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Current International and Transnational Criminal Law in Africa – Practice, Challenges and Prospects. Report on the Conference of the African-German Research Network for Transnational Criminal Justice

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The African-German Research Network for Transnational Criminal Justice conducted its annual conference on 30th and 31st October and on 4th December 2020 online. The theme of the conference was “Current International and Transnational Criminal Law in Africa: Practice, Challenges and Prospects”. The report gives a concise overview of the excellent paper abstracts and presentations of the conference, ranging from concepts of restorative justice and the implementation of international and national criminal offences to legal policy responses and prosecutions in Malawi, Nigeria, South Africa and Uganda and by the ICC. Several conference papers have been published in peer-reviewed law journals and a number of the proposals discussed have been partially implemented by national legislators.

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INTRODUCTION

The African-German Research Network For Transnational Criminal Justice

The *South African-German Centre for Transnational Criminal Justice* was a joint project between Humboldt-Universität zu Berlin and the University of the Western Cape (Cape Town) that was founded in 2008 and a "Centre of African Excellence". It was a research and teaching institution and offered the LL.M. and Doctoral Programme "Transnational Criminal Justice and Crime Prevention – An International and African Perspective". The SAGCTC has ended on 31 December 2018. In ten years of its existence, 124 alumni and alumnae, of whom 16 are PhD alumni und alumnae have graduated from the Centre. They come from 21 countries and represent three continents.¹

The *African-German Research Network for Transnational Criminal Justice* is a research network that provides these alumni and alumnae with the basis and resources to further their academic and personal exchange since 2019, for example, through its annual conferences. The Network is directed by *Prof. Dr. Gerhard Werle* at Humboldt-Universität zu Berlin, assisted by administrative staff and an advisory board composed of distinguished African and German scholars. It is funded by the German Academic Exchange Service and supported by the German Federal Foreign Office. The successful 15-year

funding phase of the project by the DAAD expires at the end of 2023.²

Along with the participating alumnae and alumni the network welcomed its Advisory Board members, in particular *Prof. Dr. Gerhard Kemp* (University of Derby, United Kingdom), *Prof. Dr. Moritz Vormbaum* (University of Münster, Germany), *Dr. Marshet Tadesse Tessema* (Assistant Professor, Hawassa University, Ethiopia) and *Dr. Hannah Woolaver* (Associate Professor, University of Cape Town, South Africa). In addition, colleagues associated with the network took part in the conference, namely *Prof. Dr. Florian Jeßberger* (Humboldt-Universität zu Berlin, Germany), *Prof. Dr. Leonie Steinl, LL.M. (Columbia)* (Humboldt-Universität zu Berlin, Germany), and *Dr. Tanja Altunjan* (Humboldt-Universität zu Berlin, Germany). The conferenced assembled African and European participants, outstanding international practitioners and academics as well as young legal experts from nine different countries, including seven African states.

30 October 2020: Conference Day 1 – Malawi, Nigeria and South Africa

The first lecture on "Restorative Justice to Victims in International Criminal Law Through Reparative Complementarity: Exploring a Possible Approach in Nigeria" was given by *Deborah Damilola Adeyemo* (Lecturer, University of Ibadan, Nigeria). She stated that on the one hand, the ICC faces several issues pertaining to victim's reparations and the scope of the defendant's liability. On the other

¹ For conference reports of the Centre see *Vesper-Gräse*, Tagungsbericht: 5. Summer School des South African-German Centre for Transnational Criminal Justice, ZIS 2013, 401; *Vesper-Gräse*, Conference Report: "Africa and the International Criminal Court" by the South African-German Centre for Transnational Criminal Justice, ZIS 2014, 145; *Materu/Mninde-Silungwe/Tessema*, Report on the 6th Summer School of the South African-German Centre for Transnational

Criminal Justice, ZIS 2014, 660; *Adem/Yankson*, The African Criminal Court: Promoting or Undermining the Prosecution of International Crimes in Africa?, ZIS 2015, 567; *Altunjan/Filbert/Ojo*, Current Debates in International Criminal Justice, ZIS 2019, 282.

² For more details to the Centre and the project please visit our webpage: <http://www.transcrim.org/>.

hand, Nigeria would not recognize victims as active participants in the administration of criminal justice and lacks the legal framework for both prosecution and reparation.³ *Deborah* opined that the state does not precisely recognize reparations for international core crimes and is often hampered by issues such as constitutional immunity, peace settlements and amnesty or sheer unwillingness to exercise their right of first refusal to prosecute crimes.⁴ To address the needs of victims of core international crimes, *Deborah* adopted a reparative perspective of the restorative justice theory believing that the state needs to explore reparative complementarity.⁵ Therefore, the primary obligation lies with the perpetrator but devolves to Nigeria when they are unable or unwilling to provide reparation for victims. The principle should ensure that the victims receive reparations in the face of its glaring limitation factors at the ICC. In *Deborah's* opinion holding the state responsible in complementary obligation for reparation to the person concerned irrespective of the alleged perpetrator's prosecution is plausible as states may be actively involved or have created the enabling environment to perpetrate crimes by its inactions and omissions. *Deborah* pleaded for the adoption of reparative

complementarity in Nigeria especially in the light of the overwhelming needs of the victims and the seeming unwillingness to pursue prosecutions.⁶

The second presentation was given by *Felisters Francisco* (Legal Counsel, Malawi Revenue Authority, Malawi) on "Human Trafficking as a Crime Against Humanity: A Focus on Malawi and South Africa's Legal and Institutional Framework". She explained that African states are greatly affected by human trafficking but have no regional instrument providing for the legal framework under which the endemic problem can be dealt with.⁷ As a consequence, states like Malawi⁸ and South Africa⁹ enacted laws but have faced many challenges to implement them. Sometimes, prosecutions have failed because the public officials have condoned corruption or are accomplices to human trafficking.¹⁰ Therefore, *Felisters* recommended human trafficking to be included in the ICC Rome Statute as an individual crime under crimes against humanity.¹¹ In her opinion, this would help in the enforcement of the state's obligation to criminalize and prosecute such conduct. Besides, she stated that human trafficking activities involve money laundering, being common to any large-scale

³ *Adeyemo*, The Right of Victims of Core International Crimes to Reparation in Nigeria, *African Human Rights Law Journal* (AHRLJ) 21 (2) 2021, p. 1058 ff.

⁴ *Adeyemo*, Recognising the Rights of Victims in the Nigerian Criminal Justice System, *International Journal of Comparative Law and Legal Philosophy* (IJOCLLEP) 2021, p. 64 ff.

⁵ *Adeyemo*, Restorative Justice Ideals and Victims of Crime in Nigeria: Towards a Reparative Justice Approach, *Law and Social Justice Review* (LASJURE) 2 (2) 2021, pp. 120 ff.

⁶ *Adeyemo*, Reparative Complementarity in International Criminal Law and Victims of Core International Crimes in Nigeria, *ABUAD Journal of Public and International Law* (AJPIL) 6 (1) 2020, p. 51 ff.

⁷ For an overview on human trafficking in Sub-Saharan Africa, see *UNODC*, *Global Report on Trafficking in Persons 2022 – Sub-Saharan Africa and, Trafficking in Persons Report July 2022*.

⁸ *Department of State of the USA*, *Trafficking in Persons Report 2022 – Malawi*.

⁹ For the ninth consecutive year, the government of South Africa did not promulgate implementing regulations for the

2013 Prevention and Combating of Trafficking in Persons (PACOTIP) Act's immigration provisions, resulting in foreign victims unable to access immigration remedies, see *Department of State of the USA*, *Trafficking in Persons Report 2022 – South Africa*.

¹⁰ Reports indicate widespread corruption, be it that lower-level officials warned traffickers against prosecution in exchange for bribes, that immigration officials facilitated illegal entry for traffickers at the borders or returned survivors to traffickers instead of referring them to a care facility, or that officials were unwilling to investigate cases, see *Department of State of the USA*, *Trafficking in Persons Report 2022 – South Africa and Malawi*.

¹¹ Such trafficking may also not fall within the definition of slavery as a crime against humanity (Art. 7 II lit. c), especially given the State policy threshold, see *Moran*, *The Age of Human Rights Journal* (AHRJ) 3 2014, pp. 32 ff. For an inclusion of human trafficking as a new core crime in the Rome Statute, see *PGA*, *Modernising the International Criminal Court: Crimes against the Environment, Trafficking in Human Beings, Hybrid Justice and Corporate Accountability 2022*, pp. 46 ff.

criminal organization. Interestingly, she elaborated on how the illegality of the proceeds collected from trafficking activities is concealed through apparently legitimate forms of investments to generate seemingly licit profit and wealth.¹²

31 October 2020: Conference Day 2 – Legal Policy, Legislation, Enforcement in Uganda

The first lecture on the second conference day by *Brenda Nanyunja* (Legal Researcher, Uganda Legal Information Institute, Uganda) was entitled “An Obligation Challenge? A Look at Uganda’s Response to Bashir’s Arrest Warrants”. She introduced the topic by mentioning the African Union’s call to its member states¹³ for defying Bashir’s arrest warrants.¹⁴ However, according to the ICC it reflects customary international law that immunities are not a bar to the exercise of jurisdiction. As a consequence, there is no head of state immunity vis-à-vis an international court.¹⁵ The International Crimes Division of the High Court of Uganda was petitioned to enforce the warrants. In late 2019, it held that the state failed to fulfil its obligation to the international community when it did not detain Al-Bashir and emphasized the necessity of implementation of the arrest warrants issued by the ICC.¹⁶ *Brenda* concluded that the extradition refusal of the African nations along with the African Union disregarded the victims of the Darfur conflict as well as the state parties’ obligations.¹⁷ Besides, she emphasized that Sudan’s

referral to the ICC presented a number of novelties: For the first time a situation in the territory of a non-member state was investigated and the court indicted a head of state indicted a head of state.¹⁸ According to her, this is in favour of the preservation of international peace and security. Furthermore, she stated that the Rome statute cannot be used to enforce an arrest warrant if the country in question is a non-member state of the ICC statute. Eventually, she called for a discussion on the contradictions presented in the Bashir case and a united front in regard to court decisions and referrals of third-party states by the United Nations Security Council.

Afterwards *Nicksoni Filbert* (Lecturer in the Private Law Department at the University of Dar es Salaam School of Law, Tanzania) lectured on “An Examination of the Criminalisation Provisions of the Prevention of Trafficking in Persons Act of Uganda in Light of International Law”.¹⁹ He opined that the content of the 2009 Act is quite comprehensive, as it deals with the prevention, criminalization and prosecution of human trafficking as well as with the protection of its victims using merging elements from international stipulations and the domestic legal framework.²⁰ Hence, the Ugandan law criminalizes the offence of human trafficking according to international standards and follows the obligations these impose. According to *Nicksoni*, the law recognizes peculiar manifestations of the crime in Uganda, but

¹² *Francisco*, Examining the Effectiveness of the Malawian Financial Intelligence Authority in the Fight against Money Laundering, 2018, pp. 29 ff.

¹³ AU, Decision from 3 July 2009, Assembly/AU/Dec.245(XIII) Rev. 1, pp. 1 f. (Nr. 2, 9 and 10).

¹⁴ The Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Albashir”) (Decision) ICC-02/05-01/09 (4 March 2009).

¹⁵ The Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Albashir”) (Decision) ICC-02/05-01/09 (4 March 2009).

¹⁶ *Uganda Victims Foundation v. Attorney General & Anor* (Decision) High Court of Uganda (International Crimes Division) Application No. 0006/2017 (19 December 2019).

¹⁷ Cf. *Nanjunya/Nortje*, Justice Delayed but not Denied: The Prosecution of Thomas Kwoyelo for International Crimes in

Uganda, PER/PELJ 2023, p. 5; <https://www.ijmonitor.org/2018/10/thomas-kwoyelo-in-uganda-victims-participation-brings-hope-and-challenges/> (last accessed October 2023).

¹⁸ *Weatherall*, Prosecutor v. Omar Al-Bashir, Judgment in the Jordan Referral Re Al-Bashir Appeal (ICC), ILM 2019, pp. 1177 ff.

¹⁹ The article will be published in South African Journal of Criminal Justice.

²⁰ This legislation is available at the official website of the Uganda Legal Information Institute at <https://old.ulii.org/node/24737> (last accessed October 2023); cf. *Filbert*, The Plaintiffs v. Attorney General and Uganda Veterans Development Ltd: A Critique, EALR 2022, pp. 126 f.

sometimes remains unclear concerning its terminology.²¹ However, the legal shortcomings would not affect the substance of the law's criminalization provisions. In fact, the 2006 Trafficking in Persons Bill, which paved the way for the current law, forms an important persuasive source that aids in understanding and interpreting the 2009 Act.²² Notwithstanding, he expressed that rectification of the shortcomings is necessary to remove ambiguity and guarantee consistent application and coherence.²³ He also stated that the High Court of Uganda needs to take a new legal approach to interpreting and applying the 2009 Act to provide predictability, certainty and compatibility with its international underpinnings.²⁴ That is why he hopes to stimulate dialogue and legal reforms as far as the anti-trafficking efforts in Uganda are concerned.²⁵

The third presentation on that day was given by *Samuel Matsiko* (Legal Researcher, Syrian Legal Network, University of Amsterdam, Netherlands) on “Data Protection and Domestic Prosecution of International Crimes in Uganda”. He especially focused on normative foundations of data protection in international criminal judicial proceedings. He

dealt with the applicability and enforcement of the Data Protection and Privacy Act in the investigation, prosecution and punishment of international crimes in Uganda.²⁶ According to *Samuel*, a court needs to explain why it processes certain personal data and which safety mechanism it uses to protect them.²⁷ In this context, he suggested appointing a data protection supervisory judge at the International Crimes Division of the High Court of Uganda.²⁸ Furthermore, he proposed to create an African International Crimes and Data Protection Handbook. This book should define when and what personal data may be processed, collected and shared in the domestic prosecution of international crimes and how long the data may be kept. Moreover, the Handbook should provide provisions on the use of a data register for data procession operations as well as on a data protection officer.²⁹ Additionally, it should determine the accountability mechanisms for data breaches (e.g., offence against the administration of justice) and clarify the data subjects' rights.³⁰

²¹ Cf. *Filbert*, *The Plaintiffs v. Attorney General and Uganda Veterans Development Ltd: A Critique*, EALR 2022, pp. 128 ff.

²² *Gallagher*, *The International Law of Human Trafficking*, CUP 2010, pp. 267 ff.

Gallagher, *The International Law of Human Trafficking*, CUP 2010, pp. 267 ff.

<https://www.state.gov/reports/2023-trafficking-in-persons-report/uganda/> (last accessed October 2023).

²⁴ See exemplary on the basis of a concrete decision *Filbert*, *The Plaintiffs v. Attorney General and Uganda Veterans Development Ltd: A Critique*, EALR 2022, pp. 132 ff.

²⁵ For an examination of human trafficking in Tanzania in the light of international law, see *Filbert Kahimba*, *Human Trafficking Under International and Tanzanian Law*, 2021.

²⁶ This legislation is available at the official website of Uganda's Ministry of Information and Communications Technology and National Guidance at <https://ict.go.ug/wp-content/uploads/2019/03/Data-Protection-and-Privacy-Act-2019.pdf> (last accessed October 2023).

²⁷ Cf. *Matsiko*, *United States Visa Applications, Global Magnisky Act & Social Media Monitoring in Uganda*, 2019 <https://www.digiface.org/united-states-visa-applications-global-magnisky-act-social-media-monitoring-in-uganda/> (last accessed October 2023); *Matsiko*, *United States Foreign Policy, Global Magnisky Act & Social Media Monitoring in Uganda*, 2019 <https://www.african-excellence.de/author/samuel-matsiko/> (last accessed October 2023).

²⁸ The Statutory Instrument Supplement to The Uganda Gazette No. 21, Volume CXIV, dated 12 March, 2021 reduces the problems, but does not eliminate them. It only provides for the introduction of a data protection officer (Part X) and a complaints and investigation mechanism (Part IX).

²⁹ The Statutory Instrument Supplement deals only cursorily with data collection and processing (Part III) as well as data correction and processing (Part VI), the data protection register (Part IV), the registration of data collectors, data processors and data controllers (Part V), and the data security in general (Part VII).

³⁰ The supplement does not address the accountability of the Personal Data Protection Office (Part II). The rights of data subjects are only dealt with superficially in Part VIII.

4 December 2020: Conference Day 3 – African States and the ICC

The third conference day was opened with a lecture by *Sarah Ngachi* (Research Fellow at Amnesty International and Advocate for Business and Human Rights, Kenya) on the “Regional Implementation of International Criminal Justice; Africa’s Role in Prosecuting International Crimes”. *Sarah* emphasized the importance of regionalized courts that prosecute international and transnational crimes.³¹ Nevertheless, pertaining to the Malabo Protocol, she criticized the Protocol’s immunity clause as an impediment to prosecution and the drafters having neglected the practical aspects of prosecution in terms of the elements of crime.³² Although, in her opinion, the African Criminal Court has great potential, the implementation of international criminal justice is wanting as the Protocol is yet to be ratified after several years and the political will to establish accountability mechanisms is lacking.³³ She concluded the slow implementation of international criminal justice at regional level can be attributed to a lack of determination to set up accountability instruments, to state decisions to provide safe havens for war lords³⁴ and to a strict interpretation of the concept of sovereignty failing to apply universal jurisdiction in domestic prosecution of international crimes.³⁵ Hence, *Sarah* called on African states to embrace universal jurisdiction over heinous crimes and to

avoid protecting perpetrators. According to her, to achieve regional implementation, clearly defined institutional mechanisms for accountability and more specialized courts need to be set up.

The final presentation of the conference was given by *Denis Wangwi Moroga* (Lecturer, Moi University, Kenya and Legal Research Assistant, Otieno and Amisi Advocates, Kenya) on “Witness Interference: The Achilles Heel of the International Criminal Court”. He discussed the ICC’s approach to witness protection and its ramifications to the international criminal justice system. He introduced his topic by explaining that tampering of witnesses occurs in many forms, such as coaching, inducement, bribery, intimidation, coercion and threat to life of witnesses or their close family members.³⁶ Furthermore, he explained that interferences make it difficult finding the truth, stifle the ability of the court to give a just decision or even lead to the termination of proceedings. In this regard, *Denis* warned that, unless this challenge is adequately addressed, the ICC will lose its allure as a bastion of justice capable of holding high level accused persons accountable, because the court could be viewed as susceptible to the same challenges as national courts. However, an antidote to witness interference is seen in witness protection. Several instruments can be used for this protection: effective coordination between the Office of the Prosecutor, the Victims and Witnesses Unit and the

³¹ Cf. *Kahombo*, *The African Union and the Development of African International Criminal Law*, 2017, pp. 16 ff., 305 ff., 345 ff., 392 ff.

³² Cf. *Ambos*, ‘Genocide (Article 28B), Crimes Against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)’, in: *Werle/Vormbaum* (eds), *The African Criminal Court: A Commentary on the Malabo Protocol*, 2017, pp. 45 ff.

³³ In July 2023 the Central African Republic became the 15th member state of the African Union to ratify the Protocol to the Constitutive Act of the AU on the Pan-African Parliament, also known as the Malabo Protocol, see <https://pap.au.int/en/news/press-releases/2023-07-19/central-african-republic-ratifies-malabo-protocol> (last accessed October 2023). It must be ratified by at least 28 countries before it can enter into force.

³⁴ The impunity is maintained when the ICC Prosecutor is too inactive in parallel, see for example the ICC’s situation in Nigeria *Ngachi*, *Two years too long – Time for the ICC Prosecutor to open a formal investigation in Nigeria*, 2022 <https://hrj.amnesty.nl/two-years-too-long-time-for-the-icc-prosecutor-to-open-a-formal-investigation-in-nigeria/> (last accessed October 2023).

³⁵ Cf. *Kahombo*, *The African Union and the Development of African International Criminal Law*, 2017, pp. 14 ff., 165 ff.

³⁶ Cf. *Open Society Justice Initiative*, *Briefing Paper – Witness Interference in Cases before the International Criminal Court*, 2016, pp. 3 f. that has examined all ICC cases since the first trial in 2009 until July 2016.

chambers of the court, concealing the identity of witnesses as well as the admission of retracted statements, among others (cf. Art. 68 of the Rome Statute).³⁷ Bearing in mind the accused persons' rights (e.g. the right to examination of witnesses, Art. 67(1)(e) of the Rome Statute), some of these measures require the court to strike a balance in order to ensure a fair and impartial trial.³⁸ Additionally, to maintain objectivity, *Denis* demanded the OTP constantly investigate allegations of interference and only indict when all vital evidence and witnesses were secured. Eventually, he concluded that the ICC's contribution to ending impunity can only be guaranteed when there are effective witness protection mechanisms.

CONCLUSION

The conference was characterized by excellent presentations and fruitful debates on the practice, challenges and prospects of international and transnational criminal law in Africa. In a total of seven presentations, the participants lively discussed current issues of international criminal law in Africa. They have developed a vivid discourse on concepts of restorative justice in international criminal law, the crime of human trafficking and international crimes, as well as convincing approaches to prosecution in Malawi, Nigeria, South Africa and Uganda. The Ugandan legislator has partially implemented the innovative proposals discussed on data protection. In addition, there was room for a broad discussion on African-regional legal implementation of international crimes and Rome Statute obligations, as well as contradictory legal policy decisions by some African states and the African Union in the Al Bashir case. The conference was rounded off by practical challenges of the International Criminal Court, such as witness interference. A number of

conference papers have been or will be published in peer-reviewed law journals.

³⁷ Cf. *De Brouwer*, The Problem of Witness Interference before International Criminal Tribunals, ICLR 2015, pp. 720 ff.

³⁸ In addition, the prohibition of offences in Art. 70 of the Rome Statute protects the administration of justice against

inappropriate witness behaviour and can thus indirectly also serve to protect the accused.