The conference assembled 60 participants, outstanding international practitioners and academics as well as young legal experts from 15 different countries, including twelve African states.

The conference was opened by the directors of the Centre, Prof. *Lovell Fernandez* (University of the Western Cape, Cape Town) and Prof. *Gerhard Werle* (Humboldt-Universität zu Berlin). Then, Deputy Vice Chancellor of the University of the Western Cape, Prof. *Ramesh Bharuthram* welcomed the audience. He endorsed the appropriate timing of the conference and the contentious conference theme. In particular, he addressed the young scholars, urging them to test their theories and skills while participating in the conference and confronting the international practitioners with their African perspectives. Following *Bharuthram*, the German Ambassa-

dor to the Republic of South Africa, *Dr. Horst Freitag*<sup>3</sup> welcomed the conference participants. In his opening address *Freitag* referred chiefly to the concrete fight against impunity without exceptions for sitting heads of state. The use of immunity, explicitly excluded by the Rome Statute, would sow the seeds for selective justice and inequality. *Freitag* also stressed that the biggest challenge was to prevent these gross human rights violations that the ICC has to deal with; striving solely for punishment would to some extent constitute a failure of the international community. He reminded the audience that the ICC is a vital pillar for safeguarding fundamental human rights and human lives. *Dr. Dorothee Weyler*, the Project Manager of the Centres of African Excellence of the German Academic Exchange Service, in her welcoming speech, introduced the structure, the aims and achievements of the Centres of African Excellence.

The theme of the conference “Africa and the International Criminal Court” could not have been more topical than these days, given the latest developments between Kenya, the African Union (AU) and the ICC.<sup>4</sup> Although the relationship between the AU and the ICC already started to deteriorate in 2009 – with the issuance of an arrest warrant for Sudanese president Al Bashir – the criticism against the ICC has now reached another level. In addition, Kenyan president Kenyatta’s trial before the ICC had to be postponed several times – quite recently in January 2014 the trial scheduled for 5.2.2014 was vacated again.<sup>5</sup>

Therefore, the relevance of the conference was evident. This holds true in particular – as *Werle* mentioned in his introductory remarks – because Africa has been of great importance to the overall development of international criminal

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<sup>1</sup> Directors of the project are Prof. *Lovell Fernandez* (University of the Western Cape, Cape Town, South Africa) and Prof. *Dr. Gerhard Werle* (Humboldt-Universität zu Berlin). The project’s coordinator is *Dr. Moritz Vormbaum*. The Centre is funded by the German Academic Exchange Service and the “Aktion Afrika” by the German Federal Foreign Office. For more details to the Centre and the project please visit our webpage: <http://www.transcrim.org/>.

<sup>2</sup> All conference presentations will be published in 2014.

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<sup>3</sup> The opening remarks by Ambassador *Freitag* can be accessed at the Embassy’s homepage: [http://www.southafrica.diplo.de/Vertretung/suedafrika/en/\\_p\\_r/Speeches-Freitag/2013/11-ICC.html?archive=3519722](http://www.southafrica.diplo.de/Vertretung/suedafrika/en/_p_r/Speeches-Freitag/2013/11-ICC.html?archive=3519722) (last accessed January 2014).

<sup>4</sup> Cf. the Closing Session of the Extraordinary Session of the Assembly of the African Union on 12.10.2013, available at: <http://summits.au.int/en/icc>. On the criticism raised recently against the ICC, see also *Ambos*, Misguided criticism, D+C/E+Z, 26.11.2013, accessible at:

<http://www.dandc.eu/en/article/criticism-international-criminal-court-being-too-focussed-africa-misleading> (last accessed January 2014) and *id.*, in: Schabas/McDermott/Hayes (ed.) *The Ashgate Research Companion to International Criminal Law*, 2013, p. 499 et seqq.

<sup>5</sup> See ICC (Trial Chamber V [B]), decision of 23.1.2014 - ICC-01/09-02/11-886 (Prosecutor v. Kenyatta), Order vacating trial date of 5.2.2014, convening a status conference, and addressing other procedural matters, available at: (<http://www.icc-cpi.int/iccdocs/doc/doc1716620.pdf>).

law. At the Rome Conference on the establishment of a permanent international criminal court, African states played a key role and today, with 34 members, they form the largest regional group of States Parties to the Rome Statute. *Werle* admitted that the criticism raised with respect to the exclusive choices of proceedings made by the ICC were understandable. Why were only Africans prosecuted, when international crimes are committed in other regions, too, where they end up going unpunished?

The key note speech was delivered by *Sanji Mmasenono Monageng* (First Vice-President and Judge at the ICC), talking on the topic “Africa and the ICC – Then and Now”. In her speech, *Monageng* made unambiguously clear that the ICC as a judicial body is in charge of interpreting and applying the law. As such, it has to respect the legal framework given to it and it is not in the Court’s capacity to remedy any deficiencies of the Rome Statute. This task should be taken seriously instead by the Assembly of States Parties (ASP), which as a political body constitutes the right forum to suggest changes and eventually amend the Statute. Moreover, *Monageng* underscored the importance to maintain the differentiation and separation of roles between the states, the ASP and the court. The different sections should be capable of working with leeway in their specific branch without interference from other divisions. With respect to the latest tendencies by Kenya and the AU, *Monageng* emphasized that any proceedings before the court were entirely conducted in accordance with the Rome Statute, which, of course, included the proceedings against sitting heads of state. Thus, she was surprised to see that the ICC is criticized by the states for doing precisely what it was created for by those states. *Monageng* left little doubt about her opinion regarding accusations of racism against the Court, calling it a ridiculous criticism. There were so many African people working at the ICC in every different branch, who have established and made the court what it represents today. Given the complementarity principle, *Monageng* recalled that it is the very own responsibility and opportunity for African states to take the ownership of justice for atrocities committed in their territory, by implementing proper domestic legislation in order to deal with these crimes. Although *Monageng* clearly marked the current relationship between Africa and the ICC as having “probably never been as tense and strained as it is today”, she stressed that from her point of view there is a very bright future for the ICC. The ensuing discussion, moderated by *Werle*, focused on a potential political role of the ICC: Is the ICC competent in working also with a “political lens”? *Shamila Batohi* (Senior Legal Advisor to the Prosecutor at the ICC) conceded that the ICC should also use a political lens at some point, since it is not working in a vacuum. However, *Batohi* stressed the strengthening of the role of other international players as well, especially when it comes to defending the ICC as an institution itself. She also posed the interesting question of the use of social media and whether these could help the ICC in its work. *Tim Murithi* (Institute for Justice and Reconciliation, Cape Town) inquired about the ICC’s role in the prevention of atrocities. *Monageng* responded that clearly the means of the Court in regard to prevention were

strong prosecutions and investigations. *Ekaterina Trendafilova* (Judge at the ICC), too, pointed to the most successful contribution to prevention by the ICC, which consisted of the full effectiveness and functioning of the Court as a legal institution, serving the people and international justice, instead of listening to the opinions of politicians. This view was further shared by Ambassador *Freitag*, who commented that he believed this preventive role of the ICC would work, it was just not as evident as other forms of political outreach.

Following *Monageng*’s speech, *Ekaterina Trendafilova* (Judge at the ICC) presented on “Africa and the ICC – a Judge’s Perspective”. Central to *Trendafilova*’s speech was the admissibility of African cases before the ICC, the immunity of heads of state and the cooperation of African states with the court. *Trendafilova* elaborated on the only two instances of admissibility challenges brought by states before the ICC, namely by Kenya and Libya. According to Art. 17 para. 1 lit. a Rome Statute, both countries claimed the inadmissibility of the trials at the ICC because of alleged ongoing domestic investigations and prosecutions. *Trendafilova* explained the Kenyan situation, where judicial reforms were initiated and the prosecutions were only “prepared” at that time. She argued, with the jurisprudence of the Court, that any determination on domestic proceedings had to be based on the facts at the time of the admissibility challenge by the state, i.e. there had to be “concrete and progressive steps” towards criminal investigations. Pre-Trial Chamber II was using the “same person/same conduct test” establishing that domestic investigations needed to comprise the same persons accused by the ICC as well as the same conduct charged by the ICC. In result, the promised Kenyan judicial reforms and the envisaged future investigations did not meet this standard and were subsequently rejected. In regards to the decisions on the Libyan admissibility challenges *Trendafilova* articulated some criticism. When she turned to the issue of immunity for sitting heads of state, she navigated through the Al Bashir case and the important question on the exclusion of immunity for heads of state from non-States Parties, discussing whether there was a possible exclusion of immunity by virtue of the Security Council referral in 2005.<sup>6</sup> This means that the referral was not simply triggering the jurisdictional mechanism, but comprehensively the whole framework of maintenance of international peace and security of the Rome Statute. That would include the exclusion of immunity as provided for in Art. 27 para. 2 Rome Statute. Furthermore, *Trendafilova* addressed the lack of cooperation of member states like Malawi, Chad, and Nigeria – in regards to the Al Bashir case – that were actually obliged to cooperate with the ICC under Art. 86 and 89 of the Rome Statute. On this occasion, she exemplified two very recent court decisions,<sup>7</sup> in which the

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<sup>6</sup> Resolution 1593 of the UN Security Council, 31.3.2005, available at:

<http://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>.

<sup>7</sup> ICC (Pre-Trial Chamber II ), decision of 18.9.2013 - ICC-02/05-01/09-162 (Prosecutor v. Al Bashir), available at: <http://www.icc-cpi.int/iccdocs/doc/doc1646291.pdf>;

ICC expanded the view of comprehensive obligations towards the ICC due to the Security Council’s referral. In particular, the potential travel plans of Al Bashir to the US, Ethiopia and Saudi Arabia have urged Pre-Trial Chamber II to stress that non-States Parties – even without any obligations under the Rome Statute – would be in duty to cooperate fully with the court as a result of the complex Resolution 1593 issued by the UN Security Council under Chapter VII of the UN-Charter. *Trendafilova* further expressed her discontent with the UN Security Council as to its inactivity in following up its referrals to the ICC and to support the court. In concluding her presentation, *Trendafilova* declared obstacles in the cooperation regime as some of the most challenging ones of the ICC and the most disturbing obstacles in regards to an effective and operational international criminal court. The discussion following *Trendafilova*’s presentation was dominated by concerns about the role of the UN Security Council. *Florian Jeßberger* (Professor at Universität Hamburg, Germany) commented on the independence of the ICC from the UN Security Council, remarking that the possibility of referrals to the ICC by the Security Council was still difficult insofar as it could weaken the ICC’s autonomous capacity and turn the court into an agent of the Council. *Jeßberger* tested the ICC’s independence in scrutinizing the funding of the court and whether the Security Council is capable of ending proceedings before the ICC. There is neither any funding by the UN nor is there any ability by the UN Security Council to stop proceedings by the ICC. According to Art. 16 Rome Statute, the Council can only defer proceedings for a period of twelve months by issuing a resolution under Chapter VII UN-Charta. Nevertheless, the last part of Art. 16 also stipulates the possibility for the Security Council to renew such a resolution after the twelve months-period. In accordance with these concerns, *Sam Rugege* (Chief Justice of the Supreme Court of Rwanda) raised the general question about justification of the role of the UN Security Council in relation to the ICC framework, highlighting the point that most of its members were not States Parties to the ICC.

The third speaker turned to the prosecutor’s perspective of the ICC. *Shamila Batohi* (Senior Legal Advisor to the Prosecutor of the ICC) discussed the complementarity mechanisms in detail, focusing in particular on the role that positive complementarity could play. She underlined the importance of states’ encouragement by the ICC, stimulating the states to initiate own investigations and therefore prosecuting crimes at the level where they were committed. *Batohi* reminded the audience of the real constituency of the ICC, namely the victims of mass atrocities and the affected communities. Their fate should constitute the focus. Furthermore, *Batohi* acknowledged the awareness at the Office of the Prosecutor (OTP) about the criticism of selective justice, but assured that the OTP was only acting when it believed in going the right way and not in order to appease certain nations or states. States were always acting in accordance with their interests,

not with principles, she described. *Batohi* explained the court’s activism on the African continent with reference to the jurisdiction of the ICC: The OTP was obliged to select the most serious situations of international crimes under its jurisdiction for investigations. It is a fact that in some instances on the continent five million victims were displaced, more than 40.000 killed, hundreds of thousands children converted into child soldiers and thousands of people raped in the pillages of violent conflict. She, furthermore, declared that she strongly believed in “peace with justice” and did not think that both are mutually exclusive. Justice could create peace that is more stable and long-lasting. In the discussion *Batohi* plead for more cooperation with the court. If the international community was serious about having a permanent, independent international criminal court, they had to give the mechanisms for effective functioning. She drew a comparison to organized crime, where undercover investigations were commonplace and essential, but she had to regret that such options were not available for the ICC. This felt like the ICC being handcuffed, *Batohi* admitted. Being asked about the relative stagnation of opening investigations other than against African states, *Batohi* referred to Colombia and remarked in general that preliminary investigations might take longer sometimes, because the ICC actually wanted the national systems to take over and to address the cases themselves, which simply required little more time. With regard to Palestine, *Batohi* explained that it was now up to Palestine itself to accept the jurisdiction of the ICC. There was the need to launch a new declaration of acceptance since the previous one was placed before the recognition of Palestine as a non-member observer state by the UN General Assembly<sup>8</sup>. *Batohi* made clear that the temporal jurisdiction would only concern future crimes and would not be reactive. Moreover, *Jessberger* inquired about the general view on external interests and whether there was a “red line”, when those externalities render the trial unfair and therefore the prosecution would stop to proceed further on. *Batohi* provided a clear statement as response: She did not believe that external obstacles or operational difficulties would be capable of disturbing the interest of justice. Therefore, in her opinion, there was no so called “red line” to trespass and no good reasons for ending prosecutions in such an event. Furthermore, *Werle* commented on the issue of the so-called “self-referrals”, which was also a point of debate during the discussion. He stated that it would be a misperception believing that the Rome Statute actually would exclude this possibility as a jurisdictional triggering mechanism.<sup>9</sup> On the contrary, the text of the Rome Statute was fairly clear on that, he pointed out.

The fourth speaker, concluding the first day of the conference, was *René Blattmann* (DAAD Professor at Humboldt-Universität zu Berlin, former Vice-President and Judge at the ICC). His presentation was titled “The Lubanga Case – Some

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ICC (Pre-Trial Chamber II), decision of 10.10.2013 - ICC-02/05-01/09-164 (Prosecutor v. Al Bashir), available at: <http://www.icc-cpi.int/iccdocs/doc/doc1662849.pdf>.

<sup>8</sup> Resolution adopted by the General Assembly, Status of Palestine in the United Nations (A/RES/67/19), 4.12.2012.

<sup>9</sup> *Werle* referred to the article by *Robinson*, JICJ 9 (2011), 355.

Legal Aspects of the First Trial Judgment of the ICC". *Blattmann* commenced his presentation by an unusual way of looking back at the history of international criminal justice. He reported about the first international mixed courts, established in the 19<sup>th</sup> century on the African continent in order to stop the transatlantic slave trade. These courts tried more than 600 cases and freed about 80.000 slaves, *Blattmann* informed.<sup>10</sup> After the introduction, he then turned to the issue of the stays of proceedings as a specific challenge for the work of the ICC in the Lubanga case. The chief reason for the stays of proceedings was the problem of non-disclosure of potentially exculpatory evidence that was deemed to form a fundamental aspect of the defendant's right to a fair trial.<sup>11</sup> The non-disclosure of several documents was related to confidentiality agreements (cf. Art. 54 para. 3 lit. e Rome Statute) between the Prosecutor and the UN. For the first stay of proceedings, there were about 156 documents, of which only two were fully disclosed, *Blattmann* explained. He illustrated the possible solutions discussed for the disclosure of some documents. With respect to the subject matter of the Lubanga trial, *Blattmann* turned to the conscription and enlistment of child soldiers. He highlighted the difficulties to face with child soldiers, namely being victim and perpetrator at the same time. *Blattmann* endorsed the regulations of the Rome Statute that were crystal clear about the jurisdiction, which only encompassed adult perpetrators. Children could never consent to become soldiers; they belonged on the playground, not on the battlefields, he declared. *Blattmann* also acknowledged the complicated and disturbing situation, in which victims of child soldiers are left. In the discussion that followed, *Batohi* commented that the OTP would not charge any child soldiers, not only – and most importantly – since there was no jurisdiction under the Rome Statute, but also because the policy of the OTP focused on charging the most responsible persons. Another contested issue of the Lubanga trial, raised by *Olwethu Kinyunyuu* (Alumna of the South African-German Centre for Transnational Criminal Justice), concerned the exclusion of charges related to sexual offences. *Blattmann* explained that the Court wanted to get these charges into the indictment, since listening to the victims and witnesses about the horrendous crimes committed, and that they actually expected the OTP would expand the indictment. *Batohi* admitted that the OTP itself learned a lot of lessons during the Lubanga trial and was aware that there were issues that could have been done better. The final remarks revolved around the problem of non-disclosure. *Hannah Woolaver* (Lecturer at the University of Cape Town) posed the question, whether the ICC will be vested with appropriate mechanisms to bridge the gap between security interests and the guarantees of a fair trial in the future, taking into account that for the crime of aggression the security concerns were even

heightened. *Blattmann* replied that from his experience, he thought it could become very hard, but he was hopeful, since there was still some time left until 2017, when the question of jurisdiction over the crime of aggression would arise.

On the second day, the focus shifted from the perspective of ICC practitioners to scholars and African legal experts. *Florian Jeßberger* (Professor at Universität Hamburg, Germany) presented on the topic "Universal Jurisdiction in the African Context". He described the African position on universal jurisdiction, voiced in the recent extraordinary session by the AU on 12.10.2013, where the AU repeatedly was pointing out to the so-called "abuse of universal jurisdiction". At the same time, the AU was pushing for a Model National Law on universal jurisdiction in order to improve and strengthen the domestic African laws in this respect. *Jeßberger* commented on the noteworthy fact about this envisaged legislative initiative, which is that the model law shall include universal jurisdiction not only confined to the international core crimes, but shall go beyond this by also encompassing piracy, trafficking in narcotics and terrorism. Therefore, *Jeßberger* concluded that the AU actually endorsed the principle of universal jurisdiction as a principle of international law. He remarked that, however, while a great many of African states provided for universal jurisdiction in their laws in the books, it is not being exercised. *Jeßberger* referred to the case of Rwandan genocidaires, who – as to his knowledge – have not been prosecuted by African states other than Rwanda, whereas there had been trials in a number of European countries (for example, Switzerland, France, Norway, Spain, Belgium, the Netherlands and Germany). A recent survey<sup>12</sup>, presented by *Jeßberger*, revealed that there had been about 1.051 defendants worldwide, whose cases had been triggered by the use of universal jurisdiction. According to this survey, during the last 25 years, 26 cases globally reached the bench for trial. The total number of African defendants did not even extend to 5 % out of all complaints and cases. *Jeßberger* inferred that universal jurisdiction is still an exceptional concept and rarely used. He furthermore argued that there was no racial bias against Africans, but rather that prosecutions based on universal jurisdiction focused on so called "low cost defendants", i.e. where the international community agreed on prosecutions and the domestic legal system has not been activated.<sup>13</sup> As a unique instance for African use of universal jurisdiction, *Jeßberger* singled out the current case of Hissène Habré tried in the Republic of Senegal. The ensuing discussion revolved around the selection of cases under universal jurisdiction. *Batohi* argued that because of states' own interests, the exercise of universal jurisdiction in national proceedings might be very selective and abusive. *Rugege* criticized a dismissive attitude towards the claim of "abuse of universal jurisdiction". To him it had substance. He also disapproved of the employment of universal jurisdiction by Spain, where arrest warrants were sent out for members of the Rwandan military, but apparently there

<sup>10</sup> Cf. *Martinez*, The Slave Trade and the Origins of International Human Rights Law, 2012.

<sup>11</sup> See the two ICC decisions referred to: ICC (Trial Chamber I), decision of 13.6.2008 - ICC-01/04-01/06-1401, which was affirmed by the ICC (Appeals Chamber), judgement of 21.10.2008 - ICC-01/04-01/06-1486 OA13.

<sup>12</sup> Survey published by *Máximo Langer*, AJIL 105 (2011), 1.

<sup>13</sup> According to the survey published by *Máximo Langer*, AJIL 105 (2011), 1.

was no interest in following up the trial; *Rugege* critically questioned the purpose of such actions. *Jeßberger*, in his reply, informed about the radical changes of the Spanish attitude in this regard after the time of Judge Garzón, concerning the legislation and the attitude of the judiciary. Spain did not seem to be too eager anymore about universal jurisdiction.

The subsequent speaker was *Gerhard Kemp* (Professor at Stellenbosch University, South Africa), who presented on “The Implementation of the ICC Statute in Africa”. *Kemp* started with a technical overview on the different types of implementation. His main question of the presentation focused on the (likely) impact of the Rome Statute on selected national systems. The specific strategies for the implementation of the Rome Statute were key to this question. Therefore, *Kemp* introduced one strategy from the southern part of Africa, the Windhoek Plan of Action on the ICC Ratification and Implementation in SADC<sup>14</sup> from 2001, wherein it was agreed on giving “priority to the drafting of implementing legislation of the Rome Statute in order to effectively cooperate with the ICC and give effect to the principle of complementarity”<sup>15</sup>. However, *Kemp* reported that there was not much of an organized and collaborative approach in pursuing the objects of the *Windhoek Plan*. He went on to portray several national legislative initiatives from African countries, including South Africa (in 2002) and Mauritius (in 2011) as examples for full acts of transformation as well as Kenya (in 2008), Senegal (in 2007) and Uganda (in 2010) as instances for at least some form of incorporation of international criminal law into domestic law. “The Implementation of the Rome Statute of the International Criminal Court Act” (ICC Act) from South Africa was enacted in 2002, which thereby made South Africa the first African country to fully implement the Rome Statute. In regards to South Africa, *Kemp* called attention to a current case,<sup>16</sup> in which the High Court dealt with the notion of universal jurisdiction and held that it would be absurd if the ICC Act was providing only for conditional universal jurisdiction, i.e. prosecutions contingent on the presence of the suspect on South African territory.<sup>17</sup> The case was recently affirmed by the Supreme Court of Appeal.<sup>18</sup> However, the

case could still be appealed to the Constitutional Court, but for now this judgment constituted an authoritative interpretation of the ICC Act. In the discussion *Kemp* was asked by *Robert Mugaga-Muwanguzi* (State Attorney, Uganda and PhD student at the South African-German Centre for Transnational Criminal Justice) about explanations for the delay of African implementation. He explained that in general there was a huge delay regarding the implementation of the law of the Rome Statute. States had draft-legislation for about nine to ten years, but did not act. A reason for this could most probably be seen in internal political disturbances, *Kemp* argued. *Monageng* appreciated the recent South African approaches in regards to universal jurisdiction in the Zimbabwean cases, brought by the Southern Africa Litigation Centre that *Kemp* referred to in his presentation.

*Sam Rugege* (Chief Justice of the Supreme Court of Rwanda) presented on the topic of “Prosecutions of International Crimes by Domestic Courts – The Rwandan Experience”. *Rugege* began with some remarks on the concurrence of domestic and international jurisdictions, arguing that the two would not be alternative mechanisms. He stated that the domestic apparatus should function as the default jurisdiction in any case, supplemented, if need be, by international or regional tribunals. Therefore, *Rugege* asserted that the role of the International Criminal Tribunal for Rwanda (ICTR) was twofold: Achievements were most evidently the convictions of numerous genocidaires, the establishment of a vast body of jurisprudence on genocide and crimes against humanity and the assistance of the ICTR in capacity building of the Rwandan judiciary. As shortcomings, *Rugege* identified the ICTR’s role for the contribution to peace building and national reconciliation in Rwanda. In particular, the distance of the proceedings was named as detrimental, since only a handful of victims and their relatives were able to follow the proceedings in person, *Rugege* remarked. He then turned to the domestic trials and the extreme struggle the Rwandan justice system was facing, including the difficulty of being vested with appropriate staff: it was estimated that only about 70 qualified judges as well as 14 prosecutors were available for the judiciary in Rwanda after the genocide. At the same time the number of suspects was raising and in the year 2000 amounted to 125.000. With respect to legislative matters at that time, he recalled the important introduction of the Organic Law of 30.8.1996, enabling Rwandan judges to make use of international norms incriminating genocide and crimes against humanity as well as war crimes according to the Geneva Conventions. *Rugege* highlighted the principle of dual incrimination, incorporated in the 1996-law, which laid down the possibility for judges to rely on both sources, the domestic regulations in the Penal Code as well as international norms. Nevertheless, it did not prove to be very effective, since judges were not used to this approach and most of the lawyers were not professionally trained, but undertook accelerated legal training programs. *Rugege* conceded that the Rwandan judicial system was overstrained, which in the end gave

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<sup>14</sup> SADC stands for Southern African Development Community. It consists of 15 member states from Southern Africa, namely: Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

<sup>15</sup> See Windhoek Plan of Action on the ICC Ratification and Implementation in SADC, para. 4.

<sup>16</sup> High Court of South Africa, judgment of 8.5.2012 – 77150/09 (Southern Africa Litigation Centre and others v. National Director of Public Prosecutions and others), available at: <http://www.saflii.org/za/cases/ZAGPPHC/2012/61.pdf>.

<sup>17</sup> For a detailed discussion on the case, see *Werle/Bornkamm*, JICJ 11 (2013), 659.

<sup>18</sup> Supreme Court of Appeal of South Africa, judgment of 27.11.2013 – 485/2012 (National Commissioner of the South African Police and another v. Southern Africa Litigation

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Centre and others), available at: [http://www.justice.gov.za/sca/judgments/sca\\_2013/sca2013-168.pdf](http://www.justice.gov.za/sca/judgments/sca_2013/sca2013-168.pdf).

rise to the reactivation of the Gacaca courts<sup>19</sup>, a heritage of Rwandan culture. The Gacaca courts as a traditional institution received a modern character – aiming to pursue reconciliation and to put “genocide convicts on the right path as citizens”, *Rugege* explained. He argued that this form of participatory justice was recalling that the crimes were committed in public and that there existed a “moral obligation to tell the truth” about the crimes witnessed, experienced or perpetrated. *Rugege* qualified the Rwandan model therefore, as “Truth through Justice”. Taking into account the amount of cases tried (1.958.643<sup>20</sup>), the rather informal procedures of the courts that promoted a less intimidating and more relaxed atmosphere, thereby encouraging truth-telling, the Gacaca courts were a successful, but a “uniquely Rwandan solution to a uniquely Rwandan problem”, *Rugege* assessed. In the following talk *Werle* commented that Rwanda could be considered as a laboratory of transitional justice: Compared to the overall-size of the country, such high numbers of perpetrators were unheard of. *Sylvester Kalemba* (Judge at the High Court of Malawi and Alumnus of the South African-German Centre for Transnational Criminal Justice) inquired about the possibility of filing an appeal against Gacaca courts’ judgments, which *Rugege* affirmed. The Gacaca court structure included one higher level for appeals, but precluded the possibility to appeal to the ordinary courts. Moreover, there existed no option in general to transfer cases to the ordinary Rwandan judiciary, alternatively. Another subject was raised by *Murithi*, who asked about how an international tribunal could contribute to reconciliation in a state, reminding that the ICTR’s impact in Rwanda was fairly minimal. In his reply, *Rugege* conceded that there were still limitations for international tribunals to contribute to reconciliation. However, he believed this process could be improved by settling tribunals in the place, where the crimes have been committed; the people needed to see justice to be done.

Another presentation on a very specific experience by an African state was held by *Mbacké Fall* (Chief Prosecutor at the Extraordinary African Chambers in the Courts of Senegal) on “The Extraordinary African Chambers: The Case of Hissène Habré”. The Extraordinary African Chambers are considered the first internationalized tribunal, which was established by an agreement between the AU and an AU member state – namely the agreement with Senegal on 22.8.2012.<sup>21</sup> This consequently implied that the prosecutions were

conducted on behalf of Africa, *Fall* argued. He informed on the law and procedure applied by the Chambers and that the jurisdiction of this internationalized tribunal was constrained in several ways: *ratione materiae* – the crimes belonging to the subject matter jurisdiction were genocide, crimes against humanity, war crimes and torture as a stand-alone crime; *ratione temporis* and *loci* – the investigations would only focus on crimes perpetrated on the territory of Chad between 7.6.1982 and 1.12.1990. Moreover, he explained that the sentences to be applied range from 30 years up to life imprisonment, in cases where there is an extreme gravity of the crimes committed and the personal circumstances of the convict require so. Interestingly, whenever situations would occur, for which the tribunal’s statute does not provide a solution, the Chambers would be allowed to employ Senegalese Law, as a subsidiary source, *Fall* explained. Furthermore, on appeal the judges were allowed to directly refer to the jurisprudence of international criminal courts and tribunals. Also, the statute’s resemblance to the ICTY and the ICTR statutes in regards to some procedural law aspects became obvious throughout the presentation. *Fall* stressed the independence of the OTP of the Chambers. There was no link whatsoever to the Senegalese Ministry of Justice nor to the AU, i.e. no monitoring by those bodies or reporting to them. As final remarks *Fall* turned to possible ICC alternatives for the African continent. He elaborated on the opportunity to expand the jurisdiction of the Court of Justice of the AU, in order to provide for prosecutions of international crimes by this institution itself. However, he concluded, there would be need for crucial amendments to the structure and basis of the court, enabling the creation of a special criminal chamber. Given the requisite of permanent staff and continuous financing, *Fall* argued in favor of temporary ad hoc tribunals as an alternative, in lieu. As a conclusion, *Fall* remarked on the relationship of the ICC and the AU, suggesting that the AU should act in advance of the ICC, meaning that the AU should encourage States Parties to act according to their obligations under the Rome Statute and to try those responsible for international crimes themselves; only when States Parties fail, the ICC’s complementarity mechanism should apply. During the discussion, *Monageng* inquired about the status quo of witness protection available by the Chambers and whether there were still witnesses alive to testify. *Fall* admitted the lack of witness protection mechanisms at the Chambers, but referred to about 1.000 victims in Chad, who would be available for testimony. Another question posed by *Brenda Akia* (Research Fellow at Human Rights Watch, NYC and PhD student at the South African-German Centre for Transnational Criminal Justice) concerned the admissibility and use of collected evidence by Belgium in the Habré trial. *Fall*’s response clarified that the statute allowed for the employment of any information the authorities got and that Belgium was very helpful and transferred all the files needed.

The conference was concluded by *Tim Murithi* (Head of the Justice and Reconciliation in Africa Programme at the Institute for Justice and Reconciliation, Cape Town), who spoke on the topic: “The African Union and the International Criminal Court – The road ahead”. Central to *Murithi*’s speech

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<sup>19</sup> Established by the Organic Law No. 40/2000 of 26.1.2001.

<sup>20</sup> Total number of cases until the Gacaca courts were closed on 18.6.2012.

<sup>21</sup> The Chambers were established ensuing the ICJ decision that Habré had to be either extradited or prosecuted by the Senegalese justice, see ICJ, judgment of 20.7.2012, Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), available at: <http://www.icj-cij.org/docket/files/144/17064.pdf>. Habré was charged with crimes against humanity, war crimes and torture. Besides Habré, there are also five other accused persons, who should be tried under the Chambers’ statute for allegedly having committed torture and crimes against humanity.

was the claim to replace the view of the ICC from a purely legal lens with a political lens. Obviously all three self-referrals to the ICC to date were politically motivated at the domestic level, he claimed. Therefore, the ICC was put into the political equation. *Murithi* argued for a stronger political role of the prosecutor of the ICC, which he deemed essential for any solution of the current relationship between Africa and the ICC. The OTP would be able to reframe this relationship with assistance from the presidency; *Murithi* even raised the option of a three-way discussion, including the ICC, the AU and the UN Security Council. He explained that everything about this relationship was about perceptions. That the present perceptions were linked to alleged bias against Africa was considered a natural consequence, recalling the history of discrimination and colonialism on the African continent, *Murithi* said. In general, he claimed, problematic perceptions on self-exclusion of powerful states already began with the “nullification” of the US-signature to the Rome Statute in 2002. Moreover, *Murithi* argued that there will be no fair international justice, unless there would be compulsory international jurisdiction. He noted that up to now no strong argument was really heard against compulsory international jurisdiction. In any case, *Murithi* concluded, it would not be of any help to anyone, if there was a continent wide, African criminal jurisdiction established in order to withdraw from the ICC’s jurisdiction.

In response to *Murithi*’s presentation, discussant *Juliet Okoth* (Lecturer at the University of Nairobi, Kenya) elaborated on the current Kenyan situation. Taking into account the fact that Kenya literally dragged herself to the ICC, she expressed her thorough disagreement with the recent developments, reproaching Kenya with dishonesty towards the ICC. In particular, it was very unfortunate that Kenya now, after the AU summit, seems to have the vote of Africa behind herself, even South Africa. *Okoth* voiced her beliefs in regards to the role of the ICC in Kenya and assessed that the Court indeed played a vital role for peace and reforms in this country. *Okoth* summarized that she does not believe in peace before justice.

The second respondent of the panel discussion was *Sostness Materu* (Lecturer of the University of Dar es Salaam, Tanzania, and Researcher at the South African-German Centre for Transnational Criminal Justice, Cape Town/Berlin). He focused on the divide between political and judicial institutions and recalled that the ICC was a purely judicial organ that was surrounded by two political bodies, namely the AU and the Security Council of the UN. Art. 16 of the Rome Statute, he argued, created an improper link between the ICC and the Security Council, which should be cut by amendments to the Rome Statute. The ICC should by all means not be undermined by politics. Moreover, *Materu* reminded that with respect to the publication of perceptions of an allegedly politicized court, one should be very careful and precise, whether those are perceptions of the African people, the ordinary citizens or whether these come from the politicians themselves. It would mostly be portrayed as the view of the people. *Materu* presented a recent Kenyan survey according to which still 67 % of the Kenyan citizens wanted to see their

president facing the ICC charges. Finally, *Materu* did not suppose that a political solution could be reached between the AU and the ICC.

The potential political role of the different branches of the ICC became the guiding theme of the ensuing discussion. The ICC representatives strongly engaged into the debate. The judges agreed on the point that there should not be a strong political role, but all bodies – as legal institutions – would have to decide according to sound legal reasoning and not on the basis of politics. The OTP should push cases, for which they are well-equipped with reliable evidence, *Trendafilova* argued. *Monageng* reminded that regarding the presidency of the ICC, it had to be kept in mind that all of them are acting as judges at the same time, thus, making them also fully unsuitable for any politics-driven action. This view was shared by *Blattmann*, who spoke out against the involvement of judges or prosecutors in strengthening the ICC via outreach activities. The Court should concentrate on being the guardian of fair and expeditious trials. *Batohi*, on the other hand, seemed to be more sympathetic to a “communicative way” of the ICC with various entities. She argued that one had to be cognizant about the realities, which made it important for the ICC to engage with states, since the Court required their support for its overall-functioning. *Kemp*, too, concluded that not everything should be condemned as being political, but that it was about applying the law in its context. It would be difficult sometimes, he assessed, to differentiate between political decision-making and properly take into account the societal impact of judicial acts; the latter would constitute sensible and logical judicial reasoning. The concluding remarks by *Batohi* and *Monageng* informed about the attempts of the ICC to reach out a hand to the AU, which unfortunately turned out as being not very successful.

Resuming the imperfection of the ICC-system, some of the last words at the conference aptly remembered that Rome was not built in a day and neither will be the Rome justice system. *Werle* then closed the conference with an assessment on the AU and ICC relationship: He pointed out that the criticism of racial bias and alleged neo-colonialism towards the ICC could be dismissed as pure propaganda, but what really should be taken seriously was the selectivity of prosecutions, especially the selection on which cases *not* to investigate.

The conference of the South African-German Centre for Transnational Criminal Justice was successfully completed and shed more light on the recent tense relationship between Africa and the ICC. All participants contributed to an open-minded and enriching two-day program in South Africa, which hopefully will be a good sign for fruitful discourses and illuminating communication on the work of the Court in The Hague in future.

The publication of this conference report will be followed by the conference volume, which will include all presentations in full length, and is planned to be published by the end of this year.