

The African Criminal Court: Promoting or Undermining the Prosecution of International Crimes in Africa?

Symposium on 29th and 30th June 2015 at Humboldt-Universität zu Berlin

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On 29 and 30 June 2015, the South African-German Centre for Transnational Criminal Justice (the Centre)¹ hosted an international symposium at Humboldt-Universität zu Berlin on the topic 'The African Criminal Court: Promoting or Undermining the Prosecution of International Crimes in Africa?'. The Centre, which was set up in 2008, is one of the seven centers of excellence in Africa which are funded by the German Academic Exchange Service (DAAD) with money it receives from the German Foreign Office. The center is founded based on a cooperation agreement between the Humboldt-Universität zu Berlin and the University of the Western Cape (UWC) in South Africa. It is housed in the Law Faculty of the University of the Western Cape. The directors of the Centre are jointly Prof. *Gerhard Werle* and Prof. *Lovell Fernandez*.

The symposium took place within the ambit of the seventh summer school, which has been held annually in June to July at the Humboldt University. The summer school is meant mainly to give exposure to both LL.M. and Ph.D. candidates enrolled in the Centre's post-graduate program, which is titled 'Transnational Criminal Justice and Crime Prevention – An International and African Perspective'. The annual Summer School provides an interdisciplinary medium of learning for the students, exposing them to lectures delivered by experts in the respective fields of International Criminal Law, Transitional Justice, International Anti-Money Laundering Law and International Anti-Corruption Law.²

The keynote speaker at the 2015 summer school was Judge *Bertram Schmitt* of the International Criminal Court. His address was on 'The Procedure of the ICC: A Compromise of Adversarial and Inquisitorial Elements'. Other speakers were Dr. *Chantal Meloni* (University of Milan), Prof. *Bernard Martin* (University of the Western Cape), Dr. *Matthias Korte* (German Federal Ministry of Justice), Prof. *Petra Wittig* (Ludwig-Maximilians-Universität, Munich), Prof. *Najma Moosa* (University of the Western Cape), Prof. *Indira Carr* (University of Surrey, England) and Prof. *Claudia Cárdenas Aravena* (Universidad de Chile, Santiago de Chile).

The 2015 summer school served as an ideal setting for hosting an international symposium which analyzed and

discussed in general the African Union's (AU) Malabo Protocol³, which extends the jurisdictional competence of the African Court on Human and Peoples' Rights to include international and transnational crimes committed in Africa (hereinafter called 'the Protocol'). The Protocol, which is named after Malabo, the capital of Equatorial Guinea, where it was adopted in June 2014, includes the statute of the 'African Criminal Court' (the Court).

The first speaker at the symposium was Prof. *Ademola Abass*,⁴ who sketched the historical and political background to the prosecution of international crimes in Africa. He pointed out that Africa and the AU have never been adverse to the prosecution of international crimes by an international court, a fact demonstrated by Africa's contribution to the establishment of the ICC. Not only was the first country to ratify the Rome Statute an African country (i.e. Senegal), but the first situations before the ICC were self-referred by African countries. *Abass* pointed to Africa's long-standing desire to prosecute international crimes at the regional level, citing as an example earlier plans of the Organization for African Unity (OAU) to include international crimes in the jurisdiction of the then proposed AU Court on Human and Peoples' Rights, for the purposes of prosecuting the crime of apartheid. However, the OAU never materialized its plans, as it was convinced that the UN was planning to prosecute the crime of apartheid under the International Covenant on Civil and Political Rights. According to *Abass*, Africa was duped into believing that the UN would give effect to this expectation, for this did not materialize in practice.

He attributed the establishment of an African Criminal Court to the indictment of President Omar Al-Bashir of Sudan, pursuant to the decision of the UN Security Council, under Chapter 7 of the UN Charter, to refer the situation in Sudan to the ICC. According to *Abass*, the AU's criticism of the indictment of Al-Bashir was based on the fact that it came at a time when the AU was attempting to restore peace to Darfur. Moreover, the Security Council ignored the AU's call for it to defer the matter, as a result of which the AU labeled the ICC a 'neo-colonial' tool, and issued a 'non co-operation' directive to its member states. Furthermore, the AU declined giving the go-ahead for the establishment of an ICC-AU liaison office in Addis Ababa.

* The authors are both Ph.D. candidates and researchers at the South African-German Centre for Transnational Criminal Justice.

¹ For more details about the Centre, visit <http://www.transcrim.org/3-The%20Centre/> (25.10.2015).

² See the reports on earlier summer schools: *Marlen Vesper-Gräske*, ZIS 2013, 401, available at: http://www.zis-online.com/dat/artikel/2013_9-10_773.pdf (25.10.2015) and *Materu/Mninde-Silungwe/Tessema*, ZIS 2014, 660, available at: http://www.zis-online.com/dat/artikel/2014_12_878.pdf (25.10.2015).

³ AU, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014, available at:

http://africancourtcoalition.org/images/docs/legal-texts/Protocol_on_amendments_to_the_Protocol_on_the_Statute_of_the_African_Court_of_Justice_and_Human_Rights%20.pdf (25.10.2015).

⁴ Prof. *Ademola Abass* is the former Head of the African Centre for Peace and Security Training in the Addis Ababa office of the Institute for Security Studies.

Abass then outlined possible challenges that the Court will face. Besides the fact that the Protocol has yet to receive the required number of ratifications for it to come into effect, *Abass* doubted whether the 'African Criminal Court' would prosecute powerful politicians like Robert Mugabe of Zimbabwe. He stressed that the Court's envisaged jurisdiction over both civil and criminal matters would most likely give rise to complications, quite apart from the hardships it would encounter in obtaining sufficient resources to enable it function properly. Adequate resources will be essential, as the Court's jurisdiction covers both international and transnational crimes.

Abass concluded by saying that the future of international criminal justice lies in co-operating with the ICC, not in duplicating international criminal justice mechanisms. His recommendation was that the AU should be more positively disposed to the ICC, but that in its referrals of situations to the ICC, the UN Security Council needs to be more reactive to international crimes perpetrated elsewhere other than in Africa, and that the ICC should realize that it needs Africa as much as Africa needs it.

The next presentation was given by Prof. *Kai Ambos*,⁵ on the core crimes contained in the Statute of the AU Court. He showed that the Protocol largely copies the crimes section of the ICC Statute, pointing especially to how similarly crimes against humanity are defined under both statutes.⁶ He highlighted the fact that, by limiting the Protocol's definition to that contained in the ICC Statute, the drafters of the Protocol forwent an opportunity to give the crime a more comprehensive definition. However, according to *Ambos*, the addition of the word 'enterprise' does indeed widen the chapeau of the crime, though the content of this element remains unclear. He also criticized the drafters for not defining what is meant by the new phrase 'cruel, inhuman and degrading treatment or punishment', in Paragraph One of the specific provision. His view was that both the omission of a definition and the absence of travaux préparatoires will make the application of this provision potentially problematic. *Ambos* went on to highlight the new crimes constituting the core crimes in the Protocol, especially 'acts of rape' and 'sexual violence' as new genocidal acts under Art. 28 B. However, the African Union, he emphasized, squandered the chance to add new 'protected groups' under the genocide provision. He stated that the omission of the connection element in the definition of Persecution is innovative. He referred also to a number of what he calls apparent 'inconsistencies' under the heading of war crimes⁷ in the Protocol. In his view, although the drafters have sought to widen the scope of the crime by adding new

crimes, the new inclusions require closer scrutiny and analysis, and presuppose the existence of an established body of jurisprudence, given that they are unknown crimes. He was especially critical of restricting the crime of enlisting or conscripting children into armed forces to national armed conflicts only, calling this an unwarranted limitation. He nevertheless welcomed the inclusion of the use of nuclear weapons as a war crime.

Ambos held the Protocol's extension of the crime of aggression⁸ to non-state actors to be revolutionary, qualifying this statement by stating that the definition of the crime of aggression in the Protocol may result in many cases of aggression giving rise to exaggerated expectations and situations of impracticality.

Prof. *Gerhard Kemp*⁹ gave an enlightening presentation on the crime of unconstitutional change of government (UCG), stating that this has been a huge problem in Africa, where 80 effective coups and more than 180 attempted coups have taken place since the 1950s. The phenomenon of UCG can, as many other crimes in the Protocol, be traced to various African regional instruments. *Kemp* viewed the inclusion of the crime of UCG in the jurisdiction of the court as a positive development, considering the fact that the ICC does not have jurisdiction over UCG. However, he went on to add that UCG needs to be adjudged critically, taking into account its legal and political implications. He noted that Sub-paragraph Three of the Protocol, which provides that 'an act of a sovereign people peacefully exercising their inherent right which results in a change of government shall not constitute an offence under this Article' was excluded from the Protocol. *Kemp's* opinion was that, aside from a military coup, the acts listed in Art. 28 E of the Protocol are debatable; for example, what is meant by a 'democratically elected government'? He was of the view that courts will be left the task of unfurling the meanings of the concepts contained in Art. 28 E; and in order to do so, judges will have to be well-versed in both criminal and constitutional law.

Kemp related the crime of UCG to the role of the AU Peace and Security Council, and stated that the provision of UCG under the Protocol means that this conduct has now been brought into the realm of criminal justice. He, therefore, questioned whether the AU Peace and Security Council will have any further role to play whenever UCG takes place, or whether it will be left to the courts alone to determine whether there has been UCG.

He also noted that, since UCG is to a large extent associated with issues of leadership, the immunity provision in the Protocol will make the effective prosecution of the crime difficult. He concluded his presentation with a concern about the threshold of seriousness under Art. 48 H of the Protocol. He pointed out that, when dealing with the crime, judges will have to look into political issues in order to satisfy the

⁵ Prof. *Kai Ambos* is a Professor of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the Georg-August-Universität Göttingen.

⁶ Crimes against Humanity are proscribed under Art. 7 and Art. 28 (C) of the Rome Statute of the International Criminal Court (2002) and Protocol on Amendments to the Draft Protocol on the Statute of the African Court of Justice and Human Rights, respectively.

⁷ Art. 28 (C) of the Protocol.

⁸ Art. 28 (M) of the Protocol.

⁹ Prof. *Gerhard Kemp* is a Professor of Criminal Law and Procedure at University of Stellenbosch, Cape Town, South Africa.

threshold of seriousness, which would add to the problem of enforcing court decisions.

*Selemani Kinyunyu's*¹⁰ presentation was an overview of the main issues discussed during the drafting process of the crime of UCG. As he himself was privy to the drafting of the Protocol, participants at the symposium were offered thitherto unknown background information that fed into the drafting process. He stated that it was because of the 2011 Arab Spring upheavals that many Arab states became concerned that those who participated in the 'popular uprisings' ran the risk of being found to have acted in violation of the norms against UCG. Algeria, therefore, proposed that such acts should not be covered by the crime. This was, however, problematic because the existing dictators in Sub-Saharan Africa feared that this would put them in danger of further uprisings in future.

Referring to the difficulty of defining 'democratically elected government', *Kinyunyu* questioned the fact that in situations such as in Libya, where the government has repeatedly been accused of being undemocratic, it would be difficult to decide whether or not an overthrow of the government would fit the crime of UCG. He drew attention to the fact that the Protocol stipulates that UCG must be directed against an incumbent elected government. Hence, his view was that a coup against a transitional government would probably not satisfy this element of the crime, but that, ultimately, this would be a matter for the courts to decide.

As to *Kemp's* question about the role of the AU Peace and Security Council in cases of UCG, *Kinyunyu* pointed out that this body does indeed have the authority to determine whether or not UCG has taken place. But his worry was that the committee on sanctions has yet to be established.

The afternoon panel discussion centered on the transnational crimes included in the Protocol. Prof. *Florian Jeßberger*¹¹ began with a useful contribution on the topic of piracy, mercenarism and terrorism. He distinguished first 'transnational' crimes from the core crimes under international law, remarking that unlike the case of the core crimes, there is no direct individual criminal responsibility for transnational crimes at the international level. He pointed out that states are required to first criminalize transnational crimes under their national law, and that it is the cross-border nature of transnational crimes that concerns the international community. In his opinion, the novelty of the African Court lies in its being vested with jurisdiction to try these transnational crimes, which also enables it to compensate for the capacity constraints that weaken the ability of many national courts in Africa to prosecute transnational crimes.

Jeßberger pointed to the special historical and contemporary relevance that the crimes of piracy, mercenarism and

terrorism¹² have for the African continent. The fact that they are included in the protocol bears testimony to the anxiety these crimes cause across the continent. However, he contended that, since most AU member states are not parties to the treaties from which this category of crimes derive, adjudicating these crimes may prove to be difficult in practice. He emphasized the fact that the source treaties do not create the crimes, but call on states to do so. And for this reason he questioned the AU's legal authority to criminalize and regulate these crimes. He added that the various ways in which treaties define the prohibited conduct, coupled with the dearth of criminalization of these transnational crimes at the national level, present extra difficulties. He stated furthermore that another choice that countries will have to make is which transnational crimes they will bring within their respective jurisdictions and which not. *Kinyunyu* expressed his concerns about the Protocol's lack of a substantive threshold clause and about the broad way in which it defines crimes. He concluded by saying that, even if the complete 'package' might look over-ambitious on paper, it has the potential to work in practice, especially if the Court adheres to the principle of complementarity.

Prof. *Lovell Fernandez's* discussion topic concerned the crimes of corruption and money laundering that are listed among the other crimes in Art. 28 of the Protocol. He pointed out that economic crimes have started to attract more attention, especially within the domain of transitional justice, which has even spawned the term 'economic violence'. He pointed out that truth commissions in Africa have taken the lead in looking into how corruption, for example, has been the cause of widespread human rights abuses. It was therefore small wonder, he said, that economic criminality has become such a concern for the AU. But he doubted whether the inclusion of corruption and money laundering as crimes within the jurisdiction of the Court was a practical idea at all. He asked that, if it was at all necessary to subject these specific economic crimes to the jurisdiction of the Court, what the reasons then were for excluding other types of economic crimes whose economic and political consequences at both the regional and continental level are no less devastating than those of corruption and money laundering. He questioned also why only corruption, and not also some of the other listed crimes in Art. 28, was made the only predicate offence of the crime of money laundering. *Fernandez* went on to decry the fact that heads of state who might be implicated in corruption are exempt from prosecution under the Statute. This, he said, has the effect of belittling the seriousness of the crime of corruption. *Fernandez* concluded his talk by stating that the different definitions of the crimes of corruption and money laundering in various national laws in Africa makes the criminalization of these crimes at the international level a problem-ridden exercise.

Fernandez also presented a summary of a paper on the crimes of trafficking in drugs and persons, which was au-

¹⁰ *Selemani Kinyunyu*, an LL.M. graduate of the South African-German Centre for Transnational Criminal Justice and a current Ph.D. candidate, works at the African Court on Human and Peoples' Rights.

¹¹ Prof. *Florian Jeßberger* is a Professor of German, Foreign and International Criminal Law as well as Modern Legal History at the University of Hamburg, Germany.

¹² These crimes are provided for under Art. 28 F, 28 G and 28 H, respectively, of the Protocol.

thored by *Fatuma Silungwe*,¹³ who was unable to be at the symposium. Speaking on her behalf, *Fernandez* said that, in contrast to international crimes, transnational criminal conduct involves the criminalization of domestic crimes at the international level. He then stated that some conventions, such as the African Charter on Human and Peoples' Rights, provide some regulations for trafficking offences, although they do not provide a definition for trafficking.

Fernandez pointed out that the Protocol lacks the seriousness threshold, but that the complementarity provisions may be utilized to determine when a trafficking offence could be prosecuted. In conclusion, he said that in Sub Saharan Africa, 75 % of trafficking cases take place within countries and not across borders, which raises the issue of whether it makes sense to prosecute human and drug trafficking as international crimes.

The last speaker of Day One of the symposium was Prof. *Martin Heger*,¹⁴ who spoke on the topic of environmental crimes (trafficking in hazardous waste/illicit exploitation of natural resources). He commenced his presentation by comparing the respective provisions on environmental crimes in the Protocol with the analogous provisions in the Rome Statute. He noted that, in the wording of the Rome Statute's provision on war crimes, the act of 'intentionally launching an attack with the knowledge that such an attack would cause incidental loss of life or damage to civilian objects or lives' may also cover environmental crimes. He also gave an overview of the international legal framework for environmental crimes, and was of the opinion that the decision whether or not to penalize environmental crimes should be left to individual states. *Heger* concluded his presentation by saying that although it is useful to have an international convention on environmental offences, the environmental crimes, as embodied in the Protocol, ignored the limitations of international crimes.

Day Two of the symposium began with a thoughtful presentation by Prof. *Harmen van der Wilt*¹⁵ on the complementarity regulation of the AU Court. He started by indicating that the intention to establish the criminal chambers in the Court stemmed from the Western nations' exercising of universal jurisdiction over African people, as well as from the way the ICC selected its cases for prosecution. He stated that although the Court is likely to be a supplement for the African justice system, it would be far-fetched to conclude that the Court is intended to replace the ICC. He accentuated the fact that 34 African states are states parties to the ICC and that those states have not displayed any intention to un-sign the ICC statute or withdraw from the Assembly of States Parties of the ICC.

Van der Wilt stated that, whereas the relationship between African states and the Court as well as the ICC is governed by the principle of complementarity, the relationship between the Court and the ICC is not yet defined. Thus, the Court and the ICC could co-exist on equal terms, or the ICC could scrutinize and assess the performance of the Court. Given the advent of the Court, he considered it conceivable that African states will refer cases either to the Court or the ICC, notwithstanding the fact that the Rome Statute does not envisage the coming into existence of a regional court. In his opinion, it is hardly conceivable that the Court would be unable or unwilling to investigate a case. However, situations could arise where the AU could lack jurisdiction, for example, such as those involving a serving head of state. Similarly, the modes of responsibility included in the Protocol are different and less sophisticated than those found in the Rome Statute. Hence, in these and other similar situations, where the AU does not prosecute, the ICC could still come into the picture as a default or fallback option.

Van der Wilt drew attention to the fact that the complementarity rule in the Protocol was adopted almost verbatim from the ICC Statute, except that the word 'genuinely' has been omitted. He said that this exclusion is significant, for the adverb 'genuinely' has the effect of raising the threshold of objective scrutiny in testing the quality of a state's criminal proceedings and its sincerity in instituting a prosecution. This, in turn, has the effect of increasing the threshold of admissibility. Hence, he argued, in view of the current situation in Africa, where states have on several occasions claimed that they have been unable to prosecute, the omission of 'genuinely' could result in the Court carrying a considerable caseload.

Van der Wilt ended his talk on a positive and optimistic note by stating that although the relationship between the AU states and the ICC has been strained and the initiative to establish the Court is inspired by spite and resentment, the scenario of hierarchy can balance the antagonism and conflict. In his view, if the two courts could agree on a structured relationship with each other, and if the cooperation endures, this could result in a prospective division of labor between the two judicial bodies.

Prof. *Dire Tladi*,¹⁶ who made the final presentation at the symposium, spoke about immunities in international criminal law and in the Statute of the AU-Court. He began by contending that the Protocol is a protest reaction to the ICC's prosecution of AU leaders, and submitted that the immunity clause in Art. 46 Abis¹⁷ emanates from the political targeting of African leaders in a political context. However, he cautioned against the tendency in international criminal law practice to adopt a hero-villain approach to issues. This, he

¹³ *Fatuma Silungwe* is an LL.M. graduate of the South African-German Centre for Transnational Criminal Justice and a current Ph.D. student at the Centre.

¹⁴ Prof. *Martin Heger* is a Professor of Criminal Law, Criminal Procedure Law, European Criminal Law and Modern Legal History at the Humboldt-Universität zu Berlin.

¹⁵ Prof. *Van der Wilt* is a Professor of International Criminal Law at the University of Amsterdam.

¹⁶ Prof. *Dire Tladi* is a Professor of International Law at the University of Pretoria, South Africa.

¹⁷ Art. 46 Abis reads as follows: 'No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.'

said, could be dangerous, because by merely disagreeing with an element of the law is not a sure sign that one is an enemy of international criminal law.

Tladi then went on to deal with some of the issues arising out of Art. 46 Abis of the Protocol. His view was that the provision is consistent with customary international law. But he acknowledged the ambiguity of the phrase ‘anyone entitled to act as such’. He suggested that the phrase could be interpreted either narrowly or broadly. The latter interpretation would have the effect of including potentially those able to act in that position, whereas the former, and accurate, interpretation would encompass exclusively heads of state or governments and their respective deputies. He discussed furthermore how Art. 46 Abis could be characterised with respect to immunities. *Tladi* argued that because of the categories of persons protected under it, the provision covers both functional immunity and immunity *ratione materiae*. He maintained that Art. 27 of the Rome Statute, which disregards immunities, is not the rule, but the exception to the general immunity principle under customary international law. He noted that as a treaty rule, Art. 27 of the Rome Statute applies only to states parties. He asserted, moreover, that even the ICC, in its Decision on the Cooperation of the Democratic Republic of Congo regarding Omar Al Bashir’s Arrest and Surrender to the Court,¹⁸ recognized and endorsed the sovereignty of States to create immunities. In conclusion, *Tladi* stated that Art. 46 Abis does not contradict international criminal law, but is also not reflective of it.

At the close of the symposium, *Dr. Moritz Vormbaum*¹⁹ and *Marshet Tadesse*²⁰ summarized the main issues discussed over the two days. *Vormbaum* appreciated the Court’s effort to regionalize international criminal law and regarded the inclusion of new crimes positively. He said that the Court creates a coherent African system and one that leaves room also for cooperation and division of tasks. He considered this to be a positive development, saying that, all told, the initiatives represent a step forward.

In his closing words on the Protocol, *Tadesse* was critical of its over-criminalization and of its lack of a clear and specific threshold clause. He took issue with the drafters of the Protocol who, in his view, simply copied prohibitions from international treaties and converted them into criminal provisions almost word for word. His take on the immunity clause was that it is important to consider to which category of crimes the immunity clause applies. He was equally disapproving of the non-transparent and non-participatory manner in which the Statute was drafted. He nevertheless thought that, as it stands, the Statute could be improved, and that constructive work on the legal text would be a more profita-

ble exercise than speculating on the motive behind the Protocol.

Following the brief summaries, Prof. *Werle* emphasized the importance of the threshold clause. He stated that even if the only threshold clause, namely, ‘affecting the stability of a state’ is broad, the Court could still make use of it by way of interpretation. Moreover, *Werle* highlighted that though the drafting stage of the Protocol was not transparent and participatory, it is still worthwhile to engage with the text analytically and in discussions. A book, which includes the presentations made at the symposium, as well as further contributions, will be published by Asser Press/Springer in the first half of 2016.

¹⁸ ICC (Pre-Trial Chamber II), Decision of 9.4.2014 – ICC-02/05-01/09.

¹⁹ *Dr. Moritz Vormbaum* is co-ordinator and lecturer at the South African German Centre for Transnational Criminal Justice.

²⁰ *Marshet Tadesse* is an LL.M. graduate of the South African-German Centre for Transnational Criminal Justice and a current Ph.D. candidate.